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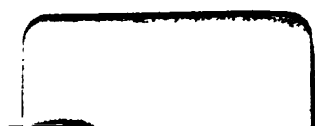
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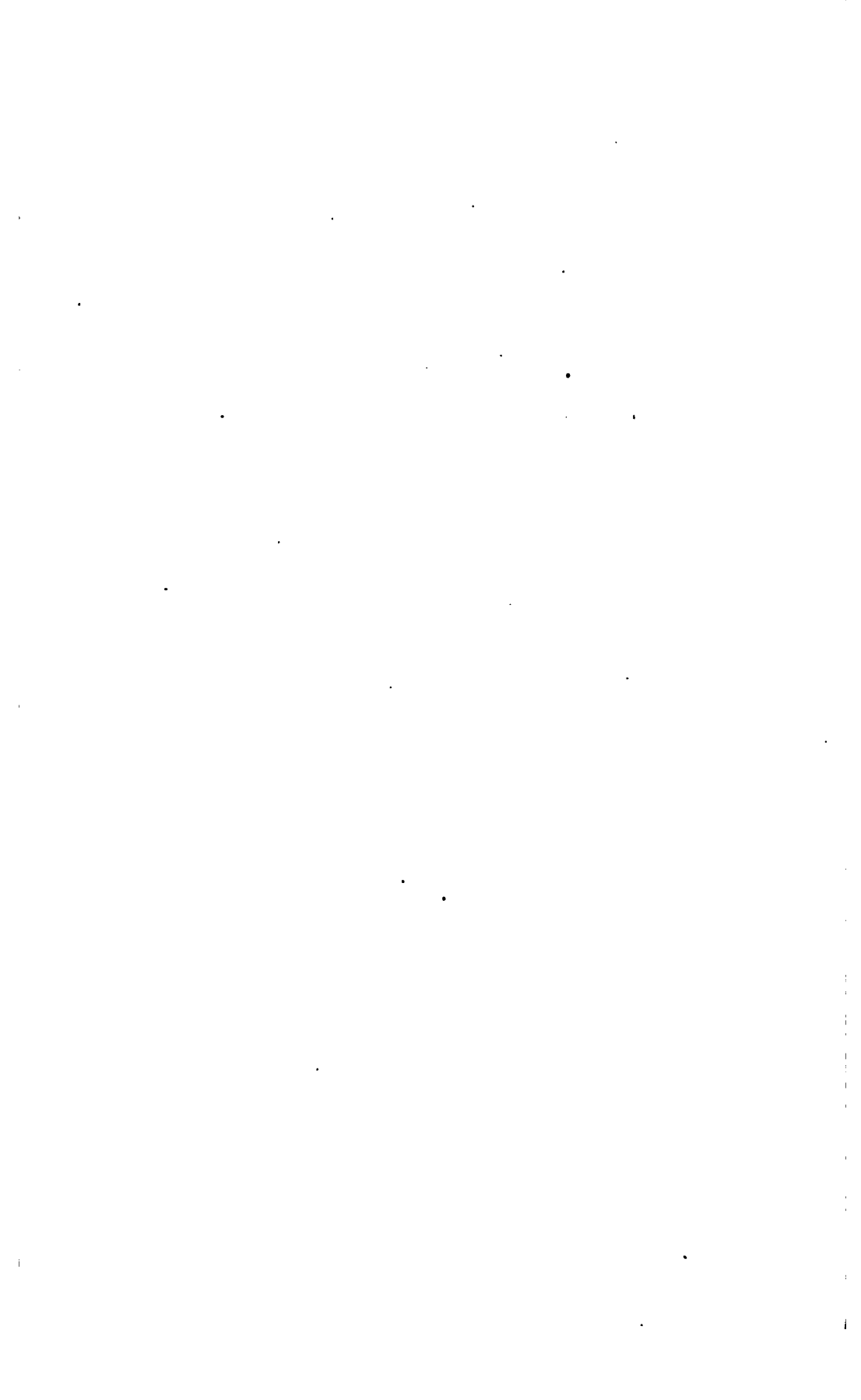
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THE LAWYERS REPORTS ANNOTATED

BOOK XXIV.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
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LAWYERS' REPORTS,

ANNOTATED.

CALIFORNIA SUPREME COURT (In Banc).

PEOPLE of the State of California, *Resp't.*,
v.
George MUNROE, *Appt.*
(100 Cal. 664.)

1. A writing may be the subject of forgery though not sufficient to create a legal

liability if genuine when it is such that if genuine it might injure another.

2. An assignment or sale of the unearned salary of a public school teacher with order therefor although void on the ground of public policy is not so plainly worthless that it cannot be the subject of forgery.

(December 30, 1898.)

NOTE.—Forgery of worthless instruments.

1. The general rule.
2. What constitutes legal efficacy.
 - a. Must be intelligible and certain.
 - b. Must be an order and not a mere request.
 - c. Must not be mere matter of opinion.
 - d. Must not be mere recommendation to court-ry.
 - e. Must purport to be the act of another.
3. Instruments void on their face.
4. Efficacy which is apparent only.
 - a. Must be sufficient to deceive.
 - b. Must be a subject of legal proceedings.
 - c. Apparent capacity or authority to make.
5. Real efficacy not apparent.
6. Instruments requiring further steps to perfect them.
7. Naked and conditional promises.
8. Instruments not in statutory form.
9. Prohibited instruments.
10. Unstamped instruments.
11. Instruments executed in fictitious name.

1. The general rule.

The general rule both at common law and under the statutes is variously stated as follows:

An instrument to be a subject of forgery must be such that if it were genuine it would have some apparent legal efficacy. *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Dixon v. State*, 51 Ala. 61; *Shannon v. State*, 109 Ind. 407; *Reg. v. Boulit*, 2 Car. & K. 604.

It must be valid for the purpose for which it purports to have been designed. *Anderson v. State*, 20 Tex. App. 596; *Costley v. State*, 14 Tex. App. 156.

It must be legally capable of effecting a fraud. *Dixon v. State*, *supra*; *Terry v. Com.* 87 Va. 672.

It must be one which might work some prejudice to law to another in his rights of person or property. *People v. Tomlinson*, 35 Cal. 503; *People v. Bidby*, 91 Cal. 470; *State v. Dunn*, 23 Or. 562; *State v. Anderson*, 30 Ia. Ann. 557; *State v. Kimball*, 50 Me. 406; *Com. v. Cullen*, 36 Phila. Leg. Int. 264; *State v. Ward*, 7 Baxt. 76; *State v. Briggs*, 34 Vt. 601; *King v. Ward*, 2 Ld. Raym. 1461.

It must be one which from its nature and the course of business might deceive or mislead to the prejudice of another. *State v. Croes*, 101 N. C. 776; *State v. Covington*, 94 N. C. 912, 55 Am. Rep. 650.

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It must purport to create a pecuniary obligation or liability upon another, or operate as evidence of a right of another. *Shannon v. State*, *supra*.

It must be one which would establish or defeat some claim or impose some duty or create some liability. *People v. Tomlinson*, *supra*.

Forgery at the common law is the false making or materially altering with intent to defraud of any writing which if genuine might apparently be of legal efficacy, or the foundation of a legal liability. *Dixon v. State*, *supra*; *State v. Johnson*, 26 Iowa, 407, 95 Am. Dec. 158.

See also note (Forgery defined) to *State v. Wheeler* (Or.) 10 L. R. A. 779.

Forgery at common law may be committed of any writing which if genuine would operate as the foundation of another's liability. *Ames' Case*, 3 Me. 285.

And the forgery of any instrument by which another might be prejudiced was punishable as such at common law. *State v. Givens*, 5 Ala. 747.

The statutes with reference to forgery usually provide either generally or specifically what instruments shall be the subject thereof, but leave the question as to the effect of their worthlessness or invalidity as it stood at common law, though many of them have provided that the instrument must be one which, if genuine would have some real or apparent legal efficacy or which would affect or prejudice the rights of another, or otherwise to the same effect, thus substantially re-enacting the rule of the common law. There are instances, however, in which the language of the statutes has effected a change of the common-law rule, which will be found noted in their proper places below.

Thus under statutory provisions with relation to the forgery of specified instruments, the instrument alleged to be forged must be one which if genuine would be effective. *Brown v. People*, 36 Ill. 230, 29 Am. Rep. 25.

Sounder the Georgia code which enumerates certain instruments and "any other writing," as the subject of forgery, any writing which might be used as a means of defrauding another is included. *Berrisford v. State*, 66 Ga. 53.

In *VanHorne v. State*, 5 Ark. 349, the word "purport" in a statute prohibiting and punishing the issue of bills purporting to be those of any bank or corporation, was held to refer to what appears upon the face of the instrument.

A PPEAL by defendant from a judgment of the Superior Court for Los Angeles County convicting defendant of the crime of forgery. *Affirmed.*

The facts are stated in the opinion.

Mr. William E. Cox, for appellant:

The fact being established that this instrument shows on its face that it was given as an assignment of the unearned salary of a public school teacher, and it also being shown that Mr. Jackson so understood the instrument, it is against the public interest that such a contract against the interests of the public, or in other words against public policy, should be made.

Arbuckle v. Coutan, 3 Bos. & P. 828; *Wayne*

Trep. v. Chhill, 49 N. J. L. 144; *Field v. Chipley*, 79 Ky. 267; *Bangs v. Dunn*, 66 Cal. 73; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Shannon v. Bruner*, 86 Fed. Rep. 148; *Dowery Nat. Bank of New York v. Wilson*, 9 L. R. A. 706, 122 N. Y. 478.

The terms "office" and "public trust" have no legal or technical meaning, distinct from their ordinary signification. An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested.

Es Wood, 2 Cow. 80; *People v. Brooklyn*, 77 N. Y. 507, 88 Am. Rep. 659; *People v. Hayes*, 7 How. Pr. 250; *People v. Nostrand*, 46 N. Y.

2. What constitutes legal efficacy.

The rule may be stated generally that an instrument is one of legal efficacy within rules relating to forgery where by any possibility it may operate to the injury of another. See *People v. Rathbun*, 21 Wend. 508; *Williams v. State*, 61 Ala. 38; *Com. v. Linton*, 2 Va. Cas. 476.

Thus a writing requesting another to let the bearer have three dollars worth of goods promising to pay in tobacco, might prejudice another's right and is a subject of forgery. *State v. Tingler*, 33 W. Va. 546.

So an order to permit the bearer to taste wine belonging to the person by whom it purports to have been made, addressed to the parties having it in store, is an order for the delivery of goods within a statute with relation to the forgery thereof. *Reg. v. Illidge*, 1 Den. C. C. 404.

So also a direction to a principal to pay to another a certain sum for corn, signed in the name of the principal by an agent, would, if genuine, render the principal liable to the third person for the amount thereof and is therefore a subject of forgery. *State v. Lee*, 32 Kan. 860.

In *State v. Kimball*, 50 Me. 409, the rule that any writing by which another might be prejudiced may be a subject of forgery was applied to a deposition taken for use in the trial of a divorce case.

In *People v. Rathbun*, 21 Wend. 508, an indorsement upon a promissory note was held to be a subject of forgery, although at the time of the transfer of the note a communication was made, which would release the indorsers if the indorsements had been genuine.

A date is not indispensable to an instrument creating a pecuniary obligation, and such an instrument, though not dated, is a subject of forgery if it is such that if genuine it would create a pecuniary obligation. *Boles v. State*, 13 Tex. App. 650.

So an assignment without a seal is a subject of forgery when the name without the seal gives authority to sue for and receive the money or thing assigned. *State v. Misner*, Add. Rep. 44.

And a deed which does not contain the usual and formal words of conveyance, but which sets out the names of the vendor and vendee and a valuable consideration, and contains a warranty of title, would, if genuine, pass the title, and is therefore a subject of forgery. *Allgood v. State*, 37 Ga. 668.

A school warrant signed by two directors, the statute entrusting the management of school affairs to three directors, is a subject of forgery where it is provided that the authority conferred upon several persons may be exercised by the majority thereof. *Clairborne v. State*, 51 Ark. 88; *Crain v. State*, 45 Ark. 450.

And a teacher's certificate of qualification is a subject of forgery under a statute with relation to the forgery of any certificate, order, or allowance by any competent court or officer, or any license or authority authorized by statute. *State v. Grant*, 74 Mo. 33.

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A receipt for money paid on account discharges a pecuniary demand and is a subject of forgery. *Allen v. State*, 79 Ala. 84.

So a common receipt for money in full of all demands is a discharge for money within the meaning of a statute imposing a punishment for forging discharges for money or property, or accountable receipts therefor. *Com. v. Talbot*, 2 Allen, 161.

In *Com. v. Lawless*, 101 Mass. 33, however, it was held that a receipt for a discharge and check for a certain amount is not a subject of forgery within a statutory provision for the punishment of the forgery of accountable receipts.

A receipt for a certain amount upon a designated demand is a subject of forgery though the amount receipted for is less than the demand. It is not necessary that the instrument should defeat a pecuniary obligation. It is sufficient if it tends to defeat it. *Fonville v. State*, 17 Tex. App. 388.

A bail bond taken by a sheriff may be a subject of forgery though there are doubts as to its validity arising from recitals therein, if the invalidity be not open and palpable. *Com. v. Linton*, 2 Va. Cas. 476.

And a bond given in anticipation of a tax, authorized by and issued under a statute is a subject of forgery although the statute might under certain circumstances operate in contravention of the constitution if it may also have a constitutional operation. *Bowles v. State*, 37 Ohio St. 35.

A telegram in the name of another requesting a bank to honor a draft upon the sender imports a pecuniary obligation and will sustain a prosecution for perjury without allegation of extrinsic facts. *Morris v. State*, 17 Tex. App. 660.

In *State v. Jefferson*, 39 La. Ann. 331, it was held that an instrument in terms as follows: "Willy Johns has picked 215 lbs. of cotton, Henry Weastly and David Jefferson has picked 852 lbs. of cotton," signed "Henry Woothen," appears upon its face to be an acknowledgment of work done by a laborer and might be deemed to be equivalent to an order which on presentation would entitle the party named, or the bearer, to the payment for such labor and is therefore a subject of forgery.

A writing in the following terms: "Received of E. E. Thompson a promissory note against S. A. Thompson, bearing date Feb. 12, 1880, of which I am to have \$100 when collected, or I am to pay \$50 at the end of three years from date," signed "S. B. Skiff," is a subject of forgery, the last clause constituting a promise on the part of Skiff, regarding the instrument as a genuine one, to pay \$50 to the person to whom it was delivered. *State v. Thompson*, 19 Iowa, 299.

In *Com. v. Ladd*, 15 Mass. 526, it was held in case of a bill of parcels to the effect that J. bought of E. & C. a bill of goods charged to G. C., to which was falsely and fraudulently added, "by order of E. & C.," that the addition amounts in law to an acknowledgment that the goods were charged to another, thus acquitting or discharging the purchaser, and is therefore a subject of forgery.

381; *Jackson v. Healy*, 20 Johns. 495; *United States v. Hartwell*, 73 U. S. 6 Wall. 385, 18 L. ed. 880; *Fols v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197; *Carlier v. Sanderson*, 5 Bing. 91; *Greenhood*, Pub. Pol. Rules 10, 297.

A contract which is against public policy is void.

Valentine v. Stewart, 15 Cal. 387; *Swan v. Chorpennig*, 20 Cal. 182; *Bangs v. Dunn*, *supra*; *Beard v. Beard*, 65 Cal. 856; *Firemen's Charitable Assn. v. Berghaus*, 13 La. Ann. 209; *St. Louis, J. & O. R. Co. v. Mathers*, 104 Ill. 259; *O'Keefe v. Barry*, 24 Miss. 22.

The object of the Helen Henry order being

In *State v. Humphreys*, 10 Humph. 442, it was held that the following order, "Mr. Bostick, charge J. S. Humphreys account to Wyman & Tannehill," would be, if genuine, an acquittance and release of the debt of Humphreys, the implied promise being a sufficient consideration therefor, and is therefore a subject of forgery.

In *State v. Wingard*, 40 La. Ann. 733, it was held that a paper of the following tenor, "Prime Wingard, 507 I. Cot. T. T. P.," is an instrument of some apparent legal efficacy, upon which money might be obtained, and is therefore a subject of forgery.

In *Dooley v. State*, 21 Tex. App. 549, a telegram in the name of another as follows: "Laura is dead. Send \$75 for her remains to S. B. Wilcox, 210 East Commerce St.," is a forgery, it being an instrument which might create a pecuniary obligation, if genuine, if the money was sent pursuant to its demand.

In *People v. Finch*, 5 Johns. 236, it was held that a writing "Due J. F. \$1, on settlement this day," if falsely made, is a forgery of a note for the payment of money.

a. Must be intelligible and certain.

A writing so imperfect and obscure that it is unintelligible without reference to extrinsic facts will not support an indictment for forgery unless these facts are averred and by the averment it is made apparent that it has the capacity of effecting fraud. *Hobbs v. State*, 75 Ala. 1.

In *People v. Farrington*, 14 Johns. 348, it was held that an order to the cashier of a bank to pay a certain sum to another or bearer in "N. Meyers' bills or yours," is too uncertain to be considered an order for the payment of money, or for the delivery of goods within a statute with reference to the forging thereof, and is not therefore a subject of forgery.

An order for the payment of money, signed, "Elmer Lowtzenheiser" when the person whose name was intended to be signed was named Ezra Lowtzenheiser, is not a subject of forgery inasmuch as it could not be construed on its face by any means to bind Lowtzenheiser. *Abbott v. State*, 59 Ind. 70.

In *Dixon v. State*, 81 Ala. 61, it was held that a written instrument as follows: "Dear sir:—I have nothing to do with Venie Dixon's patch cotton, they are welcome to it and do what they please with it.

Signed W. W. Roberts.

"Mary Ann, the same W. W. Roberts."—is incomplete in form as not to be a subject of forgery in the absence of evidence to indicate that Roberts was in any way connected in interest with the patch cotton.

A note without a signature is incomplete and not a subject of forgery. *Rex v. Pateman, Russ. & R. C. C. 455.*

Neither is an instrument in the form of a bill of exchange without the name of the drawer written thereon. *Reg. v. Harper*, 44 L. T. N. S. 615, L. R. 24 L. R. A.

unlawful, the contract is void under §§ 1595, 1596, of the Civil Code.

Black, Dict. p. 963; *Lawrence*, Dict. pp. 971, 972; *Gulick v. Ward*, 10 N. J. L. 103, 18 Am. Dec. 889; *Logan v. Plummer*, 70 N. C. 892; *Alger v. Thacher*, 19 Pick. 51, 81 Am. Dec. 119.

In England it has been held that a conviction for forging a bill of exchange void by statute was wrong, the court saying: "For if it had been a genuine instrument, it would have been absolutely void; and nothing could have made it good."

2 East, P. C. 954. See also 2 East, P. C. 953,

7 Q. B. Div. 73, 50 L. J. M. C. 90, 29 Week. Rep. 742, 14 Cox. C. C. 574.

And a check, bill, or order payable to the order of — or to — or order, is neither payable to bearer nor to order of any named person, and is so incomplete upon its face as to be incapable of sustaining an indictment for forgery. *Rex v. Randall, Russ. & R. C. C. 196*; *Rex v. Richards*, 14. 186; *Williams v. State*, 51 Ga. 535.

A draft made payable to bearer in which no payee is mentioned, however, is an order for money within a statute with reference to the forgery thereof. *People v. Brigham*, 2 Mich. 550.

And an order for the payment of money may be a forgery although neither the payee nor the drawee be named in the instrument. *State v. Bauman*, 52 Iowa, 68.

And an instrument purporting to be a promissory note which is perfect in all respects except that the name of the payee is omitted, is a subject of forgery. *Harding v. State*, 54 Ind. 859.

An order to let "the boy have \$2.00 worth of what he wants," made falsely and with intent to defraud, is a forgery and its brevity and uncertainty will not prevent a conviction. *Burke v. State*, 66 Ga. 157.

In *Williams v. State*, 24 Tex. App. 342, it was held that the following instrument, "Mr allen bounds, please let aran Williams have one pare shoes, one pare pants and charge the same by this, p. o. Stutta," is not so uncertain that it cannot be made the subject of a forgery by proper averments in the indictment.

In *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639, it was held that a writing as follows: "Due 8.25 Askew Bros," with an allegation that the meaning thereof was that \$8.25 was due to the defendant from Askew Bros. who were partners, will uphold an indictment for the forgery thereof.

In *Hollins v. State*, 22 Tex. App. 548, 58 Am. Rep. 659, it was held that the following writing, "Apolas, Halsal, Please let Mr. G. B. Rowlands, have 4\$000. in goods and oblige. Charze to me Joel Ebler."—was intended for an order on Apolas & Halsal, for \$4 in goods, and that with extrinsic proof as to whose signature it was, it may be a subject of forgery.

In *Nelson v. State*, 82 Ala. 44, it was held that a writing as follows: "Due 8.50 c. J. R.," is a subject of forgery, if accompanied by proof that it meant that the sum of \$8.50 was due the bearer of said instrument from a certain mercantile firm at their store, and that the same was made by the clerk of such firm who had authority to do so in the regular course of business.

In *Hobbs v. State*, 75 Ala. 1, a writing: "Please send me word how long you will give Stevens to pay for the bed, and if you will allow him time enough to pay for it let him have a cheap bureau, as cheap as possible and I will see that you will get so, and oblige, much a week. Just write it off the whole thing and send it to me," was held to be an

and note," *Walls Case*," *Com. v. Ray*, 8 Gray, 448; 8 Greenl. Ev. 108; *Barnum v. State*, 15 Ohio, 723, 45 Am. Dec. 601; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Clarke v. State*, 8 Ohio St. 634; *State v. Briggs*, 34 Vt. 504; *People v. Ferris*, 56 Cal. 445; *Cox v. State*, 66 Miss. 14; *Waterman v. People*, 67 Ill. 99; *Garmire v. State*, 104 Ind. 444; *State v. Wheeler*, 19 Minn. 98; 2 Bishop, Crim. L. § 508.

The presumption is that every man knows the law and is able to appreciate the legal effect of the instrument. Therefore it cannot in legal contemplation defraud any one.

People v. Stearns, 21 Wend. 414; *Hammond*, Dig. of the Law of Forgery, chap. 1, § 2, p.

instrument of apparent legal efficacy and not so obscure as to be unintelligible without reference to extrinsic facts and therefore a subject of forgery.

In *Hendricks v. State*, 26 Tex. App. 176, it was held that a written communication as follows: "Mr. Gladstone, please let Bare Have the sum of \$5 in Groceries, and charge the same to Dr. F. T. Cook," is an order for merchandise or goods or property of some kind, and may be a subject of forgery, no averment of extrinsic facts being necessary to show that such was its character.

A bank note in which a blank is left in the body of the note where the number of dollars should appear, the denomination appearing elsewhere in the bill, is a note of that denomination and may be a subject of forgery. *State v. Dourden*, 14 N. C. 445.

So though the word "pounds" is omitted in the body of the note, where the amount of the note with the sign "L" is placed in the margin. *Rex v. Elliott*, 2 East, P. C. 951, 1 Leach, C. C. 175.

b. Must be an order and not a mere request.

A mere request made without right, which may or may not be complied with at the option of the person to whom it is addressed, is not a subject for forgery.

Thus in *Shannon v. State*, 109 Ind. 407, it was held that a writing as follows: "M. T. Hemphill, please let Charles Shannon have one dress pattern and oblige, Theodore Points," is not an order but a mere request, and without the averment of extrinsic facts it is not a subject of forgery, it being uncertain in that it is not apparent whether it was intended to mean sufficient material out of which to make a dress, or a pattern whereby to cut out a dress in accordance with fashion.

Shannon v. State, *supra*, however, was distinguished in *Stewart v. State*, 113 Ind. 503, in which the order upon which the charge of forgery was predicated was similar in its phraseology, the court saying that in the former case the decision was rendered solely because the order was so uncertain that the averment of extrinsic facts showing its fraudulent tendency was necessary to the sufficiency of the indictment, and not upon the ground that the order was an instrument upon which a charge of forgery could not be predicated.

So a request for the loan of a sum of money promising to repay it on a designated day is not a warrant or order for the payment of money within the Maryland statute with relation to the forgery thereof, though it is a subject of forgery at common law. *United States v. Green*, 2 Cranch, C. C. 320.

So also, in *State v. Cook*, 52 Ind. 574, it was held that an order addressed to "Trublood & Allen, Salem, Ind., please let Jim Cook have \$2.00 worth on my credit. Fred C. Trow, Salem,"—is not an instrument for the payment of money or the delivery of goods within the Indiana statute, but a mere request that the drawee should sell to the bearer something to the value of \$2.00, and charge

102; *State v. Smith*, 8 Yerg. 150; *John v. State*, 28 Wis. 504; *Henderson v. State*, 14 Tex. 503; *People v. Tomlinson*, 85 Cal. 508; *People v. Shall*, 9 Cow. 784; *Fadner v. People*, 2 N. Y. Crim. Rep. 558.

Messrs. Edgerton & Adams also for appellant.

Messrs. W. H. H. Hart, Atty-Gen., and *Charles H. Jackson*, for respondent:

The instrument is bad in part, and good in part.

When a contract has several distinct objects of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter, and valid as to the rest.

the same to the drawer, and is not a subject of forgery without an averment as to the business in which Trublood & Allen were engaged, and a statement as to their manner of doing business and their business relations with the drawer of the order.

In *People v. Thompson*, 3 Johns. Cas. 342, it was held that a letter introducing another, requesting the person to whom it is addressed to accept his draft on the person by whom it purports to have been written, stating that his compliance would much oblige, is a mere request as a favor and is not a subject of forgery.

In *Horton v. State*, 53 Ala. 488, it was held that a direction to let another have \$5 in goods with a promise to settle on the following week would create a pecuniary demand if genuine, but is not an order for the delivery of goods, but a mere authority to sell that amount of goods upon the credit of the person making the direction, the false making of which is not forgery.

Horton v. State, *supra*, distinguishes *People v. Shaw*, 5 Johns. 283, and *Com. v. Fisher*, 17 Mass. 46, in which similar instruments were regarded as orders for delivery of goods upon the ground that the statute of those states specially designated such instruments as subjects of forgery.

An order for the delivery of goods, may be a forgery, however, though it is in the form of a request and does not show that the drawer had a right to make it, or that the person to whom it was addressed was bound to obey it. *State v. Holley*, 1 Brev. 35.

The style alone cannot determine the legal character of the instrument; the language employed may be such that the legal character of the instrument would depend upon the relations subsisting between the parties and the circumstances of the case. *Evans v. State*, 8 Ohio St. 193, 70 Am. Dec. 93.

Thus in *Jones v. State*, 50 Ala. 161, it was held that an order for money purporting to have been made by a son to his father was a forgery, the court saying that though if genuine it would be gratuitous and a mere matter of affection and favor, it is as criminal, morally and legally, to cheat and defraud the father by practicing on his affection for a child as by the pretense that he was being discharged from a legal liability or acquiring a legal right. The capacity of a false and fraudulent writing to work injury is the material question; if the writing has that capacity the offense of forgery is committed.

And a similar ruling was made in *Evans v. State*, *supra*.

So a note to a son purporting to have been written by his mother telling him to ask his employers for money and give it to a third person, who was the real writer of the note with intent to obtain the money, is a forgery, it being made to appear that the son was a minor working for wages. *People v. Krummer*, 4 Park. Crim. Rep. 217.

So also a writing as follows, "Please let the

Civil Code, § 1599; *Granger v. Original Empire Mill & Min. Co.* 59 Cal. 682; *Jackson v. Shawl*, 29 Cal. 273; *Moss v. Bonnet*, 40 Cal. 251; *Pigot's Case*, 11 Coke, 26 b; *Bank of Australasia v. Breillat*, 6 Moore, P. C. C. 152; *Pennsylvania Co. v. Wente*, 37 Ohio St. 338; *State v. Perryburg Board of Education*, 35 Ohio St. 519; *Gelpeke v. Dubuque*, 68 U. S. 1 Wall. 221, 17 L. ed. 519; *Erie R. Co. v. Union Locomotive & Exp. Co.* 85 N. J. L. 240; *Presbury v. Fisher*, 18 Mo. 50; *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 533; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 180.

Inasmuch as half of the instrument is valid, that half is legitimately the subject of forgery.

bearer have the amount of three pounds and oblige," is an order for the payment of money and not a mere request, and is therefore a subject of forgery. *Reg. v. Tuke*, 17 U. C. Q. B. 206.

So a writing as follows, "Please let the bearer have one pair of boots" is an order for the delivery of goods within the Maryland statute with reference to the forgery thereof. *United States v. Book*, 2 Cranch, C. C. 204.

And the same ruling was made with reference to a request to let "the boy" have a suit of clothes and a cap, in *Stewart v. State*, 113 Ind. 606.

And with reference to a request to "let the bearer have ten dollars and such articles as he may choose," in *United States v. Brown*, 3 Cranch, C. C. 203.

A request as follows: "Please let Mr. Borswick have his clothes and I will hold his pay till next Tuesday and will see that paid for,"—is an order for the delivery of goods and chattels within a statute with reference to the forgery thereof. *Childester v. State*, 26 Ohio St. 433.

And an order as follows, "Mr. Allen, please let A. Garmire have team to go to Mongo and charge same to me, T. Hudson," is not merely a request for the delivery of property, but is a writing promising to pay for property purporting to create a pecuniary obligation against the person whose signature is forged, and is therefore a subject of forgery. *Garmire v. State*, 104 Ind. 444.

In *People v. Shaw*, 5 Johns. 236, an order to let the bearer trade to a certain amount and "much oblige, yours, etc.," was held to be an order for the delivery of goods within a statute concerning the forgery thereof.

And the same rule was held in *State v. Cooper*, 5 Day, 250.

It is not necessary that an order or request for the delivery of goods should on its face be directed to a particular person to make it the subject of a forgery, under a statute against forging any instrument in writing, it being or purporting to be the act of another. *Noakes v. People*, 25 N. Y. 380.

See also *State v. Jefferson*, 39 La. Ann. 331, for a similar holding under the Louisiana statute.

c. Must not be mere matter of opinion.

The mere expression of a matter of opinion is not a subject upon which a forgery can be predicated.

Thus a certificate that another is a man of responsibility able to satisfy a demand for a specified amount if he agrees to, would if genuine subject no one to liability, and is not a subject of forgery. *Ames' Case*, 2 Me. 265.

So an affirmation that the makers of a note are able to pay it is a mere expression of opinion and not an obligatory writing which is the subject of a forgery. *State v. Givens*, 5 Ala. 747.

A communication from one person to another, however, that the latter might let a third person trade, stating that he has a good crop, is a recommendation that the third person is entitled to be 24 L. R. A.

Garoutte, J., delivered the opinion of the court:

This case was decided in department, but, a rehearing having been ordered, it is now before the court in banc. The appellant was convicted of the crime of forgery, and prosecutes this appeal from the judgment and order denying his motion for a new trial. It is insisted that the facts charged in the information do not constitute the offense of forgery; and that is the only matter relied upon for a reversal of the judgment which demands our attention. We will not enter into a detailed analysis of the various parts of the writing which is the subject of the forgery here

credited in the way of trade, upon which the receiver might hold the maker thereof if the statement was untrue, and is therefore a subject of forgery. *Johnson v. State*, 62 Ga. 299.

d. Must not be mere recommendation to courtesy.

A letter of introduction stating that the bearer will perform whatever he engages to do, and that he will probably want a stated sum of money to which he will undoubtedly be accommodated, is not a writing whereof forgery can be permitted. *Foulkes v. Com.* 2 Rob. (Va.) 533.

So one who fraudulently substitutes his name for that of another in a diploma of the college of surgeons to induce a belief that he was a member of the college but with no intent to commit any particular fraud or specific wrong, is not guilty of forgery. *Reg. v. Hodgson*, 7 Cox, C. C. 123, *Deans & B. C. C. & 25 L. J. M. C. 78*, 2 Jur. N. S. 483.

Likewise a paper purporting to be a certificate from one branch of a friendly society to another showing that the holder has paid all dues for a designated period, and authorizing any court of the order to accept him as a clearance member, is a certificate and not a receipt for money within a statute with reference to the forgery of receipts. *Reg. v. French*, L. R. 1 C. C. 217, 59 L. J. M. C. 58, 21 L. T. N. S. 726, 18 Week. Rep. 354.

A letter of introduction purporting to be signed by a railway superintendent introducing the bearer and promising to reciprocate any favors, would, if genuine, affect no legal rights, and is not a subject of forgery. *Waterman v. People*, 67 Ill. 91.

A letter of recommendation of character falsely written in the name of another with intent to obtain a situation as police constable, however, is a forgery. *Reg. v. Moah*, 7 Cox, C. C. 503, *Deans & B. C. C. 550*, 27 L. J. M. C. 205, 4 Jur. N. S. 464.

And the false writing in the name of another of certificates of service, sobriety, and good conduct at sea for a given period, required to enable persons to be examined for certificates of qualification to act as masters, is forgery. *Reg. v. Toehack*, 4 Cox, C. C. 33, *Temp. & M. 207*, 1 Den. C. C. 493, 13 Jur. 1011.

e. Must purport to be the act of another.

The offense of forgery consists in falsely making an instrument purporting to be made by another. One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. *People v. Mann*, 75 N. Y. 484, 31 Am. Rep. 432; *State v. Young*, 46 N. H. 266, 38 Am. Dec. 312.

Thus where one executes an instrument purporting on its face to be executed by him as agent for a principal named therein, whether a corporation or an individual, when he has in fact no authority from such principal, he is not guilty of forgery. *Mann v. People*, 15 Hun, 155; *Re Heilbronn*, 1 Park. Crim. Rep. 432.

charged, but will view it from the standpoint of appellant's claims, and, for the purposes of this investigation, will concede the writing to be an assignment or sale of the unearned salary of a public school teacher for the next ensuing month, together with an order upon the city auditor of Los Angeles for the warrant representing such salary. That being the fact, it is further claimed that Helen Henry, the purported author of the writing, being a public school teacher, is a public officer, and that the sale or assignment of an unearned salary by a public officer is void, being against public policy, and, the writing being void, it cannot be the basis of a charge of forgery. The in-

formation charged that this writing was forged and passed by the defendant with intent to defraud one J. W. Jackson; the evidence disclosing that the writing was assigned to Jackson for valuable consideration, and that subsequently the warrant was delivered to him by the auditor, and the money paid thereon by the treasurer. Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter [then follows a list by name of almost every conceivable kind and character of writing], is guilty of forgery." Upon a strict construction, it might in good reason be held that the fore-

An instrument purporting to be the contract or obligation of a county executed by a county officer in his own name, as the official representative of the county, is not a forgery. *People v. Mann, supra*.

And the same rule applies to an instrument executed by an officer, purporting to be an obligation of a city. *Conner's Case, 3 City Hall Rec. 59*.

Checks drawn by an agent without authority, who signs in his own name "by procuration," etc., show on their face all they purport to be and are not subjects of forgery. *Re Tully, 80 Fed. Rep. 818*.

And a false assertion in an indorsement, that the indorser has a procuration, without any other circumstance of falsehood or misrepresentation, does not make such indorsement a forgery. *Reg. v. White, 2 Cox, C. C. 210, 1 Den. C. C. 208, 2 Car. & K. 404, citing Maddock's Case; 2 Russell on Crimes, 8th Am. ed. 499*.

A paper made by a member of a firm without authority, though it be with intent to defraud the firm, is not a forgery. *Com. v. Brown, 80 Phila. Leg. Int. 200*.

Thus, a note made in the name of a fictitious firm of which the maker purports to be a member, or in the name of the maker thereof with another as partners when they are not so in fact, is not forgery, forgery consisting, not in the bare writing of the instrument in another's name without authority, but in giving it a false appearance of having been executed by him. *Com. v. Baldwin, 11 Gray, 197, 71 Am. Dec. 708*.

Writing a letter in the name of another representing that the real and the ostensible writer are partners, is not forgery as it imports neither a transfer or extinguishment of any right nor an obligation for money or other thing for value. *Jackson v. Weisiger, 2 B. Mon. 214*.

False charges in one's own book of accounts are not forgeries. A forgery must generally be an instrument under which others have acquired some rights or have in some way become liable. *State v. Young, 46 N. H. 266, 88 Am. Dec. 812*.

§. Instruments void on their face.

A writing void on its face because of the want of legal requisites to its validity, is not the subject of an indictment for forgery, in consequence of its incapacity to effect fraud. *Hobbs v. State, 75 Ala. 1; State v. Pierce, 8 Iowa, 281; Roode v. State, 5 Neb. 174, 25 Am. Rep. 475; People v. Shall, 9 Cow. 778; Anderson v. State, 20 Tex. App. 556; Costley v. State, 14 Tex. App. 159; Raymond v. People, 2 Colo. App. 329; Terry v. Com. 87 Va. 672; Rex v. Burke, Russ. & R. C. C. 496*.

The forging of an instrument which upon the face of the indictment would appear to be void even if genuine, is not an indictable offense. *State v. Van Hart, 17 N. J. L. 327*.

Where the instrument which is charged to be forged is of no apparent legal effect, and there are

no averments in the indictment of facts showing the capacity of the instrument for fraud, it is insufficient to sustain the prosecution. *People v. Shall, supra; State v. Wheeler, 19 Minn. 98*.

A paper purporting to be a copy of a decree of divorce with what purports to be an impression of the seal of the clerk of the court upon it, there being no certificate of comparison with the original decree, will not support an indictment for uttering a false and fraudulent impression of the seal of the supreme court even though the court had been deceived thereby, and had directed the forger's acquittal upon an indictment for bigamy. *Fadner v. People, 88 Hun, 240*.

Nor will a copy of a decree of divorce which does not purport on its face to be an authenticated copy of a record be a forgery, under a statute making it forgery to falsely make, alter, forge, or counterfeit any record or other authenticated matter of a public nature. *Brown v. People, 88 Ill. 230, 30 Am. Rep. 28*.

Thus a county warrant which is void upon its face will not support an indictment for the forgery thereof. *People v. Heed, 1 Idaho, 531*.

Nor is an order purporting to be drawn by the auditor of public accounts of a state upon the treasurer thereof without a seal, when by the law of the state in which it is made an unsealed order is void. *Cunningham v. People, 4 Hun, 455*.

So, in a state in which a married woman's deed is void without acknowledgment, an indictment for the forgery thereof cannot be sustained. *Roode v. State, 5 Neb. 174, 25 Am. Rep. 475*.

And a certificate of acknowledgment of a deed which does not set forth that the grantor acknowledged the execution thereof, would not pass title and its invalidity would be apparent upon its face, and the crime of forgery could not be predicated thereon. *People v. Harrison, 8 Barb. 560*.

Under a statute making it forgery to falsely make, alter, forge, or counterfeit any record or other authenticated matter of a public nature, if the instrument set out in the indictment does not purport on its face to be an authenticated copy of a record it is not a subject of forgery within such statute. *Brown v. People, supra*.

A writing addressed to the proper officer, "Please give R. B. Rhine his license to marry my girl. She is 18,"—purporting to have been signed by the girl's father, does not purport to be and is not a certificate within the meaning of a statute providing that if either party is a minor the consent of the parent or guardian must be filed in the clerk's office, after being acknowledged by such parent or guardian, and proved to be genuine, and such a writing when falsely made is not a forgery. *State v. Rhine, 84 Iowa, 169*.

In *Reed v. State, 28 Ind. 396*, it was held that an indictment for the forgery of a certificate purporting to be signed by the proper officer certifying that a certain person is entitled to a bounty, is not good, where the payment of such a bounty would

going definition of forgery curtails the elements necessary to be present in order to constitute the offense, as contradistinguished from forgery recognized by various writers upon criminal law. Under our statute we hold burglary to be an entry into a building with intent to commit larceny; and, upon the same lines, it might be held that forging a writing with intent to defraud another is forgery; and, indeed, it is apparent that the character of the writing is quite insignificant, when placed in the balances opposite the other element,—the intent to defraud. But we will take broader ground, and concede the essential ingredients of the crime of forgery to be (1) a false making of some instrument; (2) a fraudulent intent; (3)

if genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing. *People v. Frank*, 28 Cal. 514; *People v. Tomlinson*, 35 Cal. 506; *Ex parte Finley*, 66 Cal. 263.

There is some general language in the *Tomlinson Case*, taken very probably from *People v. Shall*, 9 Cow. 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability; but such is not the true test, in our opinion. The requirements of the statute demand no such construction, and its adoption would result in the escape from justice of many criminals.

Appellant's counsel has cited many cases to

be illegal and no extrinsic facts are alleged showing the fraudulent tendency of the certificate.

A release of all claims from a creditor to a debtor made after the debtor has transferred all his effects to an assignee in bankruptcy, is not a subject of forgery. *Barnum v. State*, 15 Ohio, 717, 45 Am. Dec. 671.

And an altered instrument between a debtor and creditor, made several months after a transfer by the debtor to a trustee, under the bankrupt law, could prejudice no one's rights, and is not therefore a subject of forgery. *Ibid*.

After an order for the delivery of goods has been satisfied and returned to the drawer an alteration of the date thereof by the drawer is not forgery. *People v. Fitch*, 1 Wend. 193, 19 Am. Dec. 447.

Having in one's possession a forged coupon attached to the bonds of a railroad company, which bond is unsigned, is not within the statute relating to forgery, the coupons being invalid because of the imperfect character of the bonds, to which they are attached. *People v. Martin*, 36 Hun. 422.

A writing addressed to another as follows: "Martin Baysinger says, let Willy Anderson have \$10 worth of goods and he will stand for it," is invalid for any purpose and not a subject of forgery. *Anderson v. State*, 20 Tex. App. 595.

In *State v. Corley*, 4 Bart. 410, it was held that an entry made on an execution docket satisfying the same as to the claim of a witness made without authority, is not a forgery as there could be no satisfaction of the judgment by the entry without the consent of the person to whom they were due.

4. Efficacy which is apparent only.

It is not necessary that an instrument shall have actual legal efficacy in order to be a subject of forgery: it is sufficient that if genuine it might apparently have such efficacy, or serve as the foundation of a legal liability. *State v. Johnson*, 26 Iowa, 407, 96 Am. Dec. 158; *Rudicel v. State*, 111 Ind. 525.

It is only where the instrument appears as matter of law to be void that the accused can escape. *Rudicel v. State*, *supra*.

A false instrument which is good upon its face is a subject of forgery, though inquiry into extrinsic facts would show it to be invalid. *State v. Hilton*, 35 Kan. 338; *State v. Pierce*, 3 Iowa, 231.

Thus a check on a bank may be a forgery though the supposed drawer never kept funds in that bank. *Rex v. Crowther*, 5 Car. & P. 318.

As to checks drawn upon banks in which there are no funds to meet them, see also *infra*, under head of *Apparent capacity or authority to make*.

So, a bank note may be the subject of forgery, though it purports to have been signed by one who never had been the president of the bank, and countersigned by one who had never been the cashier. *United States v. Turner*, 32 U. S. 7 Pet. 132, 3 L. ed. 632.

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So also a bank note dated at a time when the bank remained in existence, is a subject of forgery, although at the time of passing the note the charter had expired. *Buckland v. Com.* 8 Leigh, 732; *White v. Com.* 4 Binn. 418.

Likewise a bank note may be a forgery, though the bank has never issued a note of that amount and description. *State v. Carr*, 5 N. H. 367; *State v. Fitzsimmons*, 30 Mo. 236.

In order to constitute forgery, the name forged need not be that of a person then existing. *Riley's Case*, 5 City Hall Rec. 87.

And the making of a false check in the name of another constitutes the crime of forgery even though the person whose name was signed to it was dead at the time it was signed. *Brewer v. State*, 32 Tex. Crim. Rep. 74; *Billings v. State*, 107 Ind. 54, 57 Am. Dec. 77.

And a deed which is valid upon its face is a subject of forgery although the person by whom it purports to have been executed is dead. *Henderson v. State*, 14 Tex. 503.

So a bill may be a subject of forgery though the person purporting to have made it still lives. *Rex v. Coogan*, 2 East, P. C. 943, 1 Leach, C. C. 443, 449; *Rex v. Sterling*, 2 East, P. C. 950, 1 Leach, C. C. 90.

A will which is valid upon its face, purporting to give and bequeath an estate to a stranger, is a subject of forgery whether or not the testator had any estate and whether or not his wife occupied such a relation toward him as that the bequest of property to a third person would result in her injury. *People v. Todd*, 77 Cal. 464.

A marriage certificate may be the subject of a forgery, though no such marriage as that certified to ever took place. *State v. Boasso*, 28 La. Ann. 202.

And a certified copy of a decree of divorce is a subject of forgery, though it does not appear that the parties thereto were ever married, and its fitness for fraudulent use appears upon its face, rendering the averment of extrinsic facts unnecessary. *Ex parte Finley*, 66 Cal. 262.

If the apparent validity of a conveyance of land alleged to be forged is such that the person alleged to be defrauded may be disturbed in his possession, it is a subject of forgery, though he could not be evicted. *Rex v. Crooke*, 2 East, P. C. 921, 3 Leach, C. C. 703, 2 Strange, 901.

And a mortgage purporting to have been signed by the owner is a subject of forgery, though there is a homestead declaration on the property covered thereby, and whether or not as a matter of law the mortgage is good without execution by both husband and wife. *People v. Baker*, 100 Cal. 188.

An order for the payment of a seaman's prize money for services may be the subject of a forgery, though the statute provides that no such order made by a seaman discharged from service within seven miles from the port where his wages are payable shall be valid, where the order pur-

the effect that a contract against public policy is illegal and void, and has no standing in courts. He has also cited cases to the effect that a void contract cannot be the subject of forgery. But he has cited no case to the effect that a contract against public policy is not the subject of forgery, and, after diligent examination of authorities, we have failed to find a case to that point, and this court is not willing to be the first judicial body to declare such a doctrine. It would serve no useful purpose to review in detail the cases cited by counsel holding that void contracts are not the subject of forgery. Many of them are cases of *nudum pactum*, and others follow the very extreme

doctrine laid down in *People v. Shall, supra*, where the learned judge said: "I agree that a man ignorant of the technical requirements of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defendant stands convicted involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory note. But legal forgery cannot be made out by imputing a possible, or even actual, ignorance of the law to the

ports upon its face to have been made beyond the limited distance. *Rex v. Mackintosh*, 2 East, P. C. 942, 956, 2 Leach, C. C. 883.

And a power of attorney to receive a seaman's wages, purporting to have been made in the name of his child, may be a subject of forgery though it appears that the seaman died childless. *Lewis's Case*, Fost. 116, 2 East, P. C. 957.

An undertaker's affidavit and a clergyman's certificate of death issued for the purpose of obtaining insurance upon the life of the deceased, drawn up in the form required by statute, the invalidity of which can only be ascertained by reference to other instruments, are subjects of forgery, though they are actually attached to the instruments showing their falsity and invalidity. *State v. Hilton*, 35 Kan. 388.

A debtor who makes a pretended discharge from his creditor whereby he obtains his discharge from jail, where he was confined, is guilty of forgery although the attachment under which he was held was not for the payment of money and the discharge was therefore a mere nullity and no warrant to the sheriff for the release. *Rex v. Fawcett*, 2 East, P. C. 862.

Where the instrument upon which the alleged forgery is predicated is valid upon its face, it is not necessary to allege the existence of facts, the existence of which is assumed in the instrument. *People v. Bibby*, 91 Cal. 470.

Thus it is not necessary to allege in an indictment for the forgery of a deed that the instrument would have conveyed the land if genuine, it is sufficient to charge that it purported to convey the alleged grantor's right, title, and interest. *State v. Fisher*, 65 Mo. 437.

And in *Horton v. State*, 32 Tex. 79, it was held to be unnecessary to state facts in an indictment showing the manner in which a false instrument would, if true, create, increase, or discharge a pecuniary liability, these being deductions of law.

So, an indictment for forging a paper purporting to have been made by an agent in the name of his principal, need not allege the authority of the agent even though if the agent had no authority to draw the paper, the principal might not be injured by it. *Cross v. People*, 47 Ill. 152, 36 Am. Dec. 474.

And the legal existence of a bank, the notes of which are claimed to have been forged, need not be alleged in the indictment for the forgery, or proved on the trial thereof. *Hobbs v. State*, 9 Mo. 845; *People v. Ah Sam*, 41 Cal. 645; *Com. v. Carey*, 2 Pick. 47; *State v. Hayden*, 15 N. H. 365; *State v. Van Hart*, 17 N. J. L. 327; *People v. Peabody*, 25 Wend. 472; *Sasser v. State*, 13 Ohio, 453.

It is enough if the forged instrument purports to have been issued by a corporation or company duly authorized for that purpose. *People v. Peabody, supra*.

In *People v. Stearns*, 21 Wend. 409, it was held 24 L. R. A.

that an indictment for forging an order purporting to have been drawn by the cashier of one bank upon the cashier of another directing him to deliver the plates of the first bank to certain persons and receive them again on deposit, need not show that the bank, to the cashier of which the order purported to have been directed, has any legal existence.

So, an indictment charging the forgery of an indorsement on the back of a draft purporting to have been drawn by one bank upon another, is good without proof of the existence of either bank. *State v. Pierce*, 8 Iowa, 231.

In *Com. v. Smith*, 6 Serg. & R. 563, it was held that it is not necessary to prove the existence of a bank whose bills have been alleged to have been forged, unless the indictment alleges its incorporation.

Where the offense is alleged to defraud the bank by which the notes purported to have been issued, however, it must be shown to be a real body capable of being defrauded. *People v. Peabody, supra*; *De Bow v. People*, Denton, 9; *Com. v. Smith, supra*.

The words of the statute of Virginia and West Virginia, "to the prejudice of another's right," need not be inserted in the indictment; they are descriptive of the subject of the forgery, and not of the crime. If the instrument itself be such that it may prejudice another's right it is enough. *State v. Tingler*, 33 W. Va. 546; *Powell v. Com.* 11 Gratt. 822.

a. Must be sufficient to deceive.

It is not necessary that an instrument should be perfect in order to be a forgery; it is sufficient if it bears such a resemblance to the document it is intended to represent as is calculated to deceive. *State v. Ferguson*, 35 La. Ann. 1042.

And an indictment for forgery must show that the instrument alleged to have been forged is one having some legal effect, but it need not be shown to be a perfect instrument. *Garmire v. Indiana*, 104 Ind. 444.

The false making of any instrument whereby another may be injured is forgery, even though it be of such a character that it would not be effectual if genuine, providing its defects are not so open and palpable that one could be deceived without being grossly negligent. *Com. v. Linton*, 2 Va. Cas. 476.

It is not necessary that a forged instrument should be an exact resemblance of one that is genuine. It is sufficient if it be fit *prima facie* to pass for true. *State v. Dourden*, 13 N. C. 443.

Or sufficient to deceive men of ordinary business capacity. *Peete v. State*, 2 Lea, 53; *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 787.

In order to constitute forgery it is not necessary that there should be so perfect a resemblance to the handwriting of the party whose name is forged as would impose on persons having par-

person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime,—upon criminal breaches of perfect legal obligation." It is sufficient to say that this language carries the principle to limits which we cannot follow. The more liberal doctrine, and the doctrine which, in the interest of good government, should be sustained, is declared in *People v. Krummer*, 4 Park. Crim. Rep. 219, where the court says: "We are never called upon to determine whether, in legal construction, the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or

not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, upon its face, it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over." There is no question that a writing which is a *nudum pactum* is not the subject of forgery; but a contract which a court will not enforce, or even recognize, because it is against the policy

secular knowledge thereof. *Com. v. Stephenson*, 11 Cush. 81, 50 Am. Dec. 154.

A note or order upon a bank which is not obligatory upon the bank on which it is drawn, may be a subject of forgery, if it is calculated to impose upon and deceive persons of common observation. *United States v. Mitchell*, 1 Baldw. C. C. 386; *Hess v. State*, *supra*.

A certificate upon a deed of trust falsely made in the name of the recorder is a forgery though the year when the deed was deposited for record is not stated in it. *State v. Tompkins*, 71 Mo. 613.

A false and fraudulent lease of lands known as "Jawick" in which they are described as "Jawick Park" when made in the name of another is a forgery. *Rex v. Crooke*, 2 Strange, 901.

But in *Rudicel v. State*, 111 Ind. 595, it was held that an instrument signed, "Bill Stevens," when the name of a person whose name was alleged to have been forged was "William L. Stephens" is not such as would deceive any one and is not therefore a subject of forgery.

An order for the delivery of goods will sustain a prosecution for forgery against the person presenting it, although a different person is named as payee, and there is no indorsement or order to deliver to another. *State v. Morgan*, 35 La. Ann. 283.

b. Must be a subject of legal proceedings.

An instrument to be a subject of forgery need not be one upon which, if genuine, an action might be maintained. It is sufficient if it is one which could be used as proof either against the person whose act it purports to be or against any other person. *State v. Boasso*, 38 La. Ann. 202; *State v. Johnson*, 25 Iowa, 407, 36 Am. Dec. 158.

It must be one upon which an action could be maintained without recurring to extrinsic evidence to support it. *Conner's Case*, 3 City Hall Rec. 59.

If the instrument claimed to be a forgery is the subject of legal proceedings in which a judgment might be lawfully recovered against the maker thereof on default, he may be injured thereby, and the instrument may be the subject of a forgery. *People v. Fadner*, 10 Abb. N. C. 462.

It is not necessary that an instrument be enforceable to make it the subject of forgery; it is sufficient if it may be the basis of an action, or if it be of such a character that it may defraud or injuriously affect the rights of another. *State v. Dunn*, 23 Or. 562.

A certificate of a justice of the counting of the scalps of certain wild animals for which a bounty is offered, which is to be received as legal proof of such counting, is an instrument which if genuine would be received as legal proof of liability and is therefore a subject of forgery. *State v. Johnson*, *supra*.

The forging of an instrument which would not be proof in any legal proceeding however, cannot be made a subject of indictment without the aid of § 4 L. R. A.

extrinsic evidence. *Anderson v. State*, 20 Tex. App. 593.

Thus in *State v. Anderson*, 30 La. Ann. 557, a consolidated statement of the votes of a parish which is not made evidence of the result of the election and which was not required to be preserved among the archives of the parish, and which the officers are not required to use, was treated argumentatively as not a subject of forgery, but the decision turned upon other questions.

So a certificate that a colored person was free-born, and of good behavior, would not be evidence of the facts which it recites and therefore would not be a subject of forgery. *State v. Smith*, 8 Yerg. 150.

In *Arnold v. Cost*, 3 Gill & J. 219, 23 Am. Dec. 302, however, which is a leading case in the law of forgery, a certificate made in the name of a master of a slave, stating that the slave had been made free, was held to be a subject of forgery, inasmuch as if it had been genuine it might have subjected the master to damages for the loss of the slave.

A probate judge's memoranda book which is not required to be kept by law, used by him for his own convenience, is not a subject of forgery within a statute with reference to the forgery of public records. *Downing v. Brown*, 3 Colo. 571.

The defense of usury is available only upon plea. Usury is not a sufficient defense to an indictment for forgery therefore, even if the instrument claimed to have been forged is usurious upon its face. *People v. Fadner*, 10 Abb. N. C. 462.

So where the alleged invalidity of an instrument arises from the fact that it is subject to the bar of the statute of limitations, it is nevertheless a subject of forgery, the statute of limitations affecting the remedy and not the right. *State v. Dunn*, 23 Or. 562.

c. Apparent capacity or authority to make.

When the order which is alleged to be a forgery purports upon its face to have been made by one having authority to make it, it is a subject of forgery though such authority did not actually exist. *Rex v. Clinoh*, 2 East, P. C. 938, 1 Leach, C. C. 540; *Williams v. State*, 61 Ala. 38.

But under the earlier decisions, if the instrument purported to have been made by one who had no previous interest in the subject-matter, it was not a subject of forgery. *Rex v. Williams*, 2 East, P. C. 937, 1 Leach, C. C. 114; *Reg. v. Roberts*, 2 Russell on Crimes, 8th Am. ed. 522.

And the terms "warrant or order," used in a statute with reference to the forgery thereof, were held to import that the person giving it had or claimed an interest in the money or goods which were the subject-matter thereof, or had or assumed to have a disposing power over them. *Rex v. Mitchell*, 2 East, P. C. 936.

Thus in *Rex v. Mitchell*, *supra*, it was held that a note directed to a shopkeeper desiring him to let a prisoner have certain goods which he

of the law, cannot be termed a "*nudum pactum*." A forged contract, even though it covers a subject-matter which makes it void as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and thus it satisfies the test which we have laid down. The contract may be such that there would not only be a possibility of its injuring another, but a very strong probability of such injury; for there are many contracts against public policy which, upon their face, present a most innocent and most inviting appearance. Even though a contract presented to a court of justice would be declared void as against public policy, yet

aside from that fact it may have a pecuniary value to its owner. It could have such a value as that the theft of it would be the subject of larceny; and it would be anomalous to hold an instrument the subject of larceny, and yet its counterfeit not of sufficient value to form the basis of a charge of forgery. If the stealing of the genuine instrument would be larceny, surely the false making of such an instrument would be forgery. To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a *carte blanche* to the professional forger, of which he would not be slow to take advantage;

would see paid for, purporting to have been written by an overseer of the poor, was not a subject of forgery.

And in *Walton v. State*, 6 Yerg. 377, an order in the name of another to let a person named therein have a thirty-five dollar watch, was held not to be a forgery, it not having been shown that the drawer of the order had any interest in the subject-matter of the order.

And the same rule was applied to a note to a tradesman requesting him to let the bearer have certain goods in which the apparent writer had no interest, in *Rex v. Williams*, *supra*.

Reg. v. Roberts, *supra*, however, was distinguished in *People v. Way*, 10 Cal. 388, upon the ground that it turned upon the technical meaning of the word "order" used in describing the forged instrument.

And *Walton v. State*, *supra*, was overruled in *Hale v. State*, 1 Coldw. 187, 78 Am. Dec. 488, holding a somewhat similar order to be a forgery, the court referring to the grounds of decision in that case as an artificial, technical, and unmeaning distinction. It will be observed, however, that the order in the latter case contained a direction to charge to the drawer, not contained in the former case.

So, in *People v. Thompson*, 2 Johns. Cas. 342, it was said that the former rule was that an order within the statute concerning forgeries must be one importing a right on the part of the person who is supposed to have made it, and a duty on the part of the person on whom it is made, but by a subsequent statute in New York the act is extended to orders purporting to be made without as well as with right or authority in the person whose name may be forged.

And the rule would now seem to be general that to constitute a forgery it is not necessary that the person by whom it purports to be made should have the legal capacity to make it, nor that the person to whom it is addressed should be bound to act upon it, if genuine, or be entitled to a remedy if he so acted. *People v. Krummer*, 4 Park. Crim. Rep. 217.

And that a written request to deliver goods may be a subject of forgery though the person by whom it purports to have been made has no authority over or interest in them. *Rex v. Thomas*, 2 Moody, C. C. 18, 7 Car. & P. 861.

Or whether the supposed drawer of the order had goods in the hands of the drawee or not. *Com. v. Fisher*, 17 Mass. 46; *People v. Way*, *supra*.

Thus the fact that the person in whose name a forged check is drawn had no funds in the bank at the time, is no defense to a prosecution for the forgery thereof. *Thompson v. State*, 49 Ala. 16; *Hoskins v. State*, 11 Ga. 92; *Rex v. Crowther*, 5 Car. & P. 316. And *supra* under heading, *Validity which is apparent only*.

So, a certificate of indebtedness of a city is a subject of forgery under a statute with reference to 24 L. R. A.

forging any pecuniary demand or obligation, although the city itself is not authorized to issue such certificates. *State v. Eades*, 68 Mo. 150, 30 Am. Rep. 780.

And change tickets purporting to have been issued by a corporation are subjects of forgery, though the corporation has no power to issue them and though their issue is prohibited by law. *Van Horne v. State*, 5 Ark. 340.

So, a protection falsely made in the name of another with intent to defraud is forgery though the person by whom it purports to have been made is not a member of parliament and therefore had no power to grant it. *Rex v. Deakins*, 1 Sid. 142.

An order for the delivery of goods, made in the name of another with fraudulent intent, is a forgery though the person purporting to have made the order is a married woman who could not legally enter into such a contract. *Heath's Case*, 3 City Hall Rec. 54; *Wilcoxon v. State*, 60 Ga. 184.

And a request for the delivery of goods, addressed to a married woman in her maiden name, may be a subject of forgery when falsely made in the name of another with intent to defraud her husband. *Rex v. Carter*, 7 Car. & P. 134.

Cases in which the want of authority results from legal incapacity, however, seem to differ but little from these in which the rule is adopted, that instruments the invalidity of which arises from matter of law cannot be subjects of forgery. See *supra*, under headings, *Instruments void upon their faces*, and *Efficacy which is apparent only*.

And in *Raymond v. People*, 2 Colo. App. 829, the above doctrine as announced in *State v. Eades*, *supra*, was criticised, the court saying that that was the only case which it had found which asserted the doctrine that an instrument void upon its face might be a subject of forgery.

6. Real efficacy not apparent.

The general rule that if the instrument is void on its face, it is not the subject of forgery, is subject to the limitation that when the instrument does not appear to have any legal validity or show that another might be injured by it, but extrinsic facts exist by which the holder thereof might be enabled to defraud another, the offense is complete, and an indictment averring the extrinsic facts disclosing its capacity to deceive will be supported. *Rembert v. State*, 53 Ala. 467, 22 Am. Dec. 639.

Thus, an order for the payment of money, not addressed to any one, may be a subject of forgery when the omission of the name of the person upon whom it is drawn is alleged in the indictment and supplied by proof. *Powers v. State*, 87 Ind. 97.

And a written instrument purporting to be an order drawn by one person upon another to send money to the person in whose favor it runs, may be the subject of forgery though it specifies no particular amount, where the person to whom it is directed has money in his hands belonging to the

and hereafter he would confine himself to the manufacture of spurious paper in the nature of contracts against public policy, for he would thereby be enabled to make a very respectable living,—respectable as to the size of his income, and respectable in that such acts would be no crime.

Contracts against public policy cover a multitude of subjects, and in many cases the determination of their character in this regard calls for the exercise of the nicest discrimination from the most learned judges. From the face of the contract itself, courts will disagree as to its validity or invalidity. All things which are opposed to moral precepts may be

said to be against public policy, and thus we have a great and uncertain field opened up before us. Contracts pertaining to restraint of trade and competition in business have been entered into by parties in the utmost good faith, believing that they were making valid contracts, and upon considerations of the gravest character; and still those contracts subsequently have been declared to be invalid as against public policy. It cannot be contended for a moment that such contracts could not be forged. Suppose a contract contained a covenant on the part of a competing dealer that he would not again engage in business within the state of California. Thus we have a covenant

person whose name is signed to it. *Wright v. State*, 79 Ala. 262.

Where the legal force of a writing is not apparent on its face, and its capacity to effect a fraud arises from extrinsic facts, such facts must be averred with such certainty as to make it judicially apparent that the instrument is the subject of forgery. *Fomby v. State*, 87 Ala. 86; *King v. State*, 31 Tex. App. 567.

An indictment for forgery must show that the instrument of which the forgery is predicated is such on its face as is naturally calculated to have some effect, or if that be not the case then extrinsic matter must be averred so that the court may judicially see its fraudulent tendency. *State v. Cook*, 22 Ind. 574; *Reed v. State*, 28 Ind. 396; *People v. Tomlinson*, 35 Cal. 508; *State v. Anderson*, 30 La. Ann. 557; *Conn. v. Mulholland*, 5 W. N. C. 208; *Clarke v. State*, 8 Ohio St. 635; *State v. Dunn*, 23 Or. 562; *People v. Savage*, 5 N. Y. Crim. Rep. 543; *State v. Briggs*, 34 Vt. 501.

And where the statute prohibits the forgery of any writing to the prejudice of another's right, it must sufficiently appear from a description of the writing alleged to have been formed that it is prejudicial to such a right. *Terry v. Com.* 87 Va. 672.

Thus an indictment for the forgery of an order drawn in the name of an agent upon his principal, should aver the agency and that the agent had authority to draw on his principal in order to show the capacity of the false order to defraud. *State v. Thorn*, 66 N. C. 644.

So where an instrument claimed to be a receipt alleged to have been forged does not appear on its face to be a receipt extrinsic facts must be averred in the indictment, showing that the instrument if genuine would operate as a receipt. *Henry v. State*, 36 Ohio St. 128.

And in *Kloe v. State*, 1 Yerg. 422, it was held that an indictment for the forgery of a receipt must show that the person to whom the receipt was given was indebted to the person whose name was forged.

In *State v. Weaver*, 94 N. C. 337, 55 Am. Rep. 647, it was held that an indictment charging the forgery of a railroad pass is not sufficient unless it also alleges that the person whose name is subscribed to it was the agent of the railroad company having authority to issue such a pass for a consideration.

4. Instruments requiring further steps to perfect them.

An instrument may be a subject of forgery although if it were genuine other steps must have been taken before the instrument is perfected, which steps had not been taken. *Costley v. State*, 14 Tex. App. 156; *People v. Bibby*, 91 Cal. 470; *Com. v. Costello*, 120 Mass. 367.

Thus, an order of the trustees of a school district upon the county superintendent of schools for a requisition for a warrant against the county school fund, is a subject of forgery, although not accompanied by a bill of items, notwithstanding a statute.

tory requirement that no requisition shall be drawn upon the order of the the board of trustees against the county fund of any district, except in certain cases, unless such order is accompanied by an itemized bill showing the separate items and the price of each. *People v. Bibby*, *supra*.

A bail bond valid upon its face is a subject of forgery though it has not been forfeited and no attempt has been made to forfeit it. *Costley v. State*, *supra*.

An order for the payment of money creates a pecuniary obligation and is therefore a subject of forgery though it has been neither accepted nor filed. *Keeler v. State*, 15 Tex. App. 111.

An insurance agent who makes out and sends in an application for insurance and two promissory notes purporting to have been signed by one desiring to be insured, with intent to secure commissions therefor, is guilty of forgery, notwithstanding the fact that the application was not accepted and the notes never became obligations to pay money. He cannot escape conviction because his crime was detected before any one was injured thereby. *State v. McMackin*, 70 Iowa, 261.

5. Naked and conditional promises.

It is not necessary that the subject of forgery be shown to be a complete executory contract. A theatre ticket may be a subject of forgery even though it contains no promise or contract and no consideration is expressed in it. *Re Benson*, 24 Fed. Rep. 649.

So a railway ticket, though not a subject of forgery under the Massachusetts statute, is one at common law. Though it is wanting in detail of language stating the nature and extent of the contract, it sufficiently indicates a promise or obligation to render it an instrument of value, by the false making of which others would be prejudiced. *Com. v. Ray*, 8 Gray, 441.

A mere promise to pay, expressing no consideration and which is not connected with a consideration by the averments of the indictment, however, will not sustain a prosecution for forgery. *People v. Shall*, 9 Cow. 773.

The false making in the name of another of an acceptance of a conditional order for goods, payable when the payee shall have completed the performance of certain work, is a forgery at common law. *Com. v. Ayer*, 3 Cush. 150.

A certificate obligating a state to pay a certain sum on account of services in the militia after the claim for such services had been presented to the United States government, and the amount allowed had been paid by it to the state, is an evidence of an engagement for the payment of money upon a contingency, and is a subject of forgery, the fact that the contingency was a remote one not excusing it from the operation of the statute. *People v. Brie*, 43 Hun, 317.

Contracts for the payment of money upon a sale of property if delivered at a certain time or upon

clearly void under our code, as being in restraint of trade; yet we think such a contract is the subject of forgery. Certainly, that character of instrument might be well calculated to defraud the tradesman still remaining in business. He might be willing to pay large sums of money for that agreement, well knowing at the time that he could not enforce it in law, but knowing his man, and believing the covenants would be considered binding by the party making them, and that no attempt would ever be made to evade them. Such an agreement is of full value until denied. It answers every purpose of its creation until that time,

and perchance it may never be denied. The foregoing principle is fully illustrated in *Com. v. Pease*, 16 Mass. 91. The defendant was charged with theftbabe, defined by Blackstone as where a party robbed not only knows the felon, but also takes his goods again, or "other amends," upon agreement not to prosecute. The offense is here recognized as compounding a felony. The question in that case was, Would a promissory note of the defendant satisfy the term "other amends?" Parker, *CA. J.*, said: "It is argued that it will not, because such a note will be void in law, and in fact nothing may ever be received; but there seems

a contingency which may never happen, however, are not subjects of forgery within a statute with relation to the forgery of notes, bills, or checks or other instruments in writing for the payment of money, the words "other instruments," referring only to such as are of the same class or kind as those enumerated. *Shirk v. People*, 121 Ill. 61.

8. Instruments not in statutory form.

Where a statute authorizes an instrument not known to the common law and so prescribes its form as to render any other form null, forgery cannot be committed by making a false instrument in a form not provided by the statute even though it is so like the genuine as to be liable to deceive most persons. *Cunningham v. People*, 4 Hun, 455; *Faulkner's Case*, 3 City Hall Rec. 65.

Thus a magistrate's order for the payment of money, under hand only, is not a subject of forgery when the statute requires the order to be under hand and seal. *Rex v. Rushworth, Russ. & R. C. C.* 317, 1 Stark. 396.

And the false making of a bill of the paper medium of a state with the names of two commissioners signed to it is not a forgery, where the statute expressly requires the signature of three commissioners. *State v. Jones*, 1 Bay, 207; *State v. Gutridge*, Id. 235.

So a prosecution bond in a divorce case under the North Carolina statute providing for such a bond where the wife sues by her next friend, given by the husband directly to the wife, is binding upon one and is not therefore a subject of forgery. *State v. Lytle*, 64 N. C. 255.

When a mandatory statute prescribes that warrants drawn on the city treasurer shall show the purposes for which they are issued, a warrant omitting the statement thus required is void upon its face and not the subject of a forgery. *Raymond v. People*, 2 Colo. App. 329.

A will will be presumed to convey a freehold if there is nothing to show that a mere chattel interest is involved, and such an instrument cannot be a forgery when signed by only two witnesses where three witnesses are required to a will of land. *Wall's Case*, 2 East, P. C. 953.

A deed may be a subject of forgery though it does not conform to a statutory form prescribed therefor, however, where the provisions of the statute are directory and not mandatory. *Rex v. Lyons, Russ. & R. C. C.* 255.

In *Reg. v. McConnell*, 1 Car. & K. 371, 2 Moody, C. C. 290, it was held that a pass of a discharged prisoner may be a subject of forgery, though it is not in the precise form given by the statute, and though it is not sealed with the county seal or any other seal provided for that purpose.

9. Prohibited instruments.

An instrument may be a subject of forgery though its issuance or transfer is prohibited by law, if it is not thereby rendered totally void or if

its capacity for valuable use for any purpose is not totally destroyed.

Thus in *Butler v. Com.* 13 Serg. & R. 237, 14 Am. Dec. 679, it was held to be an indictable offense to utter and publish counterfeit notes of a private unauthorized banker, though the legislature has prohibited the issuing of such notes, but permitted suits to be maintained upon them.

So an instrument which appears upon its face to have been issued with the intent to circulate as money, is a subject of forgery though its issue is prohibited under heavy penalties both civil and criminal. *Nelson v. State*, 32 Ala. 44.

So also where an act prohibiting the circulation of certain foreign bank bills leaves their validity unimpaired as against the makers thereof, they retain their value without the state and are subjects of forgery. *Thompson v. State*, 9 Ohio St. 354.

In *State v. Van Hart*, 17 N. J. L. 327, it was held to be an indictable offense to publish a forged bank note of another state, although the passing of such a note is prohibited by law, if the statute does not forbid the receipt of such notes or render them void in the hands of a receiver.

The fraudulent indorsement of a certificate of municipal indebtedness in the name of another is forgery, although upon its face it purports to be transferable only at the mayor's office in person or by attorney, the restriction upon its transferability being for the protection of the corporation. *Bishop v. State*, 55 Md. 138.

Where all persons are prohibited from giving or receiving certain bills of other states in payment of any debt or demand whatsoever, or in any way attempting to offer or circulate any such bills however, it is not forgery to utter and publish them. *People v. Wilson*, 6 Johns. 320.

A bill of exchange is not a subject of forgery where the statute prescribes that all such bills shall be absolutely void except upon certain conditions, where the conditions are not complied with. *Rex v. Moffat*, 2 East, P. C. 954, 1 Leach, C. C. 431.

Where it is made a penal offense to pass or to receive any bank bill of a less denomination than \$5 of any bank incorporated under the laws of another state, the making, uttering, or passing such a bill is not forgery. *Guthins v. People*, 23 Ill. 642.

10. Unstamped instruments.

The false making of an instrument in the name of another is forgery whether the instrument is stamped as required by law or not, the instrument being available as evidence in either event. *People v. Frank*, 28 Cal. 507; *State v. Young*, 47 N. H. 402; *State v. Haynes*, 6 Coldw. 550; *Horton v. State*, 32 Tex. 79.

An indictment for the forgery of an unstamped note is good, a party having an interest in such note having the power under the stamp act to have the proper stamp affixed to it, so that it shall be as valid to all intents and purposes as if stamped

to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder until it is avoided. It may never be disputed."

Obligations *ultra vires* stand upon the same level with contracts against public policy as to the offense of forgery. If one is not the subject of forgery, neither is the other. In England, corporations are created by special acts of parliament. Within those acts are found the measures of their powers. In this country, the general statutes, in connection with the articles of incorporation, which are

public records, form the limitation of their powers. Thus the world deals with corporations with a knowledge of the extent of their powers, and ignorance of the law forms no defense to the plea of *ultra vires*. If this appellant's position be sound, all contracts of corporations which are *ultra vires* are not the subject of forgery. Neither would bonds of municipal corporations which are *ultra vires* form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex

when made. *State v. Mott*, 16 Minn. 472, 10 Am. Rep. 152.

The act of congress requiring stamps to be placed on certain instruments was intended for revenue purposes only and not to interfere with the criminal laws of the state. *Cross v. People*, 47 Ill. 152, 35 Am. Dec. 474.

This doctrine was applied to an unstamped bank check, in *Cross v. People*, *supra*, and in *Laird v. State*, 61 Md. 309.

And to an unstamped note, in *State v. Mott*, *supra*.

An indictment for the forgery of instruments required to be stamped need not allege the stamping, as such an instrument might be made complete by being subsequently stamped. *State v. Haynes* and *Cross v. People*, *supra*; *State v. Hill*, 30 Wis. 416; *Rex v. Hawkeswood*, 2 East, P. C. 955, 1 Leach, C. C. 57.

So the English stamp act is only a revenue law and does not alter the law of forgery, and a bill of exchange may be a subject of forgery though not stamped as required by that act. *Rex v. Hawkeswood*, *supra*; *Rex v. Morton*, 2 East, P. C. 955, 1 Leach, C. C. 558.

In *Rex v. Morton*, *supra*, it was held that forgery may be committed of an instrument on unstamped paper though the statute provides that a stamp shall not be afterwards affixed.

In *John v. State*, 23 Wis. 504, it was held that an unstamped draft is void on its face under the stamp act, and that an indictment for the forgery of a draft, which does not allege that it is stamped, is insufficient.

But *John v. State*, *supra*, was overruled in *State v. Hill*, *supra*, holding that an unstamped instrument, which the act of congress requires to be stamped, is not void because of the absence of the stamp, unless it shall be made to appear that the stamp was fraudulently omitted, and that an indictment for the forgery thereof is not bad by reason of the omission to aver that the instrument was stamped.

II. Instruments executed in fictitious name.

It is immaterial that the person whose name is claimed to have been forged is a fictitious instead of a real person, the offense being completed if the instrument has the appearance of validity on its face. *State v. Hahn*, 38 La. Ann. 109; *State v. Givens*, 5 Ala. 747; *Thompson v. State*, 49 Ala. 16; *Com. v. Chandler, Thatcher*, C. C. 187; *Grant and Hopper's Case*, 3 City Hall Rec. 142; *Gotobed's Case*, 4 City Hall Rec. 25; *United States v. Mitchell*, 1 Baldw. 385; *Rex v. Sheppard*, 1 Leach, C. C. 226, 2 East, P. C. 967, Russ. & R. C. C. 169.

And the same rule applies to the execution of an instrument in a name purporting to be that of a bank or corporation which in fact has no existence. *United States v. Mitchell*, *supra*.

Thus the execution of a promissory note in the name of a fictitious person or under an assumed

name with intent to defraud is forgery. *State v. Wheeler*, 10 L. R. A. 779, 20 Or. 190.

So is such an execution of a bill of exchange. *Rex v. Wilks*, 2 East, P. C. 957.

And it is forgery for a stranger to indorse a fictitious name upon a bill of exchange as his own. *Rex v. Taft*, 2 East, P. C. 959, 1 Leach, C. C. 172.

And a false and fraudulent order upon a banker for the payment of money purporting to have been made by a depositor is a forgery though made without authority or in a fictitious name. *Rex v. Lockett*, 2 East, P. C. 940, 1 Leach, C. C. 94.

Likewise a will fraudulently made in the name of a person who does not exist, is a forgery. *Reg. v. Avery*, 8 Car. & P. 596.

The writing of an acceptance of an existing person without authority or in the name of a firm of persons nonexistent in acceptance of a bill of exchange with intent to defraud is forgery. Writing the name of a fictitious firm is the same as writing that of a fictitious person. *Reg. v. Rogers*, 8 Car. & P. 629.

Drawing a draft upon a bank in a fictitious name with a fraudulent purpose is forgery, though the person making it gets credit personally instead of upon the draft. *Rex v. Dunn*, 2 East, P. C. 967, 1 Leach, C. C. 57.

When a bank account is opened in a fictitious name and the depositor makes an overdraft the checks by which the overdraft is effected are forgeries. *Johnson's Case*, 3 Haz. U. S. Reg. 819.

A letter signed with a fictitious name purporting to have been written by an agent of a creditor addressed to a justice of the peace directing the institution of suits against a debtor, is a subject of forgery. *Com. v. Hawks, Lewis*, Crim. L. 326.

A paper purporting to be the order of a magistrate on the treasurer of a county for reimbursement of the expenses incurred in the burial of a dead body cast ashore, if falsely made, is a forgery, though there is no such magistrate as the one mentioned in the paper, and though the person who buried the body is not stated in the paper to be a parish officer. *Rex v. Froud*, 1 Brod. & B. 300.

In order to support a charge of forgery by the use of a fictitious name, however, it must be made to appear that the fictitious name was assumed for that particular purpose. Doing business generally under an assumed name is not forgery though done for the purposes of concealment and fraud. *Rex v. Bontien, Russ. & R. C. C. 260*.

And an indictment which charges the forgery of a note made in the name of an imaginary person with intent to defraud such person is not good, non-entities having no rights which can be prejudiced. *State v. Givens*, 5 Ala. 749; *De Bow v. People*, 1 Denio, 9.

In *Com. v. Speer*, 2 Va. Cas. 65, it was held that obtaining goods by the use of a forged note purporting to be the note of a bank which never had any existence is not an offense within an act to prevent the deceitfully obtaining goods, etc., by privy tokens or counterfeit titles, but that it is a public cheat indictable at common law. F. H. B.

principles of legal jurisprudence, and, if *ultra vires* contract may not be forged, a rich field for the successful practice of fraud is presented to the forger. In *State v. Eades*, 68 Mo. 150, 80 Am. Rep. 780, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate; and this principle is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract. *Vilhas v. Stockton & I. R. Co.* 58 Cal. 208. In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained on more substantial grounds. As to what contracts are against public policy, or *ultra vires*, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view. For the purposes of the case, we conceded at the outset that this instrument would be declared void by a court as against public policy; but, if that question were a live issue in the case, this contract might be declared valid upon the ground that a teacher in the public schools is not a public officer. Certainly, the law as to that point is not so plain but that an ordinary layman, in the exercise of the greatest care, might not be defrauded in taking an assignment of a public school teacher's unearned salary.

There is a further view to be taken of this question, which is also fatal to appellant's claims, and which was incidentally touched upon in noticing the *Pease Case*. Aside from the nonenforceable character of this contract in a court of justice, it has an inherent, substantial value. It is said in *Morton's Case*, 9 East, P. C. 955, "That, though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a

man might equally be defrauded by a voluntary payment being lost to him." It cannot be said that a contract has no value because you have no standing in court to enforce it. Who can say in advance that the money will not be voluntarily paid, as agreed upon by its terms? Who can say that Helen Henry would not have lived up to the very letter of this instrument, if it had been her genuine contract? If her word is as good as it should be; if her conduct of the affairs of life is actuated by those principles of truth and justice which surely should be found in the breast of every teacher in our public schools,—then her act and deed, as evidenced by a writing such as is present in this case, would be a valuable instrument to the holder thereof; just as valuable as though it were enforceable in the courts of the land. If a genuine instrument signed by Helen Henry similar to the forged one found in this case possessed such value, the conclusion is irresistible that the forged paper was such as might defraud another. Again, if the paper had been the genuine act of Helen Henry, and upon the strength of her signature the proper officer had paid the amount it called for to Jackson, the legal holder thereof, however invalid the writing may have been as against public policy, the money would have been beyond the reach of Helen Henry forever. She could not have recovered it from the officer paying it out, or from Jackson who received it. Her mouth would be closed to assert ownership in herself. The writing would serve as a perpetual barrier to the recognition by courts of any claim upon her part; and, for this reason also, the instrument was of such value as to make it the foundation of a charge of forgery.

It is ordered that the judgment and order be affirmed.

We concur: *McFarland, J.; Patterson, J.; Harrison, J.*

DeHaven, J.:

I concur in the judgment. The writing alleged to have been forged is one which, if genuine, would be void, because against public policy; but nevertheless such a writing is, in my opinion, the subject of forgery.

INDIANA SUPREME COURT.

Martin HOLLINGER et al., Appts.,
v.

Josiah B. REEME.

(.....Ind.....)

1. A meritorious defense must be shown in order to have relief against a judgment on the ground of fraud.
2. A judgment rendered on an unauthorized appearance by an attorney, after the defendant had by demurrer given the

court jurisdiction of his person, cannot be on collateral attack declared a nullity and perpetually enjoined, but the remedy is to open up the judgment and stay proceedings thereon until a trial on the merits can be had.

3. The right to relief against a fraudulent judgment on unauthorized appearance by an attorney is not shown, where the debtor had left the case pending for four years with no one to look after it and failed to discover it for six years afterwards, making no inquiry at any time and delaying nearly a year after discovery.

NOTE.—The effect of an unauthorized appearance upon the validity of a judgment is examined at great length in a note to *Williams v. Johnson* 24 L. R. A.

(N. C.) 21 L. R. A. 848, and many decisions there shown to the same effect as that in the present case.

(April 3, 1894.)

APPEAL by complainant from a judgment of the Circuit Court for Vigo County dismissing a bill filed to enjoin the collection of a judgment which had been recovered against the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. Martin Hollinger appellant in *propria persona*.

Messrs. McNutt & McNutt for appellee.

Dailey, J., delivered the opinion of the court:

This was an action by appellant, Hollinger, against the appellees, Reeme, Quackenbush, and Stout, sheriff of Vigo county, to perpetually enjoin the collection of a certain judgment, and to have the same set aside and held for naught. The complaint is as follows: "Plaintiff complaining shows the court that on the 29th day of January, 1878, these defendants, Reeme and Quackenbush, filed a complaint in this court (cause No. 9,917) against this plaintiff and one David R. Stith; that said action was upon a joint obligation purporting to be the joint obligation, not several or joint, and several promises of the said Stith and Hollinger (a copy of said complaint, pleading, and dockets and judgments are made a part hereof,—exhibits marked 'A'); that on the 10th day of March, 1880, upon the hearing and trial of said cause, judgment was rendered against said Stith and this plaintiff, Hollinger, for the sum of \$1,033.33; that on March 16, 1880, the said court, after proper hearing, duly rendered judgment in said cause against said Stith as sole defendant for said sum of \$1,033.33, wholly releasing this plaintiff, Hollinger, from any liability thereon, and that said judgment duly rendered against said Stith still remains in full force and effect; that on the 12th day of August, 1880, these defendants, Reeme and Quackenbush, having fully abandoned the original claim, No. 9,917, brought a separate proceeding in said court against this plaintiff, to bind him to and as a party judgment defendant with said Stith in the above-recited judgment for \$1,033.33; that this last cause referred to was No. 12,127, and, after proper hearing, judgment was awarded against this plaintiff for costs of the proceeding, November 5, 1885, and the cause dismissed, and a copy of said pleadings and record is filed herewith as a part of this, marked, 'Exhibit B'; that cause No. 9,917, although fully disposed of by the court and abandoned by said Reeme and Quackenbush March 16, 1880, still remained on the docket of the court, and plaintiff, believing the same was at an end, left the state in 1881, and removed to the territory of New Mexico, and remained a nonresident of this state until 1887; that no one was authorized to represent him in said cause, or to make any agreement for him, and he had no knowledge that said suit was still pending in said court; that, as appears of record in this court, on the 8d day of November, 1885, the defendants herein, Reeme and Quackenbush, or some one in their behalf, fraudulently and without this plaintiff's knowledge or

consent, caused a judgment to be entered against this plaintiff and said Stith, as by agreement, for \$150 and costs for \$50, and plaintiff herein says that he had been his own attorney in said cause, and had no other; there never was such an agreement made by him, or any authorized to make such, and that the entry of said judgment was a gross fraud upon him and this court, and that the court made no inquiry into the merits of said cause, and, had such cause been submitted to the court for inquiry, no judgment could have been rendered against him; that plaintiff had no knowledge that said judgment had been rendered against him until about the time of the issuing of an execution on said judgment, which was on or about 5th June, 1891. Said execution was issued by the defendants Reeme and Quackenbush to the defendant Stout, who is sheriff of this county, who is threatening to levy the same upon the property of this plaintiff in this county. Wherefore plaintiff prays the court to grant a temporary restraining order until the final hearing of this, and, upon the final hearing of this cause, to grant a perpetual injunction, and set aside and hold for naught said judgment."

Appellees demurred to appellant's complaint, which demurrer was sustained by the court and, appellant refusing to plead further, judgment was rendered in favor of appellees. The error assigned is the sustaining of such demurrer. The only question raised, therefore, is the sufficiency of appellant's complaint. Exhibit A, as suggested, is the record of the proceedings in cause No. 9,917, Vigo circuit court, and such cause is entitled "*Joshua B. Reeme, Augustus L. Quackenbush vs. David R. Stith, Martin Hollinger.*" The complaint in said 9,917 shows that Stith and Hollinger executed a note for \$800, with interest, to one Keith, who had assigned the same, before the suit was instituted, to plaintiffs, Reeme and Quackenbush. Action No. 9,917 seems to have been brought previous to February 27, 1878, for on that day it appears that defendants filed answers therein. Upon issues joined, the cause came on for trial on March 3, 1880, and the jury rendered a verdict for the plaintiffs in the sum of \$1,033.33. On March 10, 1880, judgment was rendered on the record in favor of the plaintiffs, Reeme and Quackenbush, against the defendants, Stith and Hollinger. Said judgment was set aside on March 16, 1880. On June 8, 1880, the court overruled the motion of the defendants for a new trial, and rendered judgment against Stith alone. On the same day the record reads: "And comes now defendant Hollinger, and files his demurrer to plaintiff's complaint, and the court, being advised, overruled said demurrer, and the defendant excepts thereto, and is ordered to answer, and day is given." It appears the case then lay dormant until November 3, 1885, when the record shows the following entry: "Come again the parties by their attorneys aforesaid, and, this cause being at issue and coming on for trial, the same is by agreement submitted to the court, and, by agreement, the court finds for the plaintiffs, and assesses their damages at the sum of one

hundred and fifty dollars (\$150.)" The judgment for \$150 and costs is the one which the appellant seeks to permanently enjoin and set aside. Exhibit B is an exhibit of the record in cause No. 12,127 of the Vigo circuit court. The complaint is not a part of it, having been lost, but cause 12,127 appears to have been an action to bind Hollinger by the judgment rendered in cause No. 9,917, for, upon a trial by the court, a judgment was rendered on June 8, 1881, in cause 12,127, declaring Hollinger bound by the judgment in 9,917. Such judgment was set aside, however, on January 14, 1882, and on June 7, 1882, Hollinger was granted a new trial. Cause No. 12,127 was finally disposed of as follows: "Come again the parties by their attorneys, and, by agreement of the parties, it is ordered that this cause be and the same is hereby dismissed at the cost of the defendant." It is shown by the record that causes 9,917 and 12,127 were disposed of on the same day, viz., November 3, 1885, and by the agreement of the parties acting by their attorneys. Appellant seeks relief against the judgment in cause 9,917, because of an alleged fraud in its procurement; he charges that the judgment plaintiffs, Reeme and Quackenbush, procured an attorney to appear in his behalf and fraudulently agree to the judgment.

While the demurrer to the complaint admits the truth of such allegation, it is proper to bear in mind that the action was upon a promissory note executed by Hollinger for \$800, and that the appellant nowhere denies the execution of this note, nor does he deny that there was ample consideration for the same, nor does he claim that it has been paid, in whole or in part. It seems that, as a result of years of litigation, a judgment for \$150 was rendered against the appellant, when the original note, executed by him on September 18, 1877, was for \$800. In respect to attacks upon judgments procured by fraud, there are several well-established rules for the guidance of the courts: (1) The person seeking to set aside the judgment must show that he could not have prevented the fraudulent procurement of the judgment by the exercise of reasonable diligence; (2) that he was reasonably diligent in discovering the fraud; (3) that, having discovered the fraud, he proceeded with reasonable diligence to ask such relief as the law affords; (4) he must show that he had a meritorious defense to the action in which the fraudulent judgment was procured, and that the result will probably be different if he is allowed to open up the judgment and defend; (5) if the court had jurisdiction of the subject-matter and the parties, and the fraud perpetrated was in the procurement of jurisdiction, he cannot attack such judgment collaterally, but must ask that the judgment be opened up to such an extent only as will allow him to make a meritorious defense. The appellant has not by his complaint brought himself or his defense within any of these rules. According to the allegations of the complaint, appellant appeared to the action in which the judgment was rendered (9,917), for he filed his demurrer to the

complaint, which was overruled, whereupon he was ruled to answer. The filing of a demurrer to the complaint has always been recognized as a full personal appearance to the action. 1 Work, Pr. 224; *Knight v. Low*, 15 Ind. 375. The court, therefore, had jurisdiction of the subject-matter and the parties, and on June 8, 1880 (the day the demurrer was filed), the action was pending in the Vigo circuit court. Appellant alleges that in 1881 he left the state, and removed to New Mexico, and remained a nonresident until 1887. He also alleges that no one was authorized to appear for him in said action. It thus appears that he deliberately left a pending action from 1881 to November 3, 1885, when the judgment was rendered, with no one looking after his interest. This makes a case of gross negligence. It is true he alleges that the cause was fully disposed of by the court and abandoned by said Reeme and Quackenbush, March 16, 1880, but it does not aver in what manner the case was disposed of, or how it had been abandoned, and Exhibit A shows that he filed a demurrer to the complaint on June 8, 1880, three months after the alleged disposition and abandonment. He also alleges that he had no knowledge that said suit was still pending; but in law it was his business to realize, and he was bound to know, it was pending after he had entered a full appearance. It is also alleged that the appellant had no knowledge of the existence of said judgment, rendered November 3, 1885, until June 5, 1891. He returned from New Mexico in 1887, but did not discover the judgment until June, 1891,—nearly six years after its rendition, and four years after his return; presumably, he had not made inquiry about the case from the time it was rendered up to June, 1891,—a period of nearly six years,—for the slightest investigation would have disclosed its existence. And, further, it does not appear that he made an inquiry about the pending action from 1881, when he left Indiana, until 1891, when he discovered the judgment. This does not constitute diligence. The existence of the judgment was made manifest to appellant June 5, 1891, and, while the record does not reveal when this action was brought, the first step taken, as shown by the record, was on Monday, May 2, 1892, nearly a year after the discovery of the judgment. "A party who seeks to have a judgment set aside for fraud practiced in obtaining the judgment must show in his application that he has a meritorious defense, which he was prevented from making; that he was guilty of no laches in failing to prevent or discover the fraud; and that he made his application for relief without delay after the discovery." *Harman v. Moore*, 112 Ind. 227. "The parties to an action cannot impeach the judgment rendered therein in any collateral proceeding, on the ground that it was obtained through fraud or collusion. It is their business to see that it is not thus obtained." *Black, Judgm.* § 291. "In order to justify a court in enjoining the enforcement of a judgment claimed to have been obtained by fraud, mistake, or accident, it is necessary for the complaint to show, in addition to the fraud or mistake

relied upon, that it could not have been prevented by the use of reasonable diligence on his part, and that he has been diligent in seeking relief." *Ratliff v. Stretch*, 180 Ind. 285, 286. "A party who seeks the aid of a court, and asks to be relieved from a judgment obtained against him by fraud, must proceed promptly upon the discovery of the fraud." *Nicholson v. Nicholson*, 113 Ind. 135. Appellant did not use ordinary care to prevent the alleged fraudulent judgment, having left the case pending in 1881, with no one to look after it, until 1885, when the judgment was rendered; nor did he exercise diligence to discover it, for the slightest inquiry would have informed him of its existence, which he did not discover for six years, nor does he allege that he made any inquiry at any time. Besides, he was negligent in not bringing the action for relief after the discovery of the judgment until nearly a year after its rendition. It is always necessary, when one seeks to set aside a judgment procured by fraud, to show that there is a meritorious defense to the action in which the judgment was rendered. *Black, Judgm. §§ 347-349; Harman v. Moore, supra*. Not only should it be averred that there is a good defense, but the facts constituting it should be stated and verified by affidavit. *Wilson Sewing Mach. Co. v. Curry*, 126 Ind. 161; *Goldsberry v. Carter*, 28 Ind. 59, 60; *Prost v. Dodge*, 15 Ind. 139; *Black, Judgm. § 347*.

As near as the appellant comes to alleging a meritorious defense is the following: "And the court made no inquiry into the merits of said cause, and, had such cause been submitted to the court for inquiry, no judgment could have been rendered against him." This is in the nature of argument, and does not amount to an allegation that appellant had a meritorious defense in cause 9,917, wherein the judgment was rendered. He should have stated the facts showing such defense, so that the court could have seen its merits and the injustice of the alleged fraudulent judgment. The appellant does not deny that he executed the \$800 note sued on in cause 9,917; he does not deny that there was a valuable and full consideration therefor; nor does he deny that it evidenced a fair and honest debt from him to the plaintiffs, Reeme and Quackenbush, the assignees of the payee, Keith; nor does he claim that any portion of the debt evidenced by said note has been paid. He wholly fails to show that he had any defense, meritorious or otherwise, in cause 9,917, in which the judgment was rendered for about one tenth of the sum represented by the principal and interest of the original note on which the recovery was had. It is clear that the court had jurisdiction of the subject-matter and, when the appellant demurred to the complaint, it took jurisdiction of his person. He does not claim that he did not file a demurrer to the complaint, nor does he deny the court's jurisdiction of the subject-

matter and the parties. Therefore such jurisdiction did exist in cause 9,917, and any judgment rendered therein would not be void, however wrongful or erroneous; such judgment, not being wholly void, cannot be attacked collaterally. *Exchange Bank v. Ault*, 103 Ind. 322; *Anderson v. Wilson*, 100 Ind. 402; *Lantz v. Maffett*, 102 Ind. 23; *Palmerton v. Hoop*, 181 Ind. 28; *Oully v. Shirk*, 131 Ind. 79; *Harman v. Moore, supra*; *Rogers v. Beauchamp*, 103 Ind. 38; *Reid v. Mitchell*, 98 Ind. 469.

Where judgment is rendered through the unauthorized appearance of an attorney for the defendant, the defendant should not ask to perpetually enjoin the judgment, and have it declared a nullity, but should ask that it be opened up, and the proceedings thereon stayed, until there can be a trial on the merits. *Coon v. Welborn*, 88 Ind. 232; *Bush v. Bush*, 46 Ind. 88, 84; *Wiley v. Pratt*, 23 Ind. 635, 636; *Pierson v. Holman*, 5 Blackf. 453. "It may be, on a proper application, showing that a judgment has been rendered by default, or for want of an answer, or an appearance by an attorney without authority, and without notice to defendant, even after judgment, the court will allow an issue to be formed, and the merits of the case tried, but the court, in order to protect the plaintiff from suffering from the act of the attorney, and at the same time save the defendant from injury, will let the judgment stand, but stay all proceedings, and let in the defendant to plead, if he has any defense." *Bush v. Bush, supra*. "Such must now be deemed the settled practice of the court. It will always afford adequate relief to a defendant, while at the same time it protects a plaintiff who has obtained a judgment, so far as he can be protected, from some of the injurious consequences to which he might be exposed by delay." *Wiley v. Pratt, supra*. "A judgment obtained by fraud is binding on the parties until set aside in some proceeding for that purpose." *Palmerton v. Hoop, supra*; *Weiss v. Querineau*, 109 Ind. 444. "These methods, however," all contemplate proceedings in the case in which the unauthorized judgment is alleged to have been obtained. They give no countenance to the notion that a judgment, however wrongfully obtained, may be ignored, and the rights of the parties again inquired into in a collateral proceeding." *Weiss v. Querineau, supra*. Appellant has not sought relief in the original cause No. 9,917, in which the judgment was obtained, but presents a new and collateral action, asking to have the judgment rendered therein decreed a nullity and perpetually enjoined, instead of asking permission to defend in 9,917. He has mistaken his remedy, and the court cannot lend him its aid. For the reasons stated, we are convinced that the court below did not err in sustaining the demurrer to the appellant's complaint.

The judgment is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Joseph B. CARRICO

WEST VIRGINIA CENTRAL & PITTS-
BURGH R. CO., *Plff. in Err.*

(..... W. Va.)

1. In an action to recover damages for injury to a plaintiff's arm, necessitating amputation, it is not error to allow the plaintiff to exhibit to the jury the naked remnant of the arm.
2. The evidence of a witness given on a former trial of a civil case, who has since died, may be proven on a subsequent trial of the case.
3. The longhand notes made by the sworn stenographer who took the evidence upon a former trial of the case are the best evidence of such evidence of the dead witness, and should be used, or the nonproduction legally accounted for, on a second trial; but where those notes show that the dead witness made in his evidence an illustration merely, and do not show what that illustration was or in any way convey it to the second jury, a witness may be used to prove what such illustration was.
4. It is the absolute duty of a railroad company to keep its track free from dangerous obstructions of every sort, so that its cars may pass safely; and, if a passenger is injured by reason of any such obstruction along the line of its road, the burden is upon it to prove that the accident was the result of the plaintiff's own negligence, or that the most thorough and perfect diligence could not have foreseen and prevented the injury. Neither can the company relieve itself from liability as to the condition and construction of its road by confiding duties which it owes to passengers to other hands, whether independent contractors or not.
5. The doctrine of the nonliability of one for the negligence of another because the latter is an independent contractor does not apply to relieve the former from liability for the omission of a duty imposed upon him by law in behalf of the safety of the public.
6. If a railroad company, while using its track for the carriage of passengers, engages in a work to be done on its road, and in the immediate proximity to its track an accident happens to a passenger by reason of an obstruction of the track preventing the safe passage of the cars, arising from negligence in the performance of the work, it is no defense to the company to show that it had placed the work in the hands of an independent contractor, and that his carelessness caused the obstruction.
7. To debar a plaintiff from recovery of damages for an injury from negligence, his negligence must be the proximate cause of the injury. When both parties are chargeable with negligence, the plaintiff cannot recover if his negligence contributed in any de-

Headnotes by BRANNON, J.

NOTE.—For the effect of a passenger's negligent exposure of person at a car window see, in connection with the above case, the note to *Richmond & D. R. Co. v. Scott* (Va.) 16 L. R. A. 91.

24 L. R. A.

gree to his injury; but, if it did not contribute to it in any degree, he may recover, his negligence not then being contributory, because not the proximate cause of the injury, but only remote from it, or collateral to it; and the defendant's negligence is in such case the proximate cause of the injury.

8. Though the negligence of the plaintiff be in character contributory, yet, if his injury would have occurred from the defendant's negligence just the same if the plaintiff had been in no wise negligent, the plaintiff is not prevented by his negligence from recovery.
9. Though a plaintiff be chargeable with negligence contributing to the injury, yet, if the defendant know of the danger to the plaintiff arising from his negligence, and can by ordinary care avoid the injury, but does not, he is liable for his negligence, notwithstanding the plaintiff's negligence.
10. An instruction is abstract if no evidence tends to show the facts it supposes, and ought not to be given.
11. If an instruction has been given, this court will not reverse a judgment because of it, if there is any evidence tending to prove the fact it supposes, though that evidence be very weak in the opinion of this court.
12. Things which may be considered in assessing damages for injury to person.
13. An instruction ought never to assume as proven the facts which it supposes, but ought to be hypothetical; yet, if such an instruction has been given, and the appellate court sees from the record that those facts were proven beyond controversy, and were conceded or tacitly conceded, and not a subject of controversy on the trial, such improper instruction will not be ground for reversal if correct in law.
14. An instruction which could not possibly have prejudiced the party, though incorrect or abstract, will not be ground for reversal; but it must be very clear that it could not have hurt the party complaining of it.
15. If a party who has caused to be submitted to the jury particular questions of fact allows the jury finding a general verdict to be discharged without asking the court to have them answered, he is deemed to have waived such answer.

(March 24, 1894.)

ERROR to the Circuit Court for Tucker County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. W. Dailey and L. D. Strader for plaintiff in error.

Messrs. B. B. Dovener, J. J. Coniff, and A. B. Parsons for defendant in error.

Brannon, J., delivered the opinion of the court:

This case has been once before in this court.

For exceptions to the rule as to nonliability for acts of independent contractors, see note to *Hawver v. Whalen* (Ohio) 14 L. R. A. 823.

35 W. Va. 389. The action was to recover damages for injury to the arm of the plaintiff from collision with a pile of rock standing near a railroad track of a passenger coach on which the plaintiff was a passenger. The plaintiff recovered a verdict and judgment for \$9,000, and the railroad company has brought the case to this court on writ of error.

Question 1. Did the court err in allowing the plaintiff to unclasp and exhibit to the jury the shoulder from which the arm had been severed by amputation? Counsel for plaintiff in error, while insisting on this point, cites no authority to sustain his contention. Of course, evidence must be relevant, as tending to establish some material matter in the case. Is this at all relevant? The plaintiff had a right to prove the hurt, and that it had entailed lasting injury by causing the amputation and loss of his arm. He could prove that by oral evidence. He could himself stand before the jury for ocular demonstration of the fact; and why may he not intensify and make more certain the fact by inspection of the naked shoulder itself? It is only more and more conclusive evidence upon a fact which he was entitled to prove, and, being relevant, we cannot exclude it because there may have been danger of inspiring sympathy in the jury and increasing damages.

Question 2. Did the court err in permitting the witness Coniff to give evidence of the evidence of Sydney Harris on a former trial, he having died before the second trial? It seems clear that the law allows evidence to prove the evidence on a former trial of a witness since deceased. 1 Greenl. Ev. § 163; Rice, Crim. Ev. § 224. But this is said not to be sustained by decisions in Virginia or West Virginia. In *Finn's Case*, 5 Rand. (Va.) 701. it is asserted that such evidence is admissible in civil cases, but not in a criminal case. This was obiter as to a civil case, as the case was a criminal case, and perhaps obiter as to a criminal case as to a dead witness, as the witness was one out of the state. In *Brogy's Case*, 10 Gratt. 733, that case is recognized as deciding that such evidence is not admissible in criminal cases, and evidence of what a witness for the prisoner said on a former trial, though offered by the prisoner, was rejected. How far these cases settle the question as to the admissibility of evidence of a deceased witness on a former trial is immaterial here. Though not binding, I think the opinion of Judge Brockenbrough in *Finn's Case*, that in civil cases the evidence of such deceased witness is admissible, is clearly good law, harmonizing with the vast volume of authority elsewhere. It has been so held in *Lee v. Hill*, 87 Va. 497. The only serious question here is as to the mode of proof in this case. The plaintiff proved what the dead witness had stated by Coniff, and not by the evidence as taken in shorthand and written out in longhand by the stenographer on the first trial, and the appellant's counsel contends that the stenographer's report was the best evidence, and should have been used, because the statute (Code 1891, p. 1062, § 3) makes it official.

It seems to me that, as this act declares the reporter's notes official, and the best authority in any matter of dispute, and provides that they shall be used by the parties in any proceedings wherein they may be required, such notes must be used, or an excuse given before substitutionary evidence can be given. I do not regard these notes as technically primary evidence in a legal sense, but the clauses of the act just mentioned themselves make the notes in effect primary. Why, under these clauses, evidence by a witness should be resorted to in a second trial of the same case between the same parties, instead of these notes, I cannot see, looking at the statute. The legislature surely meant it to be the highest authority on the evidence between the same parties in that case, on that trial or a new trial, because taken by a sworn stenographer, in presence of court, witness, parties, and counsel, and presumably verified, and therefore more apt to be reliable than a witness stating it. But for those features of the statute, no doubt any witness could be called to prove the evidence of the dead witness. The opinion by Judge Lucas, touching this statute, in *Cummings v. Armstrong*, 34 W. Va. 1, leans in this direction. But, be that question as it may, suppose the stenographer's notes be inadequate to convey to the second jury what the witness conveyed to the first, as is peculiarly the case in this instance. A most material question is whether the plaintiff's arm, at the time the moving train raked against the pile of rock, and his injury was received, was inside the car, or extended outside the window. Mrs. Harris, when asked a pointed question as to this, according to these notes, did not answer in language, and instead of such answer the notes used the word "illustrates." However plain to the first jury that illustration may have been,—plainer to convey her meaning than words, perhaps,—yet that illustration was not furnished by these notes, and the notes on this point would convey no meaning. Coniff's evidence shows that Mrs. Harris, in her illustration, used a book to represent the window sill of the car, one side of it representing the inside of the window, the other its outside, and placing her elbow upon it, showed how Carrico's arm was relative to the outside of the sill and car, showing several inches space between the elbow and the outside of the car. Now, should the plaintiff have been required to use only these notes of the evidence, and lose the benefit and meaning of Mrs. H's evidence as given on the first trial? We think not. The proper course was to have read the official report of Mrs. Harris' evidence, and to have used oral evidence to supply its defect above specified. But an inspection of the report of her evidence, which we are authorized to make (Code, chap. 135, § 7), shows that there is no variance between it as then given and as given by Coniff. But, if there were, or Coniff omitted any matter which she stated, there was the official report, and the defendant could have used it to ward off harm to it or for any lawful purpose. We see no room to say harm was done to the defendant under this heading. To reverse a trial on

this ground would be narrow and technical. It is not every step in a long, wearisome trial that is the open sesame, all potential to call for reversal. The field of harmless error has been sensibly widening in recent years. The courts are becoming more and more, every year, averse to reversing decisions for technical errors or errors plainly not harmful, especially where it is seen that substantial justice has been done.

Question 3. Is there error as to instructions given for plaintiff? As they may be of use to courts and bar, I give them in full: "The court instructs the jury that if they believe from the evidence that the defendant placed or allowed to be placed by its railroad track a pile of stone in such dangerous proximity to said track as to prevent the passage of a passenger car on said track without striking or scraping said car, and in consequence thereof the plaintiff was injured as is charged in the declaration, without fault on his part contributing to said injury, such act of the defendant is negligence in law." It is said this instruction is bad because no evidence showed that the company placed or allowed the stones to be placed where they were, but they were placed there by third parties. They were placed there by persons getting them for work on the line of the road. I will not enter at large into the nice question of how far one person is liable for the act of another who is an independent contractor, or the question who is an independent contractor, as to do so would be useless in this case, and only repetition of elaborate discussion long ago applied to these questions. The general rule may be stated to be that one who has contracted with a fit and competent person, exercising an independent employment, to do work not in itself dangerous to others or unlawful, according to the contractor's own method, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractor or servants, committed in the prosecution of his work. Nice questions arise in the application of the rule. Who is an independent contractor? Or rather, is he an independent contractor, or only an agent or representative of the employer in the particular case? A test which has been proposed, and generally an adequate one, or as good a test put in a few words as can be suggested, is, Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong? If he had, the employer is liable; if not, he is not liable, for the reason that the one doing the act is an independent contractor. See Whart. Neg. § 181; 2 Thomp. Neg. §§ 22, 35; 2 Wood, Railway Law, § 284; 1 Rorer, Railroads, 468; *New Orleans, M. & O. R. Co. v. Hanning*, 82 U. S. 15 Wall. 649, 21 L. ed. 220; Cooley, Torts, 546; Patterson, Railway Accident Law, 119; *Powell v. Virginia Constr. Co.* 88 Tenn. 692; *St. Louis, Ft. S. & W. R. Co. v. Willis*, 88 Kan. 880; *Dillon v. Hunt*, 105 Mo. 154; *Roddy v. Missouri Pac. R. Co.* 104 Mo. 294, 13 L. R. A. 746; *Rrie v. Caulkins*, 85 Pa. 247, 27 Am. Rep. 642, and note.

But this principle cannot relieve the defendant in this particular case. One of the

very plainest duties imposed upon a railroad company carrying passengers for pay is that it shall keep its track in good and safe condition, free from obstructions endangering those passengers. For the public to yield or waive the performance of this duty would be to waive that which is of the highest importance to personal safety and life itself. The law is necessarily rigid as to this. Passengers are entitled by the clearest principles to look to the carrier who has engaged to carry them in this respect, and cannot be told to follow some one, a stranger to them and often irresponsible. The company cannot divest itself of or shift this obligation. In this case when before in this court this duty is called an absolute duty imposed upon the company; and in *Searle v. Kanawha & O. R. Co.*, 82 W. Va. 870, we held that railroad companies, in tenderness to human life, are liable to passengers for the slightest negligence, and required to exercise the greatest possible diligence and care, not only in the management of trains, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. In this case we find a pile of rock so close to the track that the passenger car cannot pass in safety, but collides with or scrapes against it, and grievously hurts a passenger's arm, invading, we may say, the very track itself, for the track is for the passage of the coach. Surely the railroad company is liable to the passenger. The doctrine of nonliability of a defendant because the act is that of an independent contractor does not apply where the thing which that contractor does, and does negligently, is something which the law in defense of public interests requires the defendant to do carefully and properly. Patterson, Railway Accident Law, 127; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; Whart. Neg. § 185. See, especially, Wood, Mast. & S. § 816; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437.

Here the duty rested on the company not to pile the stones as was done, and, had it done the act itself, it would have been liable for obstructing the way, and so none the less in this case. In the similar case of *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230, Judge Daniel said that if a railroad company using its track for passages engages in work on its road or in the immediate proximity to its track negligence in doing which would, in the opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, it would be just as incompetent for it, in case of accident to a passenger from negligence in the work, to show merely that it had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employes, as it would be for the company, in case of accident to a passenger from want of care or skill in the management of a train, to show that such management had been let out to a contractor, and that the accident was due to the negligence of one of his employes. In *Carrico v. West Virginia Cent. & P. R. Co.*, 85 W. Va. 889, this very case,—it was held—

"It is the absolute duty of a railroad company to keep its track free from dangerous obstructions of every sort, and when a passenger is injured by reason of any such obstruction along the line of its road, the burden devolves upon it to prove that the accident was the result of the plaintiff's own negligence, or that the most thorough and perfect diligence could not have foreseen and prevented the injury. Neither can the company relieve itself from liability in regard to the condition and construction of its road by undertaking to confide these duties which it owes to passengers to other hands, no matter what precaution it may have taken in selecting such agencies." I concurred in this point in the syllabus. A careful reconsideration of this feature of the case has not disclosed to my mind any error in it. We think it concludes this point on the present writ of error. We also think, as to this point, the case of *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230, binds us to hold the defendant liable in this case. There a contractor was getting out rock for work on the road, and a rock in some way obstructed the track, derailed a train, and injured a passenger, and it was held that the duty of keeping the track free of obstruction was embraced in the warranty to carry the passenger safely, and that, if a railroad company, while using its track for carriage of passengers engages in a work to be done on its road and in the immediate proximity to its track, negligence in which would, in the opinion of cautious persons involve the hazard of obstruction to the passage of cars, and an accident to a passenger comes from negligent performance of the work, it is no defense to show merely that they had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employes. For another reason the doctrine of independent contractor cannot excuse this company. When a passenger for pay, riding in a car, is injured by an accident, he has made out a prima facie case for recovery, and the railroad company must carry the burden of showing adequate defense. *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 432, 26 Am. Rep. 384; *Carrico v. West Virginia Cent. & P. R. Co.* 35 W. Va. 389. We are not shown the character of contract between the company and the persons furnishing the stone, or any of its provisions, so as to enable us to say whether they were or were not independent contractors. We see no objection, therefore, to instruction 4.

Instruction No. 5: "The court instructs the jury that if they believe from the evidence that the plaintiff was injured by being struck by a stone standing in dangerous proximity to the defendant's railroad track, and that the position of said stone was known to the defendant, or the agents of said defendant, or might have been known to them by the use of ordinary care and diligence, and there was such negligence of said agents in failing to remove said stone, or in failing to use care and diligence in ascertaining whether said stone was in dangerous proximity to the track of said defendant, such negligence of said agents was the negligence

of the defendant." This instruction was approved when the case was heretofore in this court. I see no objection to it now.

Instruction No. 6: "The jury are instructed that if they believe from the evidence that the plaintiff's arm was resting on the window sill of the passenger car, the placing of his arm there was not negligence on the part of the plaintiff, provided, when resting upon said sill, it did not protrude beyond the window of the car." Nothing is said against this instruction. It is obviously good.

Instruction No. 7: "The court instructs the jury that, even if they believe from the evidence that plaintiff's arm protruded beyond the window of the car, yet the plaintiff can recover if the jury further believe from the evidence that the injury to him would have occurred even if his arm had not protruded beyond the window of the car; and the burden of proving that the accident would have happened even if his arm had not protruded as aforesaid devolves upon the plaintiff." This is said to be improper, because irrelevant, as there was no evidence tending in the least to show that, but for the arm's protruding out of the window, the injury would have happened. This we cannot hold. Besides all the evidence of several witnesses, stating positively that the arm was inside the car, and the conceded injury thus tending to show that the injury occurred while the arm was not protruded out of the window, there are the indentations on the car forward and also in the rear of the seat in which Carrico sat, and the indentation on window facings on both sides of the window at that seat, tending to show that the scraping of the car began before reaching Carrico's seat, and, as the car was rounding a curve, and the stone was on its lower side, when the window reached the rock the pressure towards the inside of the curve, or in the careening of the car, brought the stone inside the window on account of the open window's affording no resistance, and wounded the arm of the plaintiff; and there was evidence by one witness of an indentation on the inside of the window. Question might be suggested as to this instruction in point of law. It was approved in this case heretofore. On page 401 of 35 W. Va., *President Lucas* approved this very instruction without discussion. On page 398, 35 W. Va., he states the general rule that, if the negligence of plaintiff and defendant is mutual the plaintiff cannot recover, and then states an exception to be that, if the injury would have happened just the same, although the plaintiff had been in no wise negligent, his negligence will not prevent his recovery. If this rule be law, it will clearly vindicate instruction No. 7. Is the plaintiff denied relief in every instance in which he is chargeable with negligence? From the language usually adopted in expressing the rule that, where the negligence of plaintiff and defendant is mutual, the plaintiff cannot recover, we might hastily so conclude; but we must not be misled by the generality of that language. We must remember that where both are negligent a cardinal rule is that it is that negligence which

is the proximate cause of the injury that is charged with responsibility for it. "*Injure, non remota causa sed proxima spectatur.*" By proximate cause the law does not here refer to the degree or extent of the influence of the negligence in the production of the injury, but to its relation or connection with that injury in point of cause,—its causal relation. Consequently, when the plaintiff's negligence in any degree helps in causing that injury, though the defendant's negligence also helps, we set the negligence of the one off against the negligence of the other as equal, and tell the plaintiff he cannot recover because we do not apply the rule of comparative negligence in this state, by apportioning between the plaintiff and defendant the effect of the negligence of each one in producing the injury, and finding in favor of him least negligent. But when the negligence of the plaintiff does not help in producing the injury, but that injury would have occurred just the same from the defendant's negligence, without the plaintiff's negligence, then the plaintiff's negligence is not efficient in the production of the injury. It is practically nonexistent, because nonefficient. How can we say it is the proximate cause in such case? When we cannot estimate or appreciate the influence of the plaintiff's negligence in the result—the injury—because the defendant's negligence would have caused it just the same if the plaintiff were free from negligence, we disregard the plaintiff's negligence as having no causal relation in the eye of the law to the injury. Then his negligence is noncontributory, and it is only with contributory negligence the law charges him, not simply negligence. If it be not contributory, it is collateral or remote only, and is immaterial. See *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 579; *Phillips v. Ritchie County*, 81 W. Va. 477; *Bishop, Non-Cont. L.* § 459; *Beach, Contrib. Neg.* § 83; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180, *Shearm. & Redf. Neg.* § 98; 2 *Rorer, Railroads*, 1019.

Frequently has it been laid down by courts that if the injury would not have occurred but for the negligence of the plaintiff, he cannot recover, and this is the same as to say conversely that, if his negligence is not such as, but for it, the injury would not have happened, he can recover; that is, if it would have happened anyhow, he may recover. *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *New Jersey Exp. Co. v. Nichols*, 38 N. J. L. 434, 97 Am. Dec. 722; *Richmond & D. R. Co. v. Morris*, 81 Gratt. 200; *Black, Ch. J.*, in *Pennsylvania R. Co. v. Aspell*, 28 Pa. 149; opinion in *Richmond & D. R. Co. v. Anderson*, 81 Gratt. 812, 81 Am. Rep. 750, and especially cases cited; *Cooley, Torts*, 874; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 166, 43 Am. Rep. 208; *Northern Cent. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545. So we may place these two rules side by side. On the one hand, if the injury would have occurred just the same from defendant's negligence without plaintiff's negligence, the plaintiff can recover; and, on the other hand, if the injury would

not have occurred but for the plaintiff's negligence, he cannot recover. The eminent and very able and accurate law writer, Mr. Bishop, says the test that a negligence is to be deemed contributory or not according as without it the accident would or would not have occurred, is inaccurate; but in so saying he discredits many high authorities. I grant that it is not infallible, because there may be some cases it will not suit; but practically it meets requirements in the courts. Of this I feel sure: that the rule propounded by instruction 7, as applied to this case, is correct. Is it not obviously true in law that, if the stone would have invaded the inside of the car through the window, and wounded Carrico's arm resting on the window sill inside the car, no less than if it had been protruded out of the window, its protrusion is immaterial? Its mere protrusion did not cause an injury which it would have received inside or outside the window. In the opinion of the court in *Kentucky Cent. R. Co. v. Thomas*, *supra*, it was said: "But, if the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, his right to recover will not be affected by the fact that he was at an improper place." It is apposite here. "If the injury would have occurred notwithstanding the exercise of all due care by the plaintiff, his omission to take such care is immaterial." 1 *Shearm. & Redf. Neg.* 98; sustained by opinion, citing *Butterfield v. Forrester*, 11 East, 60, in *Beers v. Housatonic R. Co.* 19 Conn. 566; opinion in *Wright v. Mississippi & I. Teleg. Co.* 20 Iowa, 195; *Short v. Knapp*, 2 Daly, 150. The law only requires of the plaintiff ordinary care to avoid injury. All agree to this. Then, suppose that ordinary care would not have prevented the defendant's negligence from working the injury, should the plaintiff be denied relief? 2 *Thomp. Neg.* 1150.

Instruction No. 8: "The court instructs the jury that, even if they believe from the evidence that the plaintiff was guilty of negligence, and that that negligence may have contributed to the injury, yet, if the jury further believe from the evidence that the negligent position of said plaintiff was known to the defendant, or its servants, and that with such knowledge the injury to the plaintiff could then have been prevented by the use of care and diligence on the part of said defendant or its servants, then the plaintiff's negligence will not excuse or relieve the defendant from liability." This propounds the law correctly relating to one of the well-known exceptions to contributory negligence. *Downey v. Chesapeake & O. R. Co.* 28 W. Va. 732; opinion in *Carrico v. West Virginia Cent. & P. R. Co.* 35 W. Va. 898, 402; *Richmond & D. R. Co. v. Anderson*, 81 Gratt. 812, 81 Am. Rep. 750. It is said to be bad in its use of the word "negligent" instead of "dangerous" for that it is not enough that the defendant is aware of the negligence of the plaintiff, but he must also see that his negligence is bringing him into danger before he is required to act to save him. This is true. *Downey v. Chesapeake & O. R. Co.* and

Carrico v. West Virginia Cent. & P. R. Co. just cited. Yet I think the word "negligent," as applicable to the case, under the evidence of Kalbaugh that he saw Carrico's arm out of the window, and saw the rock, and saw the great danger to Carrico therefrom as it was about to come in contact with the rock, and hallooed to him to look out, and waved to the engineer to stop,—actual, imminent danger,—could not have misled or been misapplied by the jury. Under the context of the instruction and the language following the word "negligent," I think we may say it was tantamount to "dangerous," at least not so plainly misleading as to call for a new trial. But it is said that the instruction is irrelevant and abstract, as no evidence tends to show the hypothesis contained in it, that it was at all in the defendant's power to save Carrico. The evidence of Kalbaugh, mentioned a few lines back, with the addition that Kalbaugh said he had no time at all, from his sight of Carrico's arm out of the window, to do more than shout to him "Look out!" is the evidence touching this instruction. Kalbaugh's evidence and his credit were before the jury. Weak to show the postulate of the instruction, it seems to me, it is true. And I am aware that *Bloyd v. Pollock*, 27 W. Va. 75, holds that an instruction ought not to be given either when there is no evidence tending to sustain the state of facts stated in it, or when, though there is some evidence tending to do so, yet it is so weak that it would be the duty of the court to set aside a verdict as contrary to the weight of evidence if based solely on the assumption that the fact supposed in the instruction was in fact true. This proposition seems logical, and has given me some question about this instruction. In this instance the weight of the contrary evidence of Kalbaugh is complicated with credibility. That was a case where the instruction was refused. Here it was given. The cases may be different. A court might say that the evidence is too light to constitute ground for an instruction, but here we are asked to annul a verdict because the instruction was given. In *Hopkins v. Richardson*, 9 Gratt. 485, it was held that, if there is any evidence tending to prove a case supposed in the instruction, it ought to be given, if correct in its law. Judge Lee said that the function of determining whether any proof of the hypothetical case has been given, and, if not, of refusing an instruction, is one to be exercised with great care and caution by a court. In a plain case of total absence of evidence to make out the supposed case the court may well refuse the instruction, but where there is evidence tending to do so, however little its weight may appear to the court to be, it is best to give it. Such I have always understood to be the law. *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155; *Barton*, Law Pr. 656. While the law is that an instruction must not be given if not relevant, and it is not relevant if there is no evidence tending to show the facts on which it is based (*Kerr v. Lunsford*, 81 W. Va. 668, 2 L. R. A. 668; and *Coffman v. Hedrick*, 32 W. Va. 120), yet, as there is evidence here tending to show the

facts in it put, I think it is not error sufficient to reverse the judgment.

On further reflection upon rehearing I am confirmed in what is above said as to this instruction, and I will add that Kalbaugh was standing on the lower step of the car, looking for a passenger to get on the train going only two miles an hour. He saw, he says, Carrico's arm lying out of the window as he looked along the train, and saw the rock, and the danger to Carrico, and waved to another brakeman to stop, with the expectation that that brakeman would signal the engineer. Now, if his mind was impressed with the idea that there was time enough to signal a brakeman, and for him to signal the engineer to avoid the danger, might the jury not say there was time enough for him to have run in to save Carrico? Kalbaugh's veracity was assailed by evidence intended directly to affect it, and his demeanor was before the jury, and on this trial he stated that he had not time to go into the car to save Carrico, but hallooed "Look out!" but admitted that on the former trial he had not stated that he had not time to warn Carrico, and did not remember whether he stated that he had hallooed "Look out!" I ask, Was not the veracity of Kalbaugh before the jury? Did not the plaintiff have a right to ask the jury to say that he was not to be credited when he said he had not time to warn Carrico? Was it improper to give an instruction under which the jury could inquire whether Kalbaugh, an employé on this train, if unable to reach Carrico, and drag his arm from the window, at least had time to take one or two steps to the car door, and shout to him, and alarm him and passengers near him as to his danger? Can it be that this court must say that the question whether the employé could have warned Carrico was not a proper theorem before the jury, because the evidence bearing on it was so very little as to make the instruction irrelevant under the circumstances and law above stated?

Instruction No. 9: "The court instructs the jury that, in order for the plaintiff to recover, it is only necessary that he make out his case by a preponderance of the evidence, and, if the defendant relies upon the contributory negligence of the plaintiff to defeat him, said contributory negligence must be proved by preponderance of all the evidence in the case, as well that of the plaintiff as that of the defendant." I think this is good. The burden of proving contributory negligence is on the defense. *Snyder v. P. C. & St. L. R. Co.* 11 W. Va. 14; *Riley v. West Virginia Cent. & P. R. Co.* 37 W. Va. 146, pt. 9.

Instruction No. 10: "The court instructs the jury that, if they find for the plaintiff, they are, in estimating the damages, at liberty to consider the health and condition of the plaintiff before the injury as compared with the present condition in consequence of said injury; and also whether said injury was permanent in its nature, and how far it is calculated to disable the plaintiff from engaging in those pursuits and occupations for which, in the absence of said injury, he would have been qualified, and also the phy-

sical suffering to which he was subjected by reason of said injury, and to allow such damages as, in the opinion of the jury, will be a fair and just pecuniary compensation for the injury which the plaintiff has sustained. The jury may include any losses that may occur in the future to the plaintiff, provided they are such as the jury believe from the evidence will actually result to the plaintiff as the proximate damages of the wrongful act complained of." I see no objection to this instruction. *Riley v. West Virginia Cent. & P. R. Co.* 27 W. Va. 146, 161; *Wilson v. Wheeling*, 19 W. Va. 325, 43 Am. Rep. 780; *Searle v. Kanawha & O. R. Co.* 32 W. Va. 370.

Instruction No. 11: "If the jury believe from the evidence that the defendant company, while using its track for the carriage of passengers, engaged in a work to be done on its road, or in immediate proximity to its track, negligence in the performance of which would, in the estimation and opinion of a reasonable, cautious person, involve the hazard of obstruction to the passage of cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of the work, it is no defense for said railroad company to show that it had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employes." Counsel makes no argument against this instruction. It is clearly good, under principles above stated and approved as instruction 7 in *Carrico v. West Virginia Cent. & P. R. Co.* 35 W. Va. 390, and it is literally point 3 in syllabus in *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230.

Instruction No. 12: "The court instructs the jury that, even, if they believe from the evidence that the arm of the plaintiff, after the injury, was on the outside of the car, yet, if they further believe from the evidence that at the time the arm was caught by the stone it was not protruding beyond the window of the car, then the plaintiff can recover." What does this instruction mean? What its aim? There was evidence that immediately after the injury Carrico's arm was hanging limp outside the window. The plaintiff's contention was that when injured it was on the window sill, inside the car window. This instruction, I think, was to meet before the jury the evidence that it hung out of the window; to tell the jury that, notwithstanding it was seen out of the window after the hurt, yet, if inside when hurt, he could recover. The words "can recover" support this theory, importing that, notwithstanding the arm was seen outside the window after the accident, yet that would not prevent recovery. But suppose we say with appellant's counsel, that it assumes the essential fact of the defendant's negligence. It technically violates that cardinal rule touching instructions that an instruction must not assume facts as proven, or assume that the weight of the evidence is in favor of certain facts, thus taking those questions from the jury, or improperly influencing it. *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50; *Harrison v. Farmers Bank of Virginia*, 4 W. 24 L. R. A.

Va. 393; *Dickschied v. Exchange Bank of Wheeling*, 23 W. Va. 341. Still the instruction, while not defensible, is not cause for reversal for these reasons. It was incontrovertibly proven that Carrico was injured while a passenger on defendant's train. No two persons could logically differ as to this; it was a concession. That alone, in law, raised a prima facie case of negligence. *Carrico v. West Virginia Cent. & P. R. Co.* 35 W. Va. 390; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394. The only matter of contest before the jury was whether the plaintiff was guilty of contributory negligence meeting the plaintiff's negligence and defeating his action. How, then, could the defendant be injured by the assumption of negligence in the instruction,—a fact incontrovertibly shown and conceded? *Sheff v. Huntington*, 16 W. Va. 307, pt. 9. As the defendant could not, for reasons stated above, have been prejudiced by said instruction, it is not cause of reversal. *Beatty v. Baltimore & O. R. Co.* 6 W. Va. 388; *Clay v. Robinson*, 7 W. Va. 348; *Danville Bank v. Waddill*, 27 Gratt. 448. I do not think it tells the jury that if the arm was inside the window, all else to fix liability on the company was established. It would be rather straining the instruction to say so. I think its fair meaning is that the fact that the arm, after the accident, was found outside the car, ought not, over other circumstances, to show that when hurt it was not inside, or prevent recovery. But, give it a construction in the other direction, then I say that if it be settled that the arm, when injured, was inside the car, under the facts of the case the company's liability follows. What circumstance, in such view, relieves it? As it does not assume, but leaves open to the jury, that decisive fact, the injury to a passenger being undenied and undeniable, liability follows. How does the instruction wrong the company? How can we reverse for that cause?

Question 4. Is there error as to particular questions of fact submitted to the jury under section 5, chapter 131, Code? They were in fact answered, but the answers are not part of the record, and we must say they were submitted, but not answered. While the jury is bound to answer them, and it is error for the court to go on to judgment without answers, yet if, as is the case here, the party submitting them allow the jury to be disbanded without asking answers, he has waived the answers. 2 Thomp. Trials, § 2635. Motion for new trial overruled.

Here I need say but little, and will not give the evidence, covering 368 printed pages. If the plaintiff's arm was outside the window, let us say, he was chargeable with contributory negligence; otherwise he was not. On that question the evidence was in irreconcilable contradiction, several witnesses saying that they saw the arm inside, several that they saw it outside, the window. Their credibility was involved. Besides, very many facts and circumstances, such as the curvature of the road there, the location of the rock pile, the shape and size of the rock as bearing on the probability of its in-

vasion of the window and there doing the injury, the marks on the car, their character and location, the character and place of the wounds on the arm, and many other features, from all which the jury had to make deductions,—necessarily and indispensably so in coming to a verdict,—were before the jury. Outside of the credibility of witnesses, different persons might have different opinions from them. Even if we had doubt as to the correctness of the verdict, or would have come to a different verdict, we cannot set it aside for that reason. *Seibright v. State*, 2 W. Va. 591; *State v. Thompson*, 26 W. Va. 149; *Miller v. Citizens F. Ins. Co.* 12 W. Va. 116.

It is argued by appellant's counsel that the stones were about two feet square, and could not have entered the window; that physical evidence overrules the statement of several witnesses herein. The mashing or mangling of the upper arm tends to show that the stone pressed it against the jamb of the window. The indentation made by bone or rock there so tends. Just how it entered we cannot say. A witness for defendant says the upper corner of a stone did the injury. The corner may have projected, and in the slant or careening of the car only the corner entered the car angularly. The many facts and features here coming up for consideration I will not detail. They were proper for the jury on the question of fact, Was the arm injured inside the window? Can we assume the function of a jury, take scales and nicely weigh evidence, great in volume, and on many points, and from many witnesses, and strike a balance, and discredit witnesses giving

direct, positive evidence, whose faces and demeanors we see not? We cannot thus invade the function of the trial court and jury. In such case the opinion of the lower court and jury is entitled to peculiar respect. *Reynolds v. Tompkins*, 28 W. Va. 229.

There is some confusion in the case as to when this court should set aside a verdict on the merits. It may do so when the verdict is manifestly and clearly against the weight of evidence; but such power should be cautiously exercised,—only where there is a plain deviation from right and justice, not simply because we have doubt of the correctness of the verdict. *Black v. Thomas*, 21 W. Va. 709; *State v. Cooper*, 26 W. Va. 888; *Martin v. Thayer*, 37 W. Va. 38; *Hatfield v. Workman*, 35 W. Va. 578. But we do not see that under any of the cases this court can do so in this case, as it would seem to us to be an invasion of the just functions of the jury and trial court. *Sheff v. Huntington*, 16 W. Va. 307, pts. 12, 13, 14; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155.

I have carefully and patiently reviewed this case, and again reviewed the points relied upon on the rehearing, as it not only involves various questions, but also the considerable liability of a verdict of \$9,000, besides attendant costs. The amount involved is considerable, but the injury to the plaintiff is grievous and irreparable.

Two trials have resulted in substantially the same result, and, seeing no error calling for reversal, we must affirm the judgment.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
Charles S. FAIRCHILD, *Appts.*,

v.

Charles M. PRESTON, Superintendent of
Banks, *Respond.*

(140 N. Y. 542.)

1. Dues may be paid in advance with the assent of the directors in a savings and loan society, under the New York Banking Law of 1892, chapter 689, and a rebate or discount on such payments allowed at such rate per annum as the directors from time to time prescribe.
2. Prepaid stock, on which sixty per cent of the amount of the shares shall be paid in, and on which dividends at the rate of six per cent per annum on the amount paid in may be drawn out, with any further dividends to be credited and payable with the stock at its maturity, is not illegal under New York Laws 1892, chapter 689.
3. Income stock on which sixty per cent shall be paid in advance, with cash dividends limited to eight per cent as the only profit to the stock-

holders, while any dividends beyond these shall go to the holders of other kinds of stock, is not illegal under the New York law applicable to savings and loan societies.

(January 16, 1894.)

APPEAL by relator from an order of the General Term of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County denying a writ of mandamus to compel respondent to approve and file the certificate of incorporation of the Peter Cooper Savings & Loan Society, under the provisions of the section of the banking law relating to loan associations. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Charles A. Deshon and Matthew Hale* for appellant.

Mr. Simon W. Rosendale, Atty. Gen., for respondent:

Associations of this character, like other corporations, are prohibited from exercising any rights or powers except such as are conferred by statute and such incidental powers

NOTE.—For power of building and loan associations to borrow money, see *North Hudson Mut. Bldg. & L. Assn. v. First Nat. Bank of Hudson* (W.) 11 L. R. A. 845, and *note*.

24 L. R. A.

For usury in loans of such associations, see *Reeve v. Ladies Bldg. Assn. Perpetual* (Ark.) 18 L. R. A. 129, and *note*.

as may be necessary to carry into effect the powers granted.

An association formed for the purposes of the "accumulation of a fund by the savings of its members to build or purchase for themselves dwelling houses or to enter into business" or merely for the purpose of loaning money to its members without expressing any intention to further the acquisition of homesteads, is not a building association.

Jarrett v. Cope, 68 Pa. 67; *Kupfert v. Guttenberg Bldg. Asso.* 80 Pa. 465; *North American Bldg. Asso. v. Sutton*, 85 Pa. 463, 78 Am. Dec. 849.

The statute in this state makes no provision for issuing paid up shares. On the contrary, it contemplates that all shares shall be paid for by periodical weekly or monthly payments.

The certificate of incorporation is required to set forth "the monthly or weekly dues per share."

Banking Law, § 170, subsec. 11, and section 178 provides: "No holder of redeemed shares shall claim to be exempt from making the monthly or other stated payments."

This (its only utterance), by the law-making power, shows the intention most clearly that shares should be paid for by periodical dues.

The issuance of shares under the two plans of prepaid and income stock practically results in the deposit of money at a specified or excessive rate of interest.

The holders of the "prepaid" and "income" shares would be in the position of creditors rather than members of the association. Their existence is nowhere provided for or contemplated by the statute of this state.

2 Am. & Eng. Encyclop. Law, 604; *Thomp. Bldg. Asso.* 2.

In the absence of statutory authority there should be no preferential members.

Thomp. Bldg. Asso. 60.

The law in England is different.

In *Re Guardian Permanent Ben. Bldg. Soc.*, L. R. 23 Ch. Div. 440, and the kindred cases, the associations were organized under the Statute, 6 & 7 Wm. IV. chap. 32.

Section 31 of that law provided that the board, for the time being, shall have power as circumstances may require to issue deposits or paid-up shares of the value of £30 each.

Earl, J., delivered the opinion of the court:

The relator and others attempted to form a corporation under article 5 of the Banking Law (Laws 1892, chap. 689), and for that purpose they made and acknowledged a certificate under section 170. They presented the certificate to the defendant, as the superintendent of banks, to be approved and filed by him as required by that section, and he declined to approve or file it on the ground that it provided for three kinds of stock, to wit, installment, prepaid, and income stock; his claim being that such a corporation can have only installment stock, to be paid for in installments. The relator then applied for a peremptory writ of mandamus to compel him to approve and file the certificate, and his application has been denied.

Persons seeking to form a corporation under any general law must have a reasonable lati-

tude as to what they may insert in their certificate of incorporation. They must insert therein all the matter particularly required by the law, and they may insert other provisions, not inconsistent with law or public policy, which are germane to the purposes of the corporation, and necessary, convenient, or appropriate to the accomplishment of such purpose. If they keep within such limits, the public authorities have no reason to interfere; the interests of the public are not jeopardized, and the rights of no citizen are violated. Section 170, after specifying certain matters to be inserted in the certificate of incorporation under that section, specifically provides that the certificate may contain "such other provisions not inconsistent with law as shall be necessary for the convenient and effective transaction of its business." There is no requirement in the law that the stock of such a corporation shall be paid for in installments from time to time, as they fall due. The law requires the certificate to set forth "the amount of each share" of stock, and "the monthly or weekly dues per share." A certificate which did not provide for the payment of monthly or weekly dues by any member of the corporation who wished to pay in that way would undoubtedly be a departure from the law. The evident purpose of the law is to authorize the formation of these corporations mainly for the benefit of wage earners and other people of limited means, to enable them to acquire homes and to accumulate their savings, and no provision should be inserted in any certificate of incorporation under this law which would thwart this purpose.

This certificate provides for shares of \$100 each, and for monthly dues of 50 cents on each share. The general scheme is that the dues, fees, penalties, and all other income of the corporation shall go into a common fund, and from this fund annual dividends are to be made, which are to be applied upon the shares of stock until they are fully paid for. Dues may be paid in advance with the assent of the directors, and upon such advance payments the directors may allow a rebate or discount at such rate per annum, for the time of payment in advance, as they shall from time to time prescribe. Such payments, instead of being contrary to the purpose of such corporations, may be promotive of that purpose. If a wage earner has the money, it may be wise to permit him to make the advance payments, and thus to save his money; and in this way, too, money is accumulated by the corporation more rapidly for loan to its members. So, the law is not violated by these advance payments upon installment stock, and no injustice is done to any of the members thereby. The certificate provides that "upon prepaid stock there shall be paid, at the time of subscription, dues to the amount of sixty dollars, and the holder thereof shall be entitled to receive, out of the profits apportioned thereto, semiannual dividends in cash, up to the rate of six per cent per annum. The profits apportioned to such stock, over and above such dividends, shall be credited thereto, and be payable with the stock at its maturity." The char-

acter of such stock must be determined at the time of the subscription. What harm can come from the creation of such stock? It allows a member who has money enough, to pay his dues for ten years in advance; and why is that not wise policy? Having thus paid in advance, his dividends are not needed to carry his stock to maturity, and hence he may draw his dividends up to 6 per cent and the balance of his dividends over that sum are applied to carry his stock to maturity. He has no advantage over the holders of installment stock. Their dividends are applied to carry their stock to maturity, and they thus have the same benefit that they would have if the dividends were first paid to them, and then by them paid upon their stock. All dividends are required to be made upon the net sums to the credit of the shares, and not upon the par value of the shares; and hence the holders of prepaid shares get precisely the same dividends proportioned to the amount standing to the credit of their shares as are paid to other stockholders, and no more. It is impossible for us to perceive how this scheme violates the law or any public policy. It does not prevent or defeat equality or mutuality among the members. And, if the prepaid stock is to be condemned, then it is not perceived how prepayment of installments upon installment stock can be upheld. Money must come into the treasury of one of these corporations, from the small monthly dues, very slowly, and members desiring to borrow the money for the purchase or improvement of homes must wait a long time before they can be accommodated with loans from money thus contributed; but if prepayment of dues is permitted, the ability of the corporation to aid its members by loans is greatly facilitated, and the main purpose of the corporation is thus promoted.

The income stock, upon which the members are also required to pay in advance \$60 per share, differs from the prepaid stock only in the fact that the holder of such stock may receive dividends in cash up to 8 per cent and, in case the dividends are more, such dividends are apportioned among the holders of other kinds of stock; and what we have said about the prepaid stock applies to this stock. The corporation has protection against the prepaid and income stock, as it is provided in the certificate that the directors may at any time refuse to issue such

stock, and may at any time, upon 30 days' notice, retire such stock by paying the book value thereof. But it is said that there is no requirement that the prepaid and income stock shall be carried to maturity, so as to be full paid. We are not sure of this. As the shares are fixed at \$100, and are not mature until they reach that sum, it may be that the directors may require that these shares shall, at the proper time, be brought to maturity on an equality with the other shares. But, even if this be not so, no injustice can come from this situation, because in no event can the holder of these shares draw more than the amount that has been credited upon them, nor can they draw dividends on more than such amounts. In England, building and loan associations existed, and were authorized and regulated by statute, long before any of them were organized in this country, and in 1874 they were specially authorized by law to have prepaid stock. 37 & 38 Vict. § 5, chap. 42. There it was held, in *Scott's Case*, L. R. 23 Ch. Div. 453, that under the law as it existed prior to 1874, which was substantially like the present law of this state, prepaid stock was not illegal. There the learned master of the rolls said: "Again, is it contrary to the constitution of such a society that members shall pay up installments in advance? I say, clearly not. The more money you get from investing members, the more money you have ready to advance to the borrowing members, and the more rapidly you will bring your society to an end, if the society is established without a fixed period. It seems to me there is no reason why the judicature should say that these arrangements, which, as far as I am concerned, appear to be perfectly reasonable, and not only framed not to obstruct, but to further, the objects of these societies, are illegal because they are contrary to the policy on which these societies are founded." And that case was affirmed in the house of lords. *Murray v. Scott*, L. R. 9 App. Cas. 523.

Our conclusion, therefore, is that the order of the General and Special Terms should be reversed, and the case resubmitted to the special term for its action upon the relator's application, with costs in all the courts to the relator against the defendant.

All concur, except Peckham, J., not voting, and Bartlett, J., not sitting.

ILLINOIS SUPREME COURT.

Rosalie E. KREITZ, Adm., etc., of John B. Kreitz, Deceased, *Appl.*,

v.

Charles F. A. BEHRENSMEYER.

(149 Ill. 496.)

1. A de jure officer may at common law recover the fees or salary paid to a de

NOTE.—As to right of *de jure* officer to recover salary from public when it has been paid to *de facto* officer, see *State v. Milne* (Neb.) 19 L. R. A. 39.

34 L. R. A.

facto officer; and this rule is in force in Illinois, although under the constitution the fees of the office belong to the county from which the salary is paid for the discharge of the duties of the office.

2. The fact that a commission has not been issued to a *de jure* officer will not defeat his right to recover from a *de facto* officer the fees or salary received by the latter, where the term of office has expired before the termination of the litigation as to the title of the office.

3. The cause of action by a *de jure* of-

fees against a de facto officer for fees or salary received by the latter does not accrue until the right to the office is determined, where this is in litigation.

(April 2, 1894.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Adams County in favor of plaintiff in an action brought to recover the perquisites of the office of county treasurer, to which plaintiff was adjudged to have been elected, but which defendant's testator held during the term for which plaintiff was elected. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. S. Davis and Carter, Govert & Pape, for appellant:

Mr. Kreitz held the office of county treasurer of Adams county from the time of being commissioned by the governor and his qualifying until his death in absolute good faith.

He had been declared elected by the board of canvassers established by law to canvass the returns and declare the result; his election had been duly certified and a commission issued to him by the governor in pursuance of the statute which provides that the "county treasurer shall be commissioned by the governor."

The person holding the certificate from the authorities appointed by law in relation to the office, is entitled to the present possession thereof notwithstanding his election is contested and its legality denied and notice of contest given.

People v. Head, 25 Ill. 325; *People v. Rives*, 27 Ill. 242.

Kreitz held the highest evidence provided by law, of the title to the office, and he was not in any way instrumental in obtaining it.

It, then, became his bounden duty to serve; and a failure or refusal would have subjected him to indictment, and forfeiture of not exceeding \$1000.

See Rev. Stat. chap. 86, § 16.

This court would, on proper application, have compelled him to serve by mandamus.

People v. Williams, 145 Ill. 573.

If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful.

Broom's Legal Maxims, 198-200.

There never was a time when appellee could have legally held the office or rendered any legal service, and this, not from any fault of Kreitz but by virtue of the laws of the state.

It is *damnum absque injuria*. It was the misfortune of appellee. It was the wrong of nobody.

Kreitz could not become either an intruder or usurper by entering and performing service required of him by law.

1 Bouvier, Law Dict. 835; 2 Bouvier, Law Dict. 773.

Kreitz died August 11, 1890, and L. E. Finley was appointed to fill the vacancy a month later.

In *Nichols v. Branham*, 84 Va. 923, the supreme court of appeals of Virginia held that such an appointee could not be held liable for the fees received by him.

That Kreitz litigated with appellee for the office cannot affect the rights of the parties. 24 L. R. A.

1 Sutherland, Damages, p. 4.

To apply the rule which admittedly flows from a recognition of the existence of a vested estate in an office to instances where such right of property is not acknowledged, is a palpable perversion of legal principles.

Stuhr v. Curran, 44 N. J. L. 181, 43 Am. Rep. 354.

But even if such should be the rule where one intrudes into or usurps an office, how can it be made to apply to one who enters into and performs the service at the laws' command?

It is not unreasonable to hold that Mr. Kreitz was bound to know whether he was elected or not—a question which it took three courts over four years to find out? Every one is bound to know the law—this rule is necessary, but every one is not bound to know the facts.

Lex non coget ad impossibilia.

Broom, Legal Maxims, 242.

There are some marked distinctions between both the law and facts as applicable to *Mayfield v. Moore*, 53 Ill. 429, 5 Am. Rep. 52, and the case at bar. As the law then stood the fees, much or little, belonged to the officer but since the adoption of the new constitution, the fees belong to the county, and when collected merely constitute a fund out of which compensation for services actually rendered are to be paid.

Purcell v. Parks, 82 Ill. 346.

In any event appellee was not damaged any more than the difference between the amount received and the reasonable cost of earning and collecting it.

If the case be analogous to the entry into the land of another under a defective title as supposed in the *Mayfield Case* and the principles of equity should control, as there suggested, then Kreitz having entered in good faith and in pursuance of a legal duty under belief that he held the valid title, he then possessing the only legal evidence of it, the doctrine of betterments or improvements, should be applied, and appellee should be allowed only the balance after deducting the reasonable value of his services in earning, or so to speak in conserving, the fund sued for.

10 Am. & Eng. Encyclop. Law, 242; 6 Am. & Eng. Encyclop. Law, 217-220; *Breit v. Yeaton*, 101 Ill. 242; *Cable v. Ellis*, 120 Ill. 152.

Appellee had no property in the office of county treasurer.

Mechem, Pub. Off. § 464.

It is not an incorporeal hereditament in this country as in England. It is not a franchise.

People v. Holtz, 92 Ill. 426; *Graham v. People*, 104 Ill. 321.

If, then, the office is not the property of the holder of the legal title, and if the fees established by law are not his property but the property of the county, out of which it must pay a reasonable compensation for necessary services rendered for it, and if there is no privity between the holder of the legal title and the officer *de facto*, upon what legal principle can the right of recovery be based? The salary or compensation itself can neither be sold nor assigned, in advance of its being actually earned.

Mechem, Pub. Off. § 884; *Ellis v. Lawrence*, 55 N. Y. 442, 17 Am. Rep. 273; *Conner v. New*

York, 5 N. Y. 285; *Hoboken v. Gear*, 27 N. J. L. 265; *Butler v. Penn.*, 51 U. S. 10 How. 402, 13 L. ed. 473.

Appellee, never having recovered the office, cannot recover the earnings.

Mechem, Pub. Off. § 838; *Farwell v. Adams*, 112 Ill. 57; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 780; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *People v. Staton*, 78 N. C. 546, 21 Am. Rep. 479.

Messrs. William McFaddon and Sprigg, Anderson & Vandeventer, for appellee:

The *de facto* officer holding an office and receiving the fees and emoluments thereof, is liable to the *de jure* officer who has been excluded from the benefits of the office to which he is entitled, and an action to recover the fees received lies in favor of the *de jure* officer against the *de facto* officer.

Mayfield v. Moore, 53 Ill. 481, 5 Am. Rep. 52; *Farwell v. Adams*, 112 Ill. 58; *Waterman v. Chicago & I. R. Co.* 15 L. R. A. 418, 139 Ill. 669; *McCrary*, Elections, 8d ed. § 832; *United States v. Addison*, 78 U. S. 6 Wall. 291, 13 L. ed. 919; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Currey v. Wright*, 9 Lea, 247, *Kessel v. Zeiser*, 103 N. Y. 114, 55 Am. Rep. 769; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 780; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 181; *Hunter v. Chandler*, 45 Mo. 452; *Throop*, Pub. Off. § 523; *Mechem*, Pub. Off. § 838; *People v. Smyth*, 26 Cal. 21; *Petit v. Rousseau*, 15 La. Ann. 239; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237.

The *de facto* officer is regarded as the agent of the *de jure* officer, and receiving the fees and emoluments of office for the latter's benefit.

Dolan v. New York, 68 N. Y. 283, 23 Am. Rep. 168; *People v. Pease*, 27 N. Y. 55.

The salary and emoluments annexed to a public office in a municipality are incident to the title to the office, and not to its exercise or occupation. A party entitled to the office is therefore held to be entitled to such salary and emoluments, although he has never actually discharged the duties of the office.

5 Am. & Eng. Encyclop. Law, p. 109; *People v. Timan*, 8 Abb. Pr. 359; *People v. Hopson*, 1 Denio, 579; *Dolan v. New York*, *supra*; *McVeany v. New York*, 80 N. Y. 192, 36 Am. Rep. 600; *Memphis v. Woodward*, 12 Heisk. 499, 27 Am. Rep. 750; *People v. Smyth*, *supra*; *People v. Oulton*, 28 Cal. 44; *Carroll v. Siebenhafer*, 87 Cal. 195; *Glascok v. Lyons*, *supra*; *Comstock v. Grand Rapids*, 40 Mich. 395; *Stadler v. Detroit*, 18 Mich. 847; *Philadelphia v. Green*, 60 Pa. 136; *Beard v. Decatur*, 64 Tex. 7, 53 Am. Rep. 735.

There is no difference as to right of appellee to recover whether the question be treated as being one of salary or fees.

McVeany v. New York, and *Beard v. Decatur*, *supra*.

Actual incumbency without title to a municipal office confers no title to the salary of the office.

People v. Hopson, *supra*; *People v. Nostrand*, 46 N. Y. 832; *New York v. Flagg*, 6 Abb. Pr. 296; *Hiddle v. Bedford County*, 7 Serg. & R. 392; *Prescott v. Hayes*, 42 N. H. 56.

24 L. R. A.

So strong is the claim of the rightful incumbent of an office to its full salary, that in a suit to recover the same such rightful incumbent cannot be required to deduct from the amount of his claim the amount of his earnings during the period of his exclusion from office.

Fitzsimmons v. Brooklyn, 102 N. Y. 537, 55 Am. Rep. 885.

Until long after the term for which Behrensmeyer was elected had expired, he could not possibly have maintained an action for the fees and emoluments against Kreitz. He could not enter into the office, or show any legal right or title to the office until January 21, 1891, and the statute of limitation does not run against a party who cannot enter, nor bar a right where there is no one capable of bringing suit.

2 Greenl. Ev. § 485; *Dugan v. Follett*, 100 Ill. 582; *Carriager v. Whittington*, 26 Mo. 811, 72 Am. Dec. 212; *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 887; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *Lawson v. Lay*, 24 Ala. 184.

Appellee was not bound to file any oath of office or collector's or other bond until the termination of the contest proceeding.

Farwell v. Adams, 112 Ill. 60; *Pearson v. Wilson*, 57 Miss. 848; *People v. Miller*, 16 Mich. 56.

Phillips, J., delivered the opinion of the court:

At the election in November, A. D. 1886, John B. Kreitz and one Behrensmeyer were candidates for election to the office of county treasurer of Adams county, Ill., and, on the canvas of the returns, Kreitz was declared elected by a plurality of 14 votes; and, a certificate being made, a commission was issued to him by the governor, as the duly elected county treasurer of Adams county, whereupon he qualified, and entered upon the discharge of the duties of that office,—continuing to occupy the office, and discharge its duties, until his death, in 1890. Appellee, by proper notice and petition contested the election of Kreitz, which, after extended litigation, finally resulted in appellee being declared duly elected to the office of county treasurer of Adams county, by the judgment of this court, reported as *Behrensmeyer v. Kreitz*, 135 Ill. 591. Kreitz having died before the filing of this opinion, such proceedings were had in this court that the judgment of reversal was entered *nunc pro tunc* as of the 11th day of June, A. D. 1890, which declared Behrensmeyer elected to said office. On the 6th of April, 1892, appellee filed a claim against the estate of John B. Kreitz in the county court of Adams county, seeking to recover the sum of \$10,000 for fees and salary received by Kreitz for Behrensmeyer's use, and interest thereon. On the petition of appellant, the venue on this claim so filed was changed from the county court to the circuit court of Adams county, where a trial was had which resulted in a finding and judgment in favor of appellee, and against appellant, for the sum of \$7,383, to be paid in due course of administration, as a claim of the seventh class. Appellant prosecuted an appeal from that

judgment to the appellate court of the third district, where the judgment was affirmed; and she now brings the record to this court by appeal, and urges that appellee has no cause of action, and asks that this case may be considered as one of first impression, regardless of what was said by this court in *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52,—arguing that that case was decided under the Constitution of 1848, and that by the provisions of the Constitution of 1870 a different rule must prevail, inasmuch as, by the provisions of the latter, the fees of the office belong to the county, from which a salary is paid for the discharge of the duties of the office, while under the former the fees belonged to the officer.

It is conceded that no statute exists in this state, declaring the rights of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer, who has discharged the duties of the office under a wrongful or a mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country. Judicial decisions of common-law courts are the most authoritative evidence of what constitutes the common law. By chapter 28, Starr & C. Stat. Ill., the common law of England is declared in force in this state. By reference to the decisions of the common-law courts of England, the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto* by reason of the intrusion of the latter into his office, and his receipt of the emoluments thereof. Among others, the following opinions of English courts may be referred to as sustaining this right of recovery: *Vaux v. Jeffereen*, 2 Dyer, 114; *Arrie v. Stukely*, 2 Mod. 260; *Lee v. Drake*, 2 Salk. 468; *Webb's Case*, 8 Coke, 45. By the adoption of the common law of England, the principle announced in these cases was adopted as the law of this state, for the principle is of a general nature, and applicable to our constitution. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, as loss would result from wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States, and the great weight of authority sustains the doctrine of the common law, as shown by the opinions of the judges in different states; and in most of the states these are based on the common law, without reference to any statute. The following cases are in point: *United States v. Addison*, 73 U. S. 6 Wall. 291, 18 L. ed. 919; *Dolan v.*

New York, 68 N. Y. 274, 23 Am. Rep. 168; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *Currey v. Wright*, 9 Lea, 247; *Kessel v. Zeiser*, 102 N. Y. 114, 55 Am. Rep. 769; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Hunter v. Chandler*, 45 Mo. 452; *People v. Smyth*, 28 Cal. 21; *Petit v. Rousseau*, 15 La. Ann. 239. And the only case enunciating a different rule is that of *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, where the conclusion was reached by a divided court. While it is true that in this state a public office is not a franchise nor an incorporeal hereditament, but a mere public agency created for the benefit of the state, yet the salary or emoluments annexed to a public office are incident to the right to the office, and not to the mere exercise of its duties, or its occupancy; and whether the compensation of the officer is by fees, or a salary, the rule is the same. *People v. Smyth*, *supra*; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Comstock v. Grand Rapids*, 40 Mich. 397.

Such being the rule, the Constitution of 1870 did not change the law, in this respect, from what it was under the Constitution of 1848. The purpose of section 10, article 10, of the Constitution of 1870,—providing that county boards should fix the compensation of county officers, with their necessary clerk hire and other expenses, to be paid, in all cases where fees were provided for, out of the fees collected,—was to limit the amount of compensation an officer was to receive to a certain sum, if the fees amounted to that sum, and the residue to be paid in the county treasury. And section 12, article 10, which provided that all laws fixing fees of certain officers should terminate with the terms of those who might be in office at the first meeting of the general assembly after the adoption of the Constitution, and that the general assembly should, by a general law, uniform in its operation, provide for and regulate the fees of said officers and their successors, so as to reduce the same to a reasonable compensation for services actually rendered, and classify counties, etc., had for its object the abolition of special acts fixing fees, and aimed to declare a rule of uniformity in fees in the several counties of the several classes, with uniform compensation, within limited discretion of the various county boards, for services actually rendered by the *de jure* officers in such counties. Its purpose was not legislation, but limitation on and requirement for, legislation. In providing for legislation looking to a reasonable compensation for services actually rendered, it was not the aim or object of that section to establish a rule that would allow a mere usurper of an office, actually rendering service, the right to claim and retain the compensation to be fixed as provided by that section. The provisions of those sections creating no different rights, so far as a *de jure* officer is concerned, the rule announced by this court in *Mayfield v. Moore*, 53 Ill. 431, 5 Am. Rep. 52, is as applicable under the present Constitution as under the Constitution of

1848, and in harmony with the rule of the common law of England, as well as with the great weight of authority in this country, and has been followed by this court in more recent adjudications. *Furwell v. Adams*, 112 Ill. 58; *Waterman v. Chicago & I. R. Co.* 139 Ill. 669, 15 L. R. A. 418. We adhere to the rule as announced in *Mayfield v. Moore*.

It is further insisted that appellee cannot recover because he was never fully qualified, not being commissioned by the governor, and not filing bonds, as collector, for the years 1888-89-90. As was said in *Mayfield v. Moore*, *supra*: "Under the law, so soon as a majority of the votes was cast for appellant at the election held in pursuance to law, he became legally and fully entitled to the office. The title was as complete then as it ever was, and no subsequent act lent the least force to the right to the place. This commission was evidence of title, but not the title. The title was conferred by the people; and the evidence of the right, by the law." The contested election was continued through a long period of litigation, and, by the final adjudication of a court of competent jurisdiction, the appellee's right to the office was determined in his favor. That determination was after the term expired for which he had been elected. His right to recover does not depend upon his possession of a commission. The judgment of the court determined his right. Neither is his right to recover affected by the fact that he failed to give bond as collector for the years 1888, 1889, 1890, and failed to qualify. The statute requiring the oath of office and bond to be given by or within a specified time applies only to a person to whom the certificate of election has been given, or who has been declared elected. Where an election has been contested, and the contestant is declared elected, the requirement to qualify within a prescribed time does not apply until the termination of the contest. *Furwell v. Adams*, *supra*. The law will not require a useless act, and by taking the oath of office, and filing bonds, as collector, for the several years of 1888-89-90, no purpose could have been subserved, as the contest was not determined until after the full term had expired. Appellee's right of recovery is therefore not affected by these considerations.

The amount fixed by the county board as salary of the county treasurer is a question of fact settled by the adjudication of the circuit and appellate courts; but it is insisted that as a part of that salary was earned, and fees received, more than five years before filing the claim, in this case, to that amount, the statute of limitation of five years applies, and bars a recovery of the amount so earned. The concluding clause of section 15, chap. 83, Starr & C. Stat. Ill., provides that actions

"shall be commenced within five years next after the cause of action accrued." The cause of action, to this plaintiff, did not accrue, so that an action could be maintained therefor by him, until his right to the office was determined. The adjudication of the court, finding he was lawfully elected, for the first time entitled him to recover the salary incident to the office. His right then first accrued. The statute of limitation barred no part of this claim.

We find no error in the admission or exclusion of evidence, or in holding or refusing to hold propositions submitted to be held as law.

We do not desire to enter on a discussion of the question as to whether it is a hardship on Kreitz, or his estate, that he should be held to receive no compensation for his services: for, however great that hardship may be, the rule of law has been long settled in this state that the *de jure* officer may recover the fees or salary paid to a *de facto* officer. The rule is in accord with a sound public policy. Its tendency is that there would be less danger or frequency of usurpation or intrusion into an office. Its tendency is to cause greater caution in, and purify, elections, as one, with such danger attendant on illegal voting, would abstain from encouraging it. Its tendency is to cause a careful investigation into the right to an office, where a notice of contest is served and petition filed. Public interest is in accord with private right, when it is held that one lawfully elected to an office, and deprived of the office by another, may recover the salary or fees attendant on the office. The rule is not changed by reason of one holding a certificate of election, and entering in good faith, under a mistaken belief of right. However much the good faith of one entering, the right exists somewhere; and, if the right existed in another, he is an intruder in the office, and enters at his peril. As was said in *Mayfield v. Moore*, *supra*: "After the vote was canvassed by the clerk and justice of the peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprized of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or, having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated on another. He has intruded into appellant's office without right, and has received the profits of the office; and, like the person entering into the land of another with a defective title, he must answer for the profits." We find no error, and the judgment of the appellate court is affirmed.

Affirmed.

ALABAMA SUPREME COURT.

Andrew J. DRAKE, Exr., etc., of J. M. Kirk,
Deceased, Appt.,
v.

LADY ENSLEY COAL, IRON & R. CO.

(.....Ala.....)

1. The pollution of the waters of a stream by washing iron ore, whereby the water is laden with refuse and *débris*, rendering it unfit for stock and drinking purposes and causing the deposit of a sediment upon portions of the farm of a lower proprietor, is an actionable injury to such proprietor, where the injury might have been prevented by the construction of proper basins to contain the water until the sediment was settled before turning the water back into the stream.
2. Case and not trespass is the proper form of action for applying a running stream to such uses as to render it impure and fill it with a sediment which is deposited on the land of a lower proprietor, thereby preventing him from putting the water to the ordinary uses, and damaging his land.
3. An executor who has taken possession of testator's real estate and held it since testator's death, for the purposes of administration and paying debts, may maintain an action for permanent injury to the land by sediment placed in the stream by an upper proprietor.

(February 2, 1894.)

NOTE.—How far stream may be polluted for mining purposes.

The efforts to make the development of the mining interests of the country appear of such commanding importance as to justify the destruction of other rights or interests for their benefit have not been successful so far as the pollution of streams is concerned. The general practice has been to apply against miners the common-law rule which entitles a riparian proprietor to have the water flow to him without material diminution in quality.

An upper riparian owner cannot use the water of the stream for mining purposes in such a way as to render it unfit for the domestic use of a lower proprietor, or so use it as to fill up the channel and cause the *débris* to be deposited on his land. *Tennessee Coal, Iron & R. Co. v. Hamilton* (Ala.) Nov. 28, 1893.

A miner cannot foul a stream so as to injure fruit trees and gardens on the banks of the stream below. *Wixon v. Bear River & Auburn Water & Min. Co.* 24 Cal. 367, 35 Am. Dec. 69.

Mining operations cannot be permitted to destroy the water for the use of gardens and domestic purposes. *Levaroni v. Miller*, 34 Cal. 231, 91 Am. Dec. 692.

Mining *débris* cannot be deposited in streams so as to run down and cover agricultural lands below. *Hobbs v. Amador & S. Canal Co.* 68 Cal. 161.

There is liability for deposit of *débris* of a mine in a stream so that it is carried down and deposited on the land of a lower proprietor. *Robinson v. Black Diamond Coal Co.* 57 Cal. 412, 40 Am. Rep. 118.

Depositing *débris* from a mine in such a way that it would be carried by a stream on to land of lower proprietors will give a right of action, if injury occurs. *Columbus & H. Coal & Iron Co. v. Tucker*, 43 Ohio St. 41.

34 L. R. A.

A PPEAL by complainant from a judgment of the Circuit Court for Franklin County in his favor for a less amount than he demanded, in an action brought to recover damages alleged to have been caused by defendant's unlawfully polluting the water of a stream which flowed through the land of plaintiff's intestate. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Kirk & Almon* for appellant.
Mr. William J. Bullock for appellee.

Coleman, J., delivered the opinion of the court:

This action was instituted to recover damages for an alleged injury to realty. The complaint consists of several counts, some of which were framed in trespass, and others in case. The important questions for consideration, and the decision of which will determine the several assignments of error, are: First, whether the facts will support the complaint, in either of its aspects; and if so, second, whether the proper action is trespass or case; and, third, if the action is maintainable, what is the proper measure of damages? The trial court held that the action should be in case, that the statute of limitations for one year applied, and that the proper measure of damages was the diminution of the rental value for one year preceding the bringing of the action. The undisputed facts show that for many years prior

Throwing coal dirt into a stream is a tort. *Little Schuylkill Nav. R. & Coal Co. v. Richards*, 57 Pa. 142, 38 Am. Dec. 209.

A mine owner is liable for injuries caused by the deposit on lower lands of culm which he negligently permits to be washed into the stream. *Elder v. Lykens Valley Coal Co.* 157 Pa. 490.

A stream cannot be filled with refuse from coke ovens using raw coal not mined on the land on which the ovens are situated. *Lents v. Carnegie Bros. & Co.* 145 Pa. 612.

Under the Georgia code, water cannot be used for washing ore in such a way as to destroy or injure its use by a lower proprietor. *Satterfield v. Rowan*, 33 Ga. 187.

Caring for tailings.

The problem of what to do with the tailings is one of the most difficult which the miner has.

The Colorado statute makes it the duty of the miner to take care of his own tailings upon his own property, or be responsible for the injuries that may arise from them. *Fuller v. Swan River Placer Min. Co.* 12 Colo. 12.

Owners of a mine on the side of a hill cannot allow their tailings to flow onto a prior claim located in the bed of a stream in such a way as to render the working of it impracticable. *Logan v. Driscoll*, 19 Cal. 623, 31 Am. Dec. 90.

A miner has no right to fill a stream with tailings so that it will flow down onto claims below. *Nelson v. O'Neal*, 1 Mont. 234.

And the same rule applies in cases not connected with streams.

One cannot throw the refuse of a mine down on lower land of another, although it is not carried by a watercourse. *Robinson v. Black Diamond Min. Co.* 50 Cal. 461; *Lincoln v. Rodgers*, 1 Mont. 217; *Har-*

and up to the time of his death, which occurred in the year 1890, plaintiff's testator had owned and been in possession of the lands claimed to have been damaged, cultivating them as a farm, and since his death the plaintiff, as executor, had been in possession of the lands; that through the lands there flowed a creek of clear, healthy water, useful for, and used for, watering stock, and at times for drinking purposes; that defendant owned a tract of land above the land of plaintiff, on the same creek, from which, for five or six years previous to the bringing of the suit, defendant had been engaged in mining iron ore, and washing its ore with the waters of the creek; that for this purpose the water was pumped into large reservoirs, and, after utilizing the water in washing the iron ore, it was allowed to escape in a way so as to return to its natural channel, above plaintiff's land. There was evidence also tending to show that, when the water reached plaintiff's farm, it was laden with red clay, refuse ore, and *débris*, rendering it unfit for stock and drinking purposes, and that in some places a thick sediment or "slush" was deposited upon portions of the farm, impairing its fertility, and in some places it was so deep as to destroy its usefulness for cultivation. The evidence conflicted as to the extent of the damage sustained. The evidence also conflicted as to whether, by the construction of proper basins to receive and hold the water, after having been used by defendant, it could not have been retained until all the objectionable matter or substance contained

in it had settled in the basins, so as to restore the water to its natural purity.

Appellee contends that, if there is error in the record, it is error without injury, inasmuch as plaintiff was not entitled to recover, in any event, and in support of his contention cites the case of *Clifton Iron Co. v. Dye*, 87 Ala. 468, in which the court uses this language: "The court will take notice that in the development of the mineral interests of this state, recently made, very large sums of money have been invested. The utilization of these ores, which must be washed before using, necessitates, in some measure, the placing of sediment where it may flow into streams which constitute the natural drainage of the section where the ore banks are situated. This must cause a deposit of sediment on the lands below; and, while this invasion of the rights of the lower riparian owner may produce injury entitling him to redress, the great public interests and benefits to flow from the conversion of these ores into pig metal should not be lost sight of. As said by the vice-chancellor in *Wood v. Sutcliffe* [2 Sim. N. S. 163], 'Whenever a court of equity is asked for an injunction in cases of such nature as this [a bill to enjoin the pollution of a stream], it must have regard, not only to the dry, strict rights of the plaintiff and defendant, but also to surrounding circumstances.'" He cites also the case of *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147, in which the court uses the following language: "*Sic utere tuo ut alienum non laedas*" is the maxim—the rule—in such

vey v. Sides Silver Min. Co. 1 Nev. 530, 90 Am. Dec. 510.

But each person mining in the same stream is entitled to use in a proper and reasonable manner both the channel of the stream and the water flowing therein; and where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*. *Edmond v. Chew*, 15 Cal. 137.

The more extended the operations become the more the problem grows. When the system of hydraulic mining became perfected it was found that the *débris* from the mines was being carried down the streams with disastrous effect. Large stretches of country covered with buildings and hamlets were buried in some instances above the tops of the houses. Cities even had to fight to maintain their existence and the navigability of some of the largest streams was being imperiled. In this condition of affairs resort was had to the courts for relief. After a severe fight the lower proprietors finally obtained a decision from a United States court in which with an exceedingly valuable historical opinion it was held that persons mining by the hydraulic process may be enjoined from discharging the *débris* into a river whence it flows to the valley below burying valuable farms and creating a public and private nuisance. *Woodruff v. North Bloomfield Gravel Min. Co.* 8 Sawy. 623, 9 Sawy. 441, 18 Fed. Rep. 763.

Subsequently it became generally recognized that hydraulic mining may be enjoined. *Eureka Lake & Yuba Canal Co. v. Yuba County Super Ct.* 66 Cal. 311.

So hydraulic mining in such a way as to fill up and obstruct the water ditch of another with *débris* may be enjoined. *McLaughlin v. Del Rio*, 71 Cal. 230-24 L. R. A.

In *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, an injunction was granted against hydraulic mining and *Keyes v. Little York Gold Washing & Water Co.* 53 Cal. 724, in which relief was denied because of misjoinder of parties, is stated to have been overruled in *Hillman v. Newington*, 87 Cal. 62.

But hydraulic mining is not so unlawful as to entitle a lower proprietor to an injunction against one who is selling water for the purpose, if there is nothing to show that he knows that the *débris* is being used so as to injure plaintiff. *Yuba County v. Cloke*, 79 Cal. 230.

These decisions so imperiled the mining industry that an attempt was made to obviate the necessity of an injunction by caring for the tailings and for this purpose the impounding dam was constructed.

It was then held that hydraulic mining will not be enjoined if sufficient impounding dams are constructed to remove the *débris* from the water before it is turned into the stream below. *United States v. North Bloomfield Gravel Min. Co.* 53 Fed. Rep. 625.

But an impounding dam should not be held sufficient, if the determination of its sufficiency rests on the opinions of engineers apparently equally intelligent and whose opinions are at variance; nor upon any evidence not of the most unquestionable and satisfactory character. *Hardt v. Liberty Hill Consol. Min. & Water Co.* 27 Fed. Rep. 738.

Mine water.

Another source of inconvenience and damage to the lower proprietor is the impregnation of the stream with water pumped from the mine.

In England it is held that an injunction may be awarded to restrain miners from pumping water from their mine into a stream to the injury of a

case. See *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 894. So, as a rule, every one must so enjoy his own property as not to offend his neighbor's equal right to enjoy his own unmolested. But this rule cannot be enforced, in its strict letter, without impeding rightful progress, and without hindering industrial enterprise. Hence, minor individual interest is sometimes made to yield to a larger and paramount good. To deny this principle would be to withhold from the world the inestimable benefits of discovery and progress in all the great enterprises of life. The rough outline of natural right or natural liberty must submit to the chisel of the mason, that it may enter symmetrically into the social structure." Notwithstanding the enunciation of this principle in favor of the public interest, the court was careful to declare: "Under these rules, defendant had no right, by ditches or otherwise, to cause water to flow on the lands of the plaintiff, which, in the absence of such ditches, would have flowed in a different direction." And it adopts the principle declared in *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 487, in which it was declared that the obligation of the inferior heritage to the superior "applies only to waters which flow naturally, without any act of man. . . . It is not more agreeable to the laws of nature that water should descend, than it is that lands should be farmed and mined. The plaintiffs had no right to insist upon his receiving waters which nature never appointed to flow there."

The principle of law declared in 87 Ala., *supra*, does not sustain the proposition to which it was cited. That was a bill for an injunction to restrain the use of the washers.

Considerations arise in applications for injunctions which do not exert a controlling influence upon a right of action for damages; and in that very case it is said, "The plaintiff should have been remitted to a court of law for the recovery of his damages." The case of *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. 126, 57 Am. Rep. 445, cited by counsel, goes far to sustain the contention of appellee. In this case it is held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners . . . must, *ex necessitate*, give way to the interest of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." The conclusion reached is not in harmony with the prior decisions of the same court. The same principle announced in 118 Pa., *supra*, to some extent, has been applied in cases of irrigation. *Schilling v. Rominger*, 4 Colo. 100; *Yunker v. Nichols*, 1 Colo. 551. The case from 118 Pa., *supra*, is an authority we think very much weakened by the subsequent cases in the same state of *Robb v. Carnegie Bros. & Co.* 145 Pa. 324, 14 L. R. A. 329, and *Lentz v. Carnegie Bros. & Co.*, 145 Pa. 612. In the latter cases it was held that "a manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business, and also for actual damages done to crops and the soil." The case in 118 Pa. is not overruled, but is commented on, and the distinction is drawn that in the latter case (118 Pa.) the ore was being mined by the owner of the soil, and in the two later cases the coke was not

lower proprietor. *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. Div. 769, 46 L. J. Ch. 774, 37 L. T. N. S. 149, 25 Week. Rep. 874.

In *Pennsylvania* it was at first held that mine water cannot be dumped into a clear stream which is used for domestic purposes in such a way as to render it useless for those purposes. *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401, 27 Am. Rep. 711.

That rule was recognized in the same case when it was twice again before the court. 94 Pa. 302, 39 Am. Rep. 789, 102 Pa. 370.

But in *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. 126, 57 Am. Rep. 445, it was distinctly overruled on the ground that individual rights must give way to the mining interests. But in that case decisions upon the question of casting material into the water which fouled it were distinguished on the ground that water coming from the mine in the case before the court was in its natural state, and the stream was used merely for natural drainage purposes.

Mine water cannot, however, be conducted a distance of five miles out of its natural course and dumped into a stream watering an agricultural region, when it could as readily be dumped into a stream draining a mining region, without inconvenience or detriment to the working of the mine. *Williams v. Union Imp. Co.* 1 Pa. Dist. Rep. 238.

Refusal of injunction.

The injunction will not issue if it is not clear that the pollution has occurred. *New Boston Coal & Min. Co. v. Pottsville Water Co.* 54 Pa. 164, 24 L. R. A.

A stamp mill will not be enjoined at the suit of one who purchased for a speculation lands in the bottoms below it, on which it is depositing sand, which he then attempts to sell at an exorbitant price to the mill company, and failing, files his bill for an injunction. *Edwards v. Allouez Min. Co.* 38 Mich. 46, 81 Am. Rep. 801.

An injunction will not be granted if complainant has another water supply, and the stream into which the mining debris is turned is also polluted to some extent by sewage from a city, while complainant has been guilty of laches and defendant is able to respond in damages for the injuries. *Clifton Iron Co. v. Dye*, 87 Ala. 408.

Estoppel.

The grantor of a right to use a stream to water meadows, and which, under the grant, is applied for more than twenty-one years to water stock, cannot afterwards foul the stream and make it unfit for the purpose to which it was put. *Wheatley v. Chrisman*, 24 Pa. 298, 64 Am. Dec. 657.

Joint tort.

When a large number of persons are mining on the same stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use, each cannot defend successfully an action for the damage on the ground that his act alone did not materially affect the water. *Hill v. Smith*, 32 Cal. 106.

Prior appropriation.

The above rules are somewhat modified by the doctrine of prior appropriation which became es-

mined on the land upon which it was manufactured. It seems to us that if, in the case where the coal was mined on the land of the owner, he was exempt from damages, upon the ground that the individual or minor interest must yield to the greater and paramount interest of the public, it would make but little difference where the coke was mined. The manufacturing of the coke from the ore was that which contributed to the paramount and public interest. On the other hand, if the owner is to be exempted from liability because the ore was mined on his own land, and not because of public benefit, then the doctrine of "*sic utere tuo ut alienum non laedas*" would be abolished, and the rights of lower riparian proprietors, almost universally recognized and protected, would be destroyed. A lower proprietor purchases under the protection of the rule that "*qua currit, et debet currere, ut solebat*," at least to the extent that the servitude of his land shall not be added to by artificial means or the industry of man. *Brynton v. Longley*, 19 Nev. 69, 8 Am. St. Rep. 781, and *note*.

Under the provisions of the constitution, private property cannot be taken for public uses, or for corporations, without just compensation being first made to the owner, except by his consent. The courts—and it was never intended to be otherwise understood—are not the "masons" to "chisel" away vested rights of property of private individuals, however humble and obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor, by appealing to the courts of his country.

We are satisfied that plaintiff's complaint showed a good cause of action, and there was

evidence tending to sustain it. *Tennessee Coal, Iron & R. Co. v. Hamilton* (Ala.) 14 So. Rep. 167; *Hughes v. Anderson*, *Cifton Iron Co. v. Dye*, *Brynton v. Longley*, *Robo v. Carnegie Bros. & Co.* and *Lentz v. Carnegie Bros. & Co. supra*; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Furris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; 6 Am. & Eng. Encyclop. Law, 149.

We are of opinion the trial court ruled properly in holding that under the facts of the case the plaintiff could recover only on the counts in case. The boundary line between where trespass ends and case begins is not always easily determined. Under the law the defendant had the right to divert the water from its channel and utilize it in washing the ore. His duty was to return the water to its proper channel. This was done. The tort to plaintiff was neither in the diversion of the water from its channel, nor that defendant used it for his own purposes, but that the use to which it was applied rendered it impure, filled it with clay and objectionable ore and *débris*, and in this condition it was carried by the flow of the water to plaintiff's farm. The damage inflicted was neither intentional nor direct nor immediate, but was consequential. The evidence of plaintiff which tended to show that the injury was the result of negligence in failing to provide proper basins to contain the water after use, until the sediment settled and the water became pure, if actionable, was clearly in case. *Polly v. McCall*, 37 Ala. 21; *Pruitt v. Ellington*, 59 Ala. 454; *Bell v. Troy*, 35 Ala. 184; *Roundtree v. Brantley*, 34 Ala. 544, 78 Am. Dec. 470; *Williams v. Hay*, 120 Pa. 485; 2 Wait, Act. & Def. 110.

We are of opinion the court erred in re-

published with reference to streams flowing on the public lands of the United States.

Upon the principles as to prior appropriators settled by *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113, a lower proprietor could probably not object to the fouling of water, if he acquired his rights after those of the upper appropriator had become fixed.

But the prior appropriator must permit the water to flow on for the use of the lower proprietors, subject only to the reasonable deterioration in quality and diminution in quantity made necessary by the use of it by him for the purpose for which he appropriated it. *Alder Gulch Consol. Min. Co. v. Hayes*, 6 Mont. 81.

Most of the decisions upon the subject, however, have been upon the question of the first appropriator's rights against persons subsequently locating further up the stream.

In *Hill v. King*, 8 Cal. 356, the court at first held that the first appropriator was entitled to the flow of the water pure and undiminished, but on rehearing the doctrine of *Bear River & Auburn Water & Min. Co. v. New York Min. Co.* 8 Cal. 327, 65 Am. Dec. 325, was followed, which held that the first appropriator is not entitled to have the quality preserved the same as when he acquired his rights, and that ruling was followed in *Mokelumne Hill Canal & Min. Co. v. Woodbury*, 10 Cal. 185.

In *Hill v. Smith*, 27 Cal. 476, the court, without referring to *Bear River & Auburn Water & Min. Co. v. New York Min. Co. supra*, held that a later

owner could not so far deteriorate the quality of the water as to render it largely unfit for the purpose for which it was appropriated and make it carry such a quantity of sediment as to impose much labor and expense upon the prior appropriator to keep his ditch clear so that it could carry the water in sufficient quantities to answer his purpose.

In Montana it is held that the first appropriator is entitled to water without material diminution in quantity or quality. *Atchison v. Peterson*, 1 Mont. 561.

So in Utah water appropriated for domestic and culinary purposes cannot be impaired by the operation of a rock crusher on the stream above the head of the ditch through which it is carried. *Crane v. Winsor*, 2 Utah, 248.

But a prior appropriator will not be granted an injunction to prevent mining operations by an upper proprietor who permits his tailings to run down the stream, if the latter is fifteen miles further up the stream and numerous tributaries of clear water enter the stream between the two points, while the evidence leaves the question very doubtful as to how much the mining affects the quality of the water, and at most it requires merely a sand gate at the end of the appropriator's ditch and the labor of one man a few minutes each day to make the water fit for such appropriator's purpose. *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414.

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stricting the damages recoverable to the diminution of the rental value for one year. The lands had belonged to plaintiff's testator, and plaintiff was the executor. The legal title was not in him, but the record states that plaintiff had held possession as executor of the lands "since the death of testator." Lands of a decedent are subject to administration, and liable for the payment of his debts. For purposes of administration and for the payment of debts, the executor had authority to take possession of the land, and he had asserted his authority. There was some evidence tending to show permanent in-

jury to some portions of the land. Under the facts, no one could sue for the permanent injury sustained, except the executor, at the time of the institution of this suit. *Calhoun v. Fletcher*, 68 Ala. 574; *Nelson v. Murfee*, 69 Ala. 598. The heirs may never succeed to the legal possession and ownership of the land. It was proper to consider the diminution of the rental value, but it was not the exclusive rule for measuring the damages. The difference between the value of the land with and without the permanent injury is recoverable.

Reversed and remanded.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *Plff. in Err.*,

v.

Ezra M. BUSWELL.

(.....Neb.....)

***1. The act to establish a state board of health; to regulate the practice of medicine in Nebraska, etc.,—is as much directed against any unauthorized person who shall operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another, as against one who practices "medicine, surgery, and obstetrics," as those terms are usually and generally understood.**

***2. The object of the statute establishing a state board of health, etc., is to prevent imposition upon the afflicted by ignorant and unqualified pretenders to healing power; and any person not within the exceptions prescribed in said act, and not having complied with its requirements as to a certificate who shall, under any pretense, operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another, thereby renders himself liable to its penalties.**

(April 17, 1894.)

EXCEPTIONS by the prosecuting attorney to rulings of the District Court for Gage County, which resulted in the acquittal of the defendant, who was on trial for practicing medicine as a Christian Scientist, without a certificate from the state board of health. *Exceptions sustained.*

The facts are stated in the commissioner's opinion.

Messrs. George H. Hastings, Atty. Gen., and R. W. Sabin, County Atty. for Gage County, for plaintiff in error.

Messrs. Rickards & Prout, and Alfred Haslett, for defendant in error:

The section under consideration was drafted by a committee appointed by the state medical society and for the purpose of debarring, if possible, the people of the Christian science

faith from carrying out the tenets of their religion and "worshiping Almighty God according to the dictates of their own consciences."

Smith v. Lane, 24 Hun, 632, was an action brought by the plaintiff to recover for services in the treatment of the defendant for bodily ills. The treatment consisted wholly in rubbing, kneading and pressure. The defendant resisted the claim wholly on the ground that the plaintiff was not a graduate of any medical school, and had no license permitting him to practice either medicine or surgery under the general laws of the state. The court says: "It is manifest that the object of the legislature in the enactment of the chapter was only to provide for regulating the practice of medicine or surgery, as those terms are usually or generally understood, and confining them to such significance, it is evident that they would not include the occupation of the plaintiff. The practice of medicine is a pursuit very generally known and understood, and so also is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances. It was entirely proper for the legislature, by means of this chapter, to prescribe the qualifications of the persons who might be intrusted with the performance of these very important duties. . . . If the plaintiff's pretensions were well founded then diseases would no longer be formidable, and even death itself would be deprived of its terrors. But because he has professed more than he has the ability to accomplish he cannot, on that account, be subjected to the disability provided for in this act. His system of practice was rather that of nursing than of either medicine or surgery. It could, in no event result in any other injury to the person practiced upon than that of possible financial loss. No bodily disability or diseases could either result from or be aggravated by the applications made by him. And what he did in no just

*Headnotes by RYAN, C.

NOTE.—The above decision is the first we believe on the subject of a so-called Christian scientist's right to practice attempts to heal the sick without a license as a physician.

For constitutional matters as to the right to 24 L. R. A.

practice medicine without a license, see that part of the note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. beginning on p. 581.

sense either constituted the practice of medicine or surgery."

To place upon this section the construction contended for by the state, and to hold that practices of the defendant are a violation of the law would be to abrogate section 4 of article 1 of the Constitution of this state, which provides that "all persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."

Medicine is not a science, although many of our medical brethren delight in so terming it. Dr. Magendie, an eminent French physician in charge of a Paris hospital, at one time experimented with about four thousand patients under his charge. He divided them equally in three classes, one third he treated according to the prescribed methods of the profession, to another third he gave nothing but bread pills, under the guise of medicine, to the remaining class he gave no medicine whatever, simply the careful nursing of the hospital. The result of the experiment was that of the first class who were treated in the ordinary manner a larger part of them died; of the second class, who were treated with bread pills, a small percent died; of the third class, who received simple nursing, every one recovered. After relating to the students of the Paris medical college the result of the experiment the doctor continued: "Gentlemen: Medicine is a great humbug, it is nothing like science. Doctors are mere empirics, when they are not charlatans. We are ignorant as men can be. I must tell you frankly that I know nothing about medicine. I repeat to you there is no such thing as medical science. I grant you people are cured, but how? Nature does a great deal, but doctors do devilish little."

Sir Astley Cooper, the eminent English physician, said: "The science of medicine is founded on conjecture and improved by murder."

Dr. Armour, of the Long Island College Hospital, in an article in the New York Medical Journal, for January, 1883, says: "Drugs are administered, patients sometimes recover, and we have supposed that we have cured them whereas our remedies have had little or nothing to do with their recovery; very likely it took place in spite of the drugs."

Dr. Oliver Wendell Holmes, in an address to the Massachusetts Medical Society, said: "I firmly believe that if the whole *Materia Medica* could be sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes."

It is the work of this profession that is sought to be protected by the act under consideration and by this class of legislation wherever met with.

The most specious excuse for not extending to medical advice the principle of free trade is the same as that given for not leaving education to be diffused under them; namely, that the judgment of the consumer is not a sufficient guarantee for the goodness of the commodity. The intolerance shown by orthodox surgeons and physicians toward unordained followers of their calling is to be understood as arising from a desire to defend the public against quackery. Ignorant people, say they,

cannot distinguish good treatment from bad, or skillful advisers from unskillful ones; hence, it is needful that the choice be made for them. And then, following in the track of priesthood, for whose persecutions a similar defense has always been set up, they agitate for more stringent regulations against unlicensed practitioners, and descant upon the dangers to which men are exposed by an unrestricted system.

Spencer, *Social Statistics*, pp. 408-411.

Ryan, C., filed the following opinion:

The material parts of the indictment upon which the defendant was tried were in the following language: "That Ezra M. Buswell, late of the county aforesaid, on the first day of September in the year of our Lord one thousand eight hundred and ninety-one, in the county of Gage and state of Nebraska aforesaid, then and there an illiterate man, and unskilled in the art and faculty of medicine and surgery, and devising and intending by divers unlawful means, falsely, unlawfully, craftily, and wickedly, to deceive and defraud the people and citizens of said county of their goods, chattels, and money, to maintain his dishonest course of living, on the first day of September in the year of our Lord one thousand eight hundred and ninety-one, and thence continually until the finding of this indictment, to wit, for the space of eighteen months, at divers places in said county, falsely and unlawfully did assume upon himself to execute, exercise, and occupy the art, faculty, and science of a physician and surgeon, and did then and there profess to heal and otherwise treat sick persons, of their physical and mental ailments, and did then and there, falsely and fraudulently, as a physician and pretended healer of sick persons, attend on sick persons, and persons with various infirmities, diseases, and wounds, and treat them, and profess to heal them, in the city of Beatrice, and divers other places in said county,—the said Ezra M. Buswell never having been a graduate from any medical college; nor had he a diploma from any medical college, as required by law, to practice medicine in said state, nor had he a certificate from the state board of health of said state, entitling him to practice medicine or surgery, or otherwise treat, or profess to heal, physical or mental ailments, nor had he complied with the law, in any respect, so as to entitle him to practice medicine or surgery, or treat, in any manner, physical or mental ailments; nor had he confined himself to administering gratuitous services in cases of emergency, or to the administering of ordinary household remedies." The defendant was acquitted, and the case is brought to this court under the provisions of sections 483, 515-517, of the Criminal Code. To a compliance on our part with the provisions of the sections just referred to, it is necessary only to consider the sixth instruction given at the request of the defendant. This instruction was in the following language: "(6) The jury are instructed, as a matter of law, that it is manifest, from the law under which defendant is indicted, that the object of the legislature in the enactment thereof was only to provide for the regulation of the practice of 'medicine, sur-

gery, and obstetrics,' as these terms are generally understood; and unless you believe from the evidence, and beyond a reasonable doubt, that the defendant, within the time mentioned in the indictment, practiced 'medicine, surgery and obstetrics,' as these terms are usually and generally understood, then you will find the defendant not guilty." The law to which reference was made in the instruction is found in chapter 85 of the Laws of 1891. The Act constituting chapter 85, aforesaid, was entitled "An Act to Establish a State Board of Health; to Regulate the Practice of Medicine in the State of Nebraska," etc. Section 17 thereof was as follows: "Sec. 17. Any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another; but nothing in this act shall be construed to prohibit gratuitous services in case of emergency, and this act shall not apply to commissioned surgeons of the United States army or navy, nor to nurses in their legitimate occupations, nor to the administering of ordinary household remedies." The other provisions of the act are, for our purpose, sufficiently indicated in the language already quoted from the indictment. The instruction complained of required, as an indispensable prerequisite to a conviction, that the jury should find that the defendant, within the time mentioned in the indictment, had practiced "medicine, surgery, or obstetrics," as those terms are usually and generally understood. Governed by this instruction, the jury could not do otherwise than acquit, for there was no proof to meet its requirement. Whether or not the instruction was proper, in view of the evidence adduced, is the sole question presented for our determination.

It is conceded that the perfect toleration of religious sentiment, and enjoyment of liberty in all religious matters, is of paramount importance; and, lest the contention of the defendant may be misunderstood or imperfectly stated in our own language, that contained in the brief filed on behalf of the defendant will be freely used. Such evidence as was in that brief, deemed sufficient to illustrate the argument for defendant, was as follows: Richard Walthers testified that his brother's boy came home from Florida in September, 1892; that there were running sores on his legs, caused by rheumatism, and that he could not walk, except by the aid of crutches; that after the defendant had seen him, about two weeks after the boy came back, he laid aside his crutches, and walked by the aid of a cane, and after using that for awhile, threw it away, and walked as other boys do. James Ellerbeck testified to having been bitten by a rattlesnake, and that he at once sought the defendant, and asked him for help. After talking with the defendant at the church rooms, they went to Rev. Buswell's house; and what took place there is best told in the language of the witness himself: "Q. What did you do then? A. The pain ceased after his treatment, and after driving to his house it seemed to get worse, until about 8 o'clock. He talked to me on the Bible, and different subjects in the Bible, and about 8 o'clock he said he would treat me again. I laid down on a lounge, and

he sat down, and put his hands over his face, and was in that position, may be, ten or fifteen minutes; and all at once I felt it come right through me, and it raised me up, and I sat on the lounge, and I told him I had wakened up. And from that time on I had no more pain, only there was one or two minutes, when I first got up, and put my foot on the floor, that the stiffness seemed to be hard, for a few minutes. Now, during all this time, I never lost a meal, nor an hour's sleep, after that one treatment." L. Bushnell testified that he was afflicted with a disease that baffled the skill of the physicians who advised him, if he could obtain assistance from scientists that he should try; that he then sought aid from them, and a very short time afterwards was able to go about as usual, and sawed wood for the people of the village in order to earn his livelihood; that about three years prior to the time of giving his testimony, he had fallen down a flight of stairs, and had received serious injuries; that the defendant was sent for, and visited him; and that he recovered without any other aid than that of the prayers of the defendant. The witness Burgess testified of his serious illness from pneumonia, and that the defendant called on him, and explained the Scripture to him, and prayed for him, and that in a short time he recovered. Mrs. Gibbs testified that in the previous January her little boy, four years of age, had an attack of scarlet fever; that the physicians pronounced his case hopeless; that the child was treated by the scientists, and fully recovered. The defendant, Buswell, having been sworn, testified that he was a Christian scientist, so far as he understood, and that he lived up to the teachings of Jesus Christ; that he first studied the Christian science in his home, at Beatrice, and was cured of physical ills through that study. After that he studied with Mary B. G. Eddy in her Metaphysical College, in Boston, of which college he was afterwards a graduate. The term "Christian," as he understood it, means "Christlike;" the teachings of Jesus understood and followed; science, truth understood. He further testified that the Scripture teaches us that God is truth. "Truth," the witness said, "is that which is always the same, can never change; the one Supreme Being, the All Powerful; that which created all things that are; He who made all that was made, and made it good, as is said in His Word. The Scripture tells us to know the truth, and it will make us free. We understand 'to be free' means to be free in the full sense,—free from sickness as well as from sin; that if God can heal the sinner he can heal the sick, or else the sick are more hopelessly lost than the sinner." "The Christian Science Church," said the witness, "has a recognized code and textbooks of theology. These text books are the Bible, Science and Health. Rev. Mary B. G. Eddy, of Boston, is the author of the book called 'Science and Health.' It and the Bible are the recognized standard among Christian scientists, and adherents of that faith." The accused further testified that he had not practiced surgery or medicine, or any of the branches thereof, within the state of Nebraska, within eighteen months preceding the trial; that, in a medical sense, he had not, within

eighteen months, treated any physical or mental ailment within that time, for, said he, "I understand with God's laws, and not mortal man's. We can experience this only as we learn of the nothingness of mortal man, and of the omnipotence of God. When persons request aid, and come to us for advice and assistance, we treat them as a mother treats her child that is frightened at some object it fears,—by showing them that God is love, and understanding the all presence of love, there is no room for fear. We treat it as a question of fear; that is, we seek to dispel the fear by showing them the presence of love. The Scripture tells us that perfect love casts out fear. If we can convince ourselves, and those that are suffering, that God is all powerful, and that God is supreme; if we can show them, through the Bible, that God is the power that reigns entirely,—just so far as they understand that, so far will they experience love and harmony, and respond, as we speak of it. So far as I understand them, I have taught and teach the doctrine of Christian Science. Prayer enters into our work. We are taught by the Scripture to pray always. We understand prayer to mean the earnest, sincere desire of the heart; and that desire is that we may know the omnipotence of God, and the nothingness of ourselves. Our authority for this treatment is the Scripture,—Jesus' teachings. Jesus taught His disciples to go out in the world, and He healed the sick, and cast out devils, and raised the dead; and He further said (His last words before his ascension): 'Teach all nations, baptizing them in the name of the Father, Son, and Holy Ghost.' 'Teach them, if you are My disciples, to observe all things whatsoever I have commanded you; and lo! I am with you always, even unto the end of the world.' We believe and understand, so far as we obey him, that the same power is for us to-day, as well as eighteen hundred years ago." Continuing his evidence, this witness said: "I have been engaged in this work since I first began to read 'Science and Health' in connection with the Bible, which was eight years ago. I was healed from physical ills through the 'Science and Health' and the Scripture. I was not treated by Christian scientists." In the course of his testimony, this question was asked the witness, and the following answer was elicited: "Q. What is your custom in allowing people and parents to call physicians,—the custom of yourself and church? A. We believe that every one has a right to express their wish, and it is always understood that if they prefer some other treatment, or some other mode, or some one else to aid them, it is their privilege. We always do that. It is taught in our text-books. We never give any medicine. That is entirely contrary to the teaching of Christian-science. I treated Mr. Burgess about three years ago. I found him suffering a great deal. If I remember, he was not able to sit up; was bolstered up in bed, I think. I treated him solemnly, and talked with him of the teaching of the Scripture, and read to him from them, and also from 'Science and Health,' and sought to show him that there was a greater power than man, and that that power ruled in love, and, in proportion as that power was under-

stood, we should realize (demonstrate) the presence of love. At the end of a week, he was able to go to his stock yards. I have no way of knowing the number of persons I have treated within eighteen months by means of Christian science. I may have treated a hundred or more. Of these, only two died."

Commenting upon the facts, counsel for defendant make use of the language following: "To place upon this section [17, *supra*] the construction contended for by the state, and to hold that the practices of the defendant are a violation of the law, would be to abrogate section 4, article 1, of the Constitution of this state, which provides that all persons have the natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, and also the second provision of section 4 of the Enabling Act, which provides that perfect toleration of religious sentiments shall be secured, and no inhabitant of said state shall ever be molested, in person or property, on account of his or her mode of religious worship. The defendant, and those of the same faith with him, believe, as a matter of conscience, that the giving of medicine is a sin; that it is placing faith in the power of material things, which belongs alone to Omnipotence. To the Christian scientist, it is as much a violation of the law of God to take drugs for the alleviation of suffering or the cure of disease, as for a Methodist clergyman to take the name of his God in vain to relieve his overwrought feelings. It is as much the duty of the defendant, as his conscience and understanding teach him his duty, to visit the sick and afflicted, and relieve their distress of mind, as it is for the Presbyterian minister to go into his pulpit on Sabbath morning and preach the word of God according to the understanding of that denomination, or visit the bedside of one of his sick parishioners, and administer that religious consolation which is so dear to the heart of the Christian, and which is apparently so necessary to their spiritual welfare. The act of the latter, the eyes of all Christendom look upon in admiration, as the performance of a Christian duty. Upon the former, the able counsel for the state would have the world look as upon the act of a criminal."

The defendant relied upon the teachings of the Bible as his authority as a Christian scientist. It will not, therefore, be amiss to refer to it for instances applicable to his case. In the eighth chapter of the Acts of the Apostles, we find an account of Simon, a sorcerer, who had used sorcery, and bewitched the people of Samaria, giving out that himself was some great one. This Simon was thought to be the possessor of great power. Under the ministrations of Philip, he believed, and was baptized. Thereafter, sufficiently for our purpose, there follows a statement of the conduct of this convert, beginning with the eighteenth, and ending with the twenty-third, verse of the chapter just cited. These verses are as follows:

"18. And when Simon saw that, through laying on of the apostles' hands, the Holy Ghost was given, he offered them money,

"19. Saying, Give me also this power, that on whomsoever I lay hands he may receive the Holy Ghost.

"20. But Peter said unto him, Thy money perish with thee, because thou has thought that the gift of God may be purchased with money.

"21. Thou has neither part nor lot in this matter; for thy heart is not right in the sight of God.

"22. Repent therefore of this thy wickedness, and pray God, if perhaps the thought of thine heart may be forgiven thee.

"23. For I perceive that thou art in the gall of bitterness, and in the bond of iniquity."

It would seem, from this account, that Simon regarded the gift of the Holy Ghost, by the laying on of hands, as something akin to, and an improvement upon, the sorcery which he himself had practiced, and, therefore, that its advantages were proper subjects of barter. The language of Peter, "Thy money perish with thee, because thou has thought that the gift of God may be purchased with money," was a most emphatic and authoritative refutation of the idea that this special gift of God could form a proper basis for money transactions. The universal reprobation in which the conduct of Simon has ever been held has crystallized in the Latin word "Simonia," the English, "Simony," etc.; the derivative, in each instance, signifying either the crime of buying or selling ecclesiastical preferment, or the corrupt presentation of any one to an ecclesiastical benefice for money or reward. In the case at bar the defendant testified as follows: "Q. You may state whether or not you make any charges when people come to you for advice, or when you go to them. A. As a rule I do not. We tell them we leave the question to them and God. I spend my whole time at work, showing the people, through examination and administration, what the teachings of the Scripture are; and Jesus says the laborer is worthy of his meat (?), and we expect that those who we spend our time for to remunerate us for it. If they are not willing to part with the sacrifice themselves, it is not expected that those should reap the benefit." This language puts the matter of compensation in a milder form than that adopted by Simon in the case above cited, but that even this modified claim is open to serious objection we think still further illustrated by an instance to which reference will now be made. In the fifth chapter of the second book of Kings, there is an account of the healing of Naaman of leprosy by compliance with a very simple hydropathic course of treatment prescribed by the prophet Elisha. After he was healed, Naaman said to Elisha, "I pray thee, take a blessing of thy servant;" but Elisha said, "As the Lord liveth, before whom I stand, I will receive none." And he urged him to take it, but he refused. The subsequent proceedings are best given in the language found in verses 20 to 27, inclusive.

"20. But Gehazi, the servant of Elisha the man of God, said, Behold, my master has spared Naaman this Syrian, in not receiving at his hands that which he brought: but as the Lord liveth, I will run after him, and take somewhat of him.

"21. So Gehazi followed after Naaman. And when Naaman saw him running after him, he lighted down from the chariot to meet him, and said, Is all well?

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"22. And he said, All is well. My master hath sent me, saying, Behold, even now there be come to me from Mount Ephraim two young men of the sons of the prophets: give them, I pray thee, a talent of silver, and two changes of garments.

"23. And Naaman said, Be content, take two talents. And he urged him, and bound two talents of silver in two bags, with two changes of garments, and laid them upon two of his servants, and they bare them before him.

"24. And when he came to the tower, he took them from their hand, and bestowed them in the house: and he let the men go, and they departed.

"25. But he went in, and stood before his master. And Elisha said unto him, Whence comest thou, Gehazi? And he said, Thy servant went no whither.

"26. And he said unto him, Went not mine heart with thee, when the man turned again from his chariot to meet thee? Is it a time to receive money, and to receive garments, and olive yards, and vineyards, and sheep, and oxen, and men servants, and maid servants?

"27. The leprosy therefore of Naaman shall cleave unto thee, and thy seed forever. And he went out from his presence a leper as white as snow."

In chapter 22 *et seq.* of Numbers is recorded God's disapproval of Balaam's partly executed project of profiting by the use of the Divine power with which he was endowed.

In the light of these instances cited from defendant's own authority, it is confidently believed that the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty, as was claimed in the district court. There is no claim in this case that compensation, in one or the other of these methods, was not accepted when tendered. The evidence affirmatively shows the contrary. Not only is this true, but we find a very considerable part of defendant's brief devoted to an argument as to the inefficiency of the established and recognized modes of treatment in the cure of diseases, as compared with defendant's method, as tested by the results attained. The evidence upon which the case was tried convinces us that the defendant was engaged in treating physical ailments of others for compensation. He was within none of the exceptions provided by statute. The instruction which required that, to a conviction, he should be found guilty of practicing medicine, surgery, or obstetrics, as generally or usually understood, was erroneous. The object of the statute is to protect the afflicted from the pretensions of the ignorant and avaricious, and its provisions are not limited to those who attempt to follow beaten paths and established usages. The conservatism resulting from the study of standard authors might be somewhat depended on to minimize the evils attendant upon unlicensed practitioners' attempts to follow regular and approved methods, although, as against even these, the law should be enforced. Still more stringently should its provisions be rendered effective against pretensions based upon ignorance, on the one hand, and credulity, on the other. The statute does not merely give

a new definition to language having already a given and fixed meaning. It rather created a new class of offenses, in clear and unambiguous language, which should be interpreted and enforced according to its terms. Under the indictment the sole question presented, upon the evidence, was whether or not the defendant, within the time charged, had operated on, or professed to heal, or prescribe for, or otherwise treated, any physical or mental ailment of another. There was involved no question of

sentiment, nor of religious practice or duty. If the defendant was guilty as charged, neither pretense of worship, nor of the performance of any other duty, should have exonerated him from the punishment which an infraction of the statute involved. In cases presented as is this case, no judgment can be rendered in this court, and therefore none will be attempted. The exceptions of the county attorney are sustained.

Exceptions sustained.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES, *Appl.*,

v.

TRANS-MISSOURI FREIGHT ASSOCIATION *et al.*

(58 Fed. Rep. 53.)

1. A statute must be read in the light of all general laws upon the same subject in force at the time of its passage.
2. Words which have acquired a well understood meaning by judicial interpretation must be presumed to be used in that sense in a subsequent statute, unless the contrary clearly appears.
3. Common-law terms used in an Act of Congress creating an offense without defining the terms may be interpreted by the common law.
4. Contracts between carriers are not necessarily invalid because they incidentally restrict competition, but this depends upon their reasonableness.
5. An alleged violation of the Anti-Trust Act of Congress must be clearly within its provisions, as the statute is a criminal one.
6. Fraud and illegality in contracts are not to be presumed.
7. An association of railroad companies for mutual protection by establishing and maintaining reasonable rates, rules and regulations is not illegal as a restraint of trade, under the Anti-Trust Act of Congress, merely because it incidentally tends to restrict competition in some degree, where each member of the association must still compete with other members for business, and while regular monthly meetings are provided for at which action may be taken, five days' notice of any proposed reduction of rates or change of rules must be given, and members are bound by the decision of the association, unless they give written notice in ten days thereafter to the contrary, and any member may withdraw on thirty days' notice.
8. An association of railroad compa-

nies cannot be held to create a monopoly, within the meaning of the Anti-Trust Act of Congress, where it is not intended to have any trade of its own, but to be a mere adviser of its members, who are competitors of each other.

9. A contract between competing railroad companies is not necessarily "in restraint of trade" and illegal, within the meaning of the Anti-Trust Act of Congress, because it in some manner imposes a restriction upon competition.

(Shiras, District Judge, *dissent*.)

(October 2, 1890.)

APPEAL by plaintiff from a decree of the Circuit Court of the United States for the District of Kansas in favor of defendants in a proceeding to dissolve the Trans-Missouri Freight Association on the ground that it had violated the United States Anti-Trust Act. *Affirmed.*

Statement by Sanborn, *Circuit Judge*:

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States against the Trans-Missouri Freight Association and eighteen railroad companies under the provisions of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the "Sherman Anti-Trust Act" (26 Stat. at L. 209, chap. 647; Rev. Stat. Supp. 762) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

The bill alleges that the defendant rail-

NOTE.—The Anti-Trust Act of Congress receives in the above case an extraordinary discussion and review. The briefs of counsel and the opinion of the court very exhaustively present the law applicable to the subject. The decision is quite in accord with that of *Queen Ins. Co. v. State (Tex.)* 22 L. R. A. 433.
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Since this case was prepared for publication we have learned that it has been taken to the Supreme Court of the United States, but considering its great practical importance it is deemed best to report it here without waiting for the decision of that court.

road companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz: Atchison, Topeka & Santa Fé Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red river; thence *via* that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence *via* the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence *via* the said eastern boundary line to the international line,—the foregoing to be known as the 'Missouri River Line'; thence *via* said international line to the Pacific coast; thence *via* the Pacific coast to the international line between the United States and Mexico; thence

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via said international line to the Gulf of Mexico, and thence *via* said Gulf to the point of beginning, including business between points on the boundary line as described.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

"Exceptions.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business *via* their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver & Rio Grande Western railway companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental & International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone and gravel from Colorado, Wyoming and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

* Article II.

"Sec. 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and where the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this

article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which

due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"Article III.

"The duties and powers of the chairman shall be as follows:

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 8 of article 8 of the agreement.

"Article IV.

"Any willful under billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement. L. R. A.

ment, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"Article V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two thirds vote of the members.

"Article VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employees, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"Article VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"Article VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are deprived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not

members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the Interstate Commerce Law of February 4, 1887, entitled "An Act to Regulate Commerce" (24 Stat. at L. 379, chap. 104; Rev. Stat. Supp. 529) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the Act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1890, and that rules, regulations, and rates of freight have since been fixed and charged by the association thus formed, and that they have complied with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and the acts amendatory thereof. They aver that under that Act they were required to make all charges reasonable and just; that they

were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the Interstate Commerce Commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the Interstate Commerce Commission under the Act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the Interstate Commerce Act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 58 Fed. Rep. 440.

Argued before *Sanborn, Circuit Judge*, and *Shiras and Thayer, District Judges*.

Mr. J. W. Ady for appellant.

Mr. George R. Peck, for appellees:

I. The Act of July 2, 1890, commonly called the Anti-Trust Act, does not include, and was not intended to include, combination or agreements between railway companies. The provisions of the Act operate, and were intended to operate, upon other and different combinations, and have no application to agreements or combinations between railway companies.

The Act itself does not assume to deal with transportation or with the carrying trade of the country.

A comparison of the different provisions of the Act, shows that the idea that railway combinations are included in it, cannot for one moment be entertained.

All statutes are read in the light of history. *Church of Holy Trinity v. United States*, 148 U. S. 457, 36 L. ed. 227.

When the Act under which this suit is brought was passed, the public mind was in an agitated and excited state on the subject of trusts. When the Fifty-first Congress met in December, 1889, a great number of trusts ex

isted, some small and some large, some local and some national,—and even international.

So far as congressional regulation of railways was concerned it was a time of profound peace. The people had already demanded a law upon that subject and had obtained it. The subject of Congressional Railway Legislation had had its day; the Interstate Commerce Act had been passed and all of its provisions were in active operation.

Historically considered, trusts were the evils specially in mind when Congress passed the Act under consideration.

Traffic associations were well known, both when the Interstate Commerce Act was passed and when the Anti-Trust Act was passed.

In the very first annual report of the Interstate Commerce Commission, an elaborately prepared official document, the Commission, with all the facts before it, had spoken in high commendation of traffic associations.

With this report, before Congress, is it possible to believe that they intended by the Anti-Trust Act to prohibit traffic associations—the very instrumentalities upon which the Interstate Commerce Commission relied for assistance in carrying on its great work?

Congress positively refused to include transportation.

An amendment was introduced in the House of Representatives specifically including transportation, and it was rejected, as shown by the Congressional record which the court can examine.

Blake v. National City Bank of New York, 90 U. S. 23 Wall. 307, 23 L. ed. 119. See Cong. Rec. vol. 21, part 1, p. 96; Cong. Rec. vol. 21, part 4, p. 8153; Cong. Rec. vol. 21, part 4, p. 3857; Cong. Rec. vol. 21, part 5, p. 4069; Cong. Rec. vol. 21, part 5, p. 4104; Cong. Rec. vol. 21, part 5, p. 4123; Cong. Rec. vol. 21, part 5, p. 4753; Cong. Rec. vol. 21, part 5, p. 4857; Cong. Rec. vol. 21, part 6, p. 5118; Cong. Rec. vol. 21, part 6, p. 5950; Cong. Rec. vol. 21, part 6, p. 5981; Cong. Rec. vol. 21, part 7, p. 6116; Cong. Rec. vol. 21, part 7, p. 6206; Cong. Rec. vol. 21, part 7, p. 6312.

Taken as a whole, the Interstate Commerce Act is special and regulative, while the Anti-Trust Act is general and prohibitive.

The penalties, the procedure, the entire machinery by which the two acts are enforced is so different as to make it impossible that they were intended to cover the same subject.

Where a statute in general words is compared with a statute which is special or particular, the general gives way to the special and will not be held to embrace the subject contained in the special statute unless the intention that it should be so is clearly manifested.

Endlich, Interpretation of Statutes, § 225; Bishop, Written Laws, § 126; *Brewer v. Blougher*, 39 U. S. 14 Pet. 178, 10 L. ed. 408; *Akins v. Fiber Disintegrating Co.* 85 U. S. 18 Wall. 272, 21 L. ed. 841; *United States v. Saunders*, 89 U. S. 22 Wall. 493, 23 L. ed. 736; *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012.

II. The agreement of March 15, 1889, between the defendants is neither a "contract, combination in the form of trust or otherwise," 34 L. R. A.

or conspiracy in restraint of trade or commerce among the several states," nor by virtue of it do the defendants "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states." The agreement, therefore, is not a violation of the Act of July 2, 1890.

Whatever in the way of restraint of trade or commerce, or of monopolizing, is illegal at the common law, is illegal under this statute, and not otherwise.

Patterson, Contracts in Restraint of Trade, 52, 53.

Restraint of trade, at the common law, meant that restriction upon freedom of action which, first, deprived the public of the restricted party's industry, and, secondly, precluded the restricted party from pursuing his occupation, and thus prevented him from supporting himself and family.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 64, 23 L. ed. 815.

A monopoly was originally a grant by the crown to certain persons or corporations of the exclusive right to carry on some business, trade or avocation.

The Monopolies, 11 Coke, 84 b.

Monopoly, at the present day, simply means the obtaining, without a grant from the sovereign, of the exclusive power to carry on a certain trade or business.

Is the Trans-Missouri Association an organization in restraint of trade or commerce? An indispensable element of restraint of trade, in its proper legal sense, is that one or more of the parties to the contract must agree to go out of business, and surrender that which before belonged to him or them to the other parties making the agreement.

The contract between the defendants, constituting the Trans-Missouri Freight Association, is clearly not within the section of the Act which prohibits restraint of trade.

Mitchell v. Reynolds, 1 P. Wms. 181, 192, 197; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 23 L. ed. 815.

The Anti-Trust Act does not forbid contracts and combinations merely on the ground that they are against public policy, but only such as are in restraint of trade or which monopolize or attempt to monopolize.

The phrase "public policy" can only mean the settled policy of a state or government which appears in its constitution, laws and judicial decisions.

Richardson v. Mellish, 2 Bing. 229, 252; *Mogul S.S. Co. v. McGregor* [1892] 2 App. Cas. 25, 45, 46; *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 205; *Hadden v. Barney*, 72 U. S. 5 Wall. 107, 18 L. ed. 518.

If the statute has not been violated by the defendants the government can well afford to wait for another opportunity to vindicate public policy.

Contracts in restraint of trade involve a diminution of the number of persons engaged in trade or of the supply furnished the public. If a contract alleged to be in restraint of trade contains one of these elements, then and not until then can public policy come in to determine whether the restraint is of such a char-

acter or goes to such extent as to make it violative of public right.

Patterson, Contracts in Restraint of Trade, 17; *Forbes v. Park*, 131 U. S. 88, 33 L. ed. 67; *Diamond Match Co. v. Roebert*, 106 N. Y. 478, 60 Am. Rep. 464; *Beal v. Chase*, 81 Mich. 490; *Proctor v. Sargent*, 2 Scott, N. R. 289.

The mere fact that a contract places a restriction upon trade or competition is not sufficient to avoid it.

Shrainka v. Scharringhausen, 8 Mo. App. 522; *Central Shade Roller Co. v. Oushman*, 148 Mass. 363; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 386; *Leather Oloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Waterman Thermometer Co. v. Pool*, 51 Hun, 157; *Perkins v. Lyman*, 9 Mass. 523; *Gloverster Ininglass & G. Co. v. Russia Cement Co.* 154 Mass. 92; *Jones v. Fell*, 5 Fla. 510; *Master Stevedores Asso. v. Walsh*, 2 Daly, 1; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Re Greene*, 52 Fed. Rep. 104.

The Anti-Trust Act is not intended, and does not profess, to enforce public duties; it is a general Act applicable to individuals as well as to corporations, and as it makes no distinction in the penalties imposed, it is plain that so far as the Act is concerned, it does not place corporations engaged in public duties on any different footing from individuals or corporations engaged in purely private pursuits.

The rule as to agreements in restraint of trade manifestly ought to be much more stringent in respect to individuals and private corporations than it is in respect to railway corporations, for the reason that individuals and private corporations are not subject to the limitations upon their charges which are imposed upon railway corporations by the law of their existence.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Jess v. Smith*, 19 N. Y. S. R. 556; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 2 Macn. & G. 324, 17 Q. B. 652; *Hare v. London & N. W. R. Co.* 2 John. & H. 80; *Ex parte Koehler*, 28 Fed. Rep. 529, 21 Am. & Eng. R. Cas. 57.

The agreement between the different companies constituting the Trans-Missouri Freight Association, discloses not a single element of a monopoly at common law.

The purpose of the agreement was not to raise rates, but to establish and maintain just and reasonable rates; and to establish just and reasonable rates is a right which belongs to every railroad company in the United States. It can never be legally wrong to contract for what is legally right.

The public are deprived of no facilities to which they are entitled; all the roads are in full operation, and as shown by the pleadings, the public are served for just and reasonable rates; how, then, can it be claimed that a monopoly has been established, or that the people have been or can be oppressed?

Stewart v. Erie & W. Transp. Co. 17 Minn. 372; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant. Ch. 540; *Wickens v. Evans*, 8 Youngs & J. 318; *Mogul S.S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, 28 Q. B. Div. 598, [1892] 2 App. 24 L. R. A.

Cas. 25; Eclipses Tonnboat Co. v. Pontchartrain R. Co. 24 La. Ann. 1.

No such legal doctrine as free and unrestricted competition ever existed. Competition was always a legal public right; but free and unrestrained competition, like unregulated liberty of any kind, has always belonged to the literature of doctrinaires and theorists, and never to the sober and sensible jurisprudence of the Anglo-Saxon race.

Kellogg v. Larkin, 3 Pinney, 150; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689.

Bargaining to limit competition, when it is kept within the bounds of reasonable protection, is legal, either assumed or expressly affirmed.

Mitchell v. Reynolds, 1 P. Wms. 181; *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 158; *Pierce v. Fuller*, 8 Mass. 228, 5 Am. Dec. 103; *Bowser v. Bliss*, 7 Blackf. 344, 43 Am. Dec. 98; *Grundy v. Edwards*, 7 J. J. Marsh. 363, 23 Am. Dec. 409; *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Moras Twist Drill & M. Co. v. Morse*, 103 Mass. 72, 4 Am. Rep. 513; *Hoyt v. Holly*, 39 Conn. 226, 13 Am. Rep. 390; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64.

Our legislative, judicial and commercial history for the past twenty-five years has all been against the doctrine of unrestrained competition.

As executive officers of the government in the control of railways, what the Interstate Commerce Commission has said and done on this subject amounts to an executive construction of the existing laws on the subject, and as such will be followed by the courts, except upon the most clear and conclusive showing that it is erroneous.

Brown v. United States, 118 U. S. 568, 23 L. ed. 1079.

The only criticism upon the associations, to be found anywhere in their reports, is that they have not in all cases lived up to their articles of agreement as closely as they ought, and that they should be strengthened and made more effective in their organization.

The agreement establishing the Trans-Missouri Freight Association was made long before the passage of the Anti-Trust Act. Making the agreement, therefore, was not a violation of this Act, for the Act was not then in existence. Whatever violation is now asserted consists, and must consist, in doing something—in acts that contravene the law. If the question of tendency is before the court, how can that tendency be established except by a consideration of what has actually happened by carrying out the agreement? What will happen can only be determined by a consideration of what has happened.

Stewart v. Erie & W. Transp. Co. 17 Minn. 372; *Mogul S.S. Co. v. McGregor*, [1892] 2 App. Cas. 25; *Eperton v. Brownlow*, 4 H. L. Cas. 108.

Freedom to contract is the rule, and all restraints upon it the exception.

Spangler v. Cleveland, 43 Ohio St. 526, 536; *Manhattan Gaslight Co. v. Barker*, 86 How. Pr. 233, 236; 1 High. Inj. 9.

Courts do not enlarge the meaning of statutes for the purpose of affording a doubtful

relief or of embracing an act not clearly and undoubtedly within its meaning.

United States v. Eaton, 144 U. S. 677, 86 L. ed. 591; *Chase v. Curtis*, 118 U. S. 452, 28 L. ed. 1038.

Messrs. B. P. Waggener, Wolcott & Vaile and Wallace Pratt, adopted the foregoing brief on behalf of companies represented by them.

Mr. John M. Thurston with Messrs. A. L. Williams, N. H. Loomis and R. W. Blair, for the Union Pacific Railway Co. *et al* appellees:

I. The articles of agreement of the Trans-Missouri Freight Association are justified by the provisions of the Interstate Commerce Act; and the objects sought to be attained by that association, as shown by its articles of agreement, are made necessary by the requirements of that Act.

Congress has left it entirely to the voluntary action of the carriers subject to the Act, to arrange the details for the interchange of traffic between them.

"Where the law commands anything to be done, it authorizes the performance of whatever may be necessary for executing its commands."

Sutherland, Stat. Constr. § 841; *Re Neagle*, 185 U. S. 1-87, 84 L. ed. 55-79; *New York v. Sands*, 105 N. Y. 210; 1 Kent, Com. 464.

II. The Interstate Commerce Act and its amendments form a special code of laws for the regulation of common carriers engaged in interstate traffic.

III. The Anti-Trust Act, under which this suit is brought, is general in its nature, and it is only by a literal construction of the Act, which is broad enough to include contracts of every kind and nature, that it can be said to include the articles of agreement in question.

IV. A statute in general terms, or treating the subject in a general manner, will not repeal the particular provisions of a prior statute, unless the general act indicates a plain intention to do so.

Sutherland, Stat. Constr. § 157; *Ex parte Crow Dog*, 109 U. S. 570, 27 L. ed. 1085; *State v. Archibald*, 43 Minn. 328; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770; *Robbins v. State*, 8 Ohio St. 131; *Crane v. Reeder*, 22 Mich. 322; *Skate v. Bishop*, 41 Mo. 16; *State v. Judge of St. Louis Prob. Ct.* 38 Mo. 584; *Rushville v. Rushville*, 32 Ill. App. 320; *Arthur v. Homer*, 96 U. S. 187, 24 L. ed. 811; *Brown v. Philadelphia County Comrs.* 21 Pa. 87.

V. The Interstate Commerce Act is one special in its nature, and with a particular object in view. The Act under which this suit is brought is one of a general nature, disclosing no intent to repeal any of the provisions of the Interstate Commerce Act. It follows, therefore, that none of the provisions of that Act are repealed by the Anti-Trust Act, and that the articles of agreement in question, which are authorized and made necessary by the provisions of the Interstate Commerce Act, are not in conflict with the Anti-Trust Act.

VI. The provisions of the Anti-Trust Act, under which this action is brought, were not intended to and do not relate to the business of common carriers, and therefore the articles 24 L. R. A.

of agreement in question are not in conflict with that Act.

The different portions of a statute are to be construed with reference to each other and in a sense which harmonizes with the subject matter and general purpose of the statute.

Sutherland, Stat. Constr. § 241; 1 Kent, Com. 461; *Brewer v. Blougher*, 39 U. S. 14 Pet. 193, 10 L. ed. 417; *Smith v. People*, 47 N. Y. 836; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 227.

VII. The articles of agreement of the Trans-Missouri Freight Association are not in restraint of trade and commerce, they do not create, nor attempt to create a monopoly, and are in no wise obnoxious to the provisions of the Anti-Trust Act.

By the common law, contracts in restraint of trade were those which prevented a person from pursuing his trade or from engaging in business either generally, or within a particular locality, or for a certain period of time.

2 Parsons, Cont. §§ 253-259; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315.

In Ray, on Contractual Limitations, p. 194, a work frequently quoted in complainant's brief, the modification of the ancient rule is thus referred to:

"The tendency of recent adjudications is to conform to the spirit which induced such modified legislation, and it is now clearly marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and unjust rule of that kind has ever been the law of England.

"The law has for centuries permitted contracts in restraint of trade when reasonable, and in *Horne v. Crafts*, 7 Bing. 785, Tindal, Ch. J., considered a true test to be, whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so advantageous as to interfere with the interest of the public. When the restraint is general, but at the same time is coextensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. There is no public reason which necessarily condemns the one and not the other.

See also *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464; *Whittaker v. Hove*, 8 Beav. 863; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 315; *Beal v. Chase*, 81 Mich. 490; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *National Benefit Co. v. Union Hospital Co.* 11 L. R. A. 437, 45 Minn. 272.

"In each particular case the surrounding circumstances are to be considered in determining whether the covenant will operate as a restraint, injurious to the public."

Ray, Contractual Limitations, 200; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979. See also *Beal v. Chase*, 81 Mich. 490.

The articles of agreement in question are not in restraint of trade, in the sense of being contrary to public policy.

Public policy is defined as "that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good."

19 Am. & Eng. Enc. Law, 565; *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Swann v. Swann*, 21 Fed. Rep. 299; *Davies v. Davies*, L. R. 36 Ch. Div. 364; Ray, Contractual Limitations, p. 197, § 44.

Unlimited competition between railroads is not essential for the protection of the public.

Morawetz, Priv. Corp. § 1181; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 819, 9 L. R. A. 639. See also, Ray, Contractual Limitations, 260; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Gloucester Ininglass & Glue Co. v. Russia Cement Co.* 13 L. R. A. 563, 154 Mass. 92; *Kellogg v. Larkin*, 3 Pinney, 150.

A definition of the word "monopoly" is given by the Supreme Court of the United States in *Charles River Bridge v. Warren Bridge Proprietors*, 36 U. S. 11 Pet. 607, 9 L. ed. 847.

It is an exclusive right granted to a few, of something which was before of common right.

4 Bl. Com. 159; *Bac. Abr. Prerogative*, F. 4. *Meera E. M. Spencer, C. A. Mosman, J. D. Strong and W. F. Guthrie* also for appellees.

Sanborn, C. J., delivered the opinion of the court:

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their main purpose. When acting independently, the spur of self-interest drives each corporation to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 Congress recognized and adopted this rule of public policy, and by section 5 of "An Act to Regulate Commerce," commonly called the "Interstate Commerce Act" (24 Stat. at L. 379, chap. 104; Rev. Stat. Supp. 539) prohibited such contracts between common carriers engaged in interstate or international commerce. That Act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly called the "Anti-Trust Act" (26 Stat. at L. 24 L. R. A.

309, chap. 647; Rev. Stat. Supp. 762) Congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act."

The government bases this suit on these provisions of the latter Act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; and third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation. The government does not claim that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the Interstate Commerce Act; but it insists that the Anti-Trust Act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the Anti-Trust Act prohibits any contract between competing railroad companies that restricts competition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the Anti-Trust Act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that Act? and if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the Anti-Trust Act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this Act.

but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the Supreme Court of the United States. *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67. Two years before its passage Congress had enacted the Interstate Commerce Law. They had there provided a code of rules and established a commission for the express purpose of regulating that part of interstate and international commerce which relates to transportation. Under these circumstances, three well settled rules of construction must be applied to ascertain the meaning and scope of the Act:

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the Act.

(2) Where words have acquired a well understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where Congress creates an offense, and uses common law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common law offense, for the definition of the offense if it is not clearly defined in the Act adopted or creating it. *United States v. Armstrong*, 2 Curt. 446; *United States v. Coppermith*, 4 Fed. Rep. 198; *Re Greene*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 66 U. S. 1 Black, 459, 469, 17 L. ed. 218, 221; *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. ed. 269, 271.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this Act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules to which we have referred and from the title of the Act, viz: "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," that it was such contracts, and such contracts only, that Congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft quoted remarks of Justice Burrough in *Richardson v. Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century

ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not use his art within the time limited. Hull, J., said: "In my opinion, you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and, per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king." Y. B., 2 Hen. V. fol. 5, pl. 26. In 1841, Lord Langdale, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid. *Whitaker v. Howe*, 8 Beav. 883. In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or in any other town where the plaintiffs might have been practicing was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns. *Mallon v. May*, 11 Mees. & W. 652, 667. In 1869, Vice Chancellor James sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it. *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 845. In 1889 the supreme court of New York sustained a contract not to manufacture or sell thermometers or storm glasses throughout the United States for ten years. *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 163. And in 1891 the supreme court held that a contract of a railroad corporation giving the Pullman Southern Car Company the exclusive right to furnish all drawing room and sleeping cars required by that road during a period of fifteen years was not an illegal restraint of trade, and sustained it. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97. It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject, we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the per-

sonal views of the judges who constitute the court. The public policy of the nation must be determined by its Constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it, beyond that it is unnecessary and unwise to pursue our inquiries. *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 197, 11 L. ed. 205, 283; *Swann v. Swann*, 21 Fed. Rep. 299.

Turning first, then, to the decisions, we find that it has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.

To maintain his proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, the counsel for the government has cited numerous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277. "It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction." *Stewart v. Erie & W. Transp. Co.* 17 Minn. 872. "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501. "Whatever destroys, or even restricts, competition in trade, is injurious, if not fatal, to it." *Hooker v. Vandewater*, 4 Denio, 849, 858, 47 Am. Dec. 24 L. R. A.

258. A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes to which we have referred, or rest upon some other ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178, 8 Am. Rep. 159; *India Bagging Assn. v. Kock*, 14 La. Ann. 168; *United States v. Jellico Mountain Coal & C. Co.* 19 L. R. A. 758, 46 Fed. Rep. 432; *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 686; and *People v. North River Sugar Ref. Co.* 54 Hun, 354; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 846, 22 Am. Rep. 171; *Hooker v. Vandewater*, 4 Denio, 849, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 375; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *Morrill v. Boston & M. R. Co.* 55 N. H. 531; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled nonmembers to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501, and *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were *ultra vires* the corporations, and their purpose and effect was to monopolize trade, like *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 18; and *Western U. Tele. Co. v. American U. Tele. Co.* 65 Ga. 160, 38 Am. Rep. 781; or cases of questionable authority, like *Com. v. Carlisle, Bright*, (Pa.) 36, 89. See, *contra*, *Snow v. Wheeler*, 118 Mass. 179, 185; *Boven v. Matheson*, 14 Allen, 499; *Skrasinka v. Scharringhausen*, 8 Mo. App. 522; and *Carew v. Ruthersford*, 106 Mass. 1, 14, 8 Am. Rep. 287. It was natural that in the discussion of contracts of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground,—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade; they rest on the well settled rules, and come within the well defined classes, to which we have above referred.

A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competi-

tion from illegal contracts in restraint of trade. The decision in the leading case upon this subject (*Mitchell v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. [7th Am. ed.] pt. 2, p. 708) the case which *Chief Justice* Fuller says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade (*Gibbs v. Consolidated Gas Co.* 180 U. S. 409, 82 L. ed. 984) held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. *Chief Justice* Parker, in delivering it, declared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of *Chief Justice* Parker that contracts in general restraint of trade are illegal—a remark that was not necessary to the determination of the question before him—has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tullis v. Tullis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general postoffice, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantor or his successors had an establishment or might have had one within six months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul SS. Co. v. McGregor*, 21 Q. B. Div. 544, certain ship-owners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of 5 per cent on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea carrying trade. The latter brought suit for an injunction and damages, but, notwithstanding the obvious restriction upon free competition, Lord Coleridge held that the association was not an unlawful combination in restraint of

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trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal (23 Q. B. Div. 598), and finally affirmed by the house of lords. [1892] App. Cas. 25. In *Parkins v. Lyman*, 9 Mass. 523, the supreme judicial court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Diamond Match Co. v. Roeder*, 106 N. Y. 478, 60 Am. Rep. 464, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the Supreme Court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for ten years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public by non-competing companies. *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Hoole v. Park*, 131 U. S. 88, 97, 83 L. ed. 67, 74; *Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 32 L. ed. 979; *Re Greene*, 52 Fed. Rep. 104, 118; *Hornner v. Graves*, 7 Bing. 735, 743; *Hubbard v. Miller*, 27 Mich. 15, 19, 15 Am. Rep. 153; *Roussillon v. Roussillon*, L. R. 14 Ch. Div. 851, 363; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 845, 354; *Wickens v. Evans*, 3 Younge & J. 318; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant. Ch. 540; *Mallan v. May*, 11 Mees. & W. 652, 657; *Whittaker v. Howe*, 3 Beav. 383; *Kellogg v. Larkin*, 3 Pinney, 123, 150; *Beul v. Chase*, 81 Mich. 490; *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389; *Gloucester Ininglass & G. Co. v. Russia Cement Co.* 154 Mass. 92, 94; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 163; *Master Stevedore's Asso. v. Walsh*, 3 Daly, 1; *Hodge v. Sloan*, 107 N. Y. 244; *Brown v. Rounsavell*, 78 Ill. 689; *Jones v. Fell*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the Anti-Trust Act was passed the rule had become firmly established in the jurisprudence of England and the United States that the va-

lidity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 82 L. ed. 979, 984; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 23 W. Va. 600, 625; *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* 121 Ill. 580, and *Western U. Tele. Co. v. American U. Tele. Co.* 65 Ga. 160, 38 Am. Rep. 781,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*Western U. Tele. Co. v. American U. Tele. Co.*) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* it was held that an owner of 2000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city,

could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Consolidated Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a . . . contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed. *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97; *Mogul SS. Co. v. McGregor*, 21 Q. B. Div. 544; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 78 Mo. 389, 39 Am. Rep. 519. But even if such an extreme view, as is above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the Interstate Commerce Law, and the action that has been taken thereunder by the government Commission which was created to enforce its provisions. The Interstate Commerce Law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the In-

terstate Commerce Act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation (Interstate Commerce Act, § 1); merchants may sell articles of like character and value for as many different prices as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services (Interstate Commerce Act, § 2); merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place (Interstate Commerce Act, § 3); merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul (Interstate Commerce Act, § 4); merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules (Interstate Commerce Act, § 6); merchants may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after ten days' public notice or from decreasing them except after three days' public notice (Interstate Commerce Act, § 6); merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a Commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions (Interstate Commerce Act, § 12). These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an Act of Congress three years before the Anti-Trust Act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the Interstate Commerce Commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of Congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare, that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the Interstate Commerce Act invites conferences between railway managers, and that concert of action in certain matters by railway com-

panies is absolutely essential to enable it to accomplish its true purpose.

In the Fourth Annual Report of the Commission, at page 19, we find the following statement:

"It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations, for the purpose of agreeing upon classifications and rates, and upon a great variety of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces." And on page 21 of the same report the following:

"In former reports, the Commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them."

In the Second Annual Report, on page 25, when speaking of the unity of railroad interests, the Commission uses this language:

"But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon."

And in the same report, on page 28, we find the following:

"A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest com-

petition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But, in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the First Annual Report, on page 83, the Commission further said:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps, more than anything else, influenced the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we assumed to state the reasons which probably influenced Congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the Interstate Commerce Commission, seems to some extent to invite conference and concert of action. It is likewise unnecessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 8 Inters. Com. Rep. 819, 9 L. R. A. 689. But, without entering into that discussion, it is sufficient to say that, in our judg-

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ment, there was no hard and fast rule in force when the Anti-Trust Act was enacted which made every contract between railroad companies void on grounds of public policy if it in any wise checked competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the Interstate Commerce Act, that such contracts were void, if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to examine the contract which is alleged to be in violation of the Anti-Trust Act, but before doing so a preliminary observation will not be out of place. The Anti-Trust Act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the Interstate Commerce Act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials of the answer, and the averments of fact in the answer stand admitted. *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.

The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon v. Barnard*, 88 U. S. 21 Wall. 430, 437, 22 L. ed. 673, 676; *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 577, 35 L. ed. 278, 281.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchell v. Reynolds*, 1 P. Wms. 181, the unfortunate remark "that wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad," fell from Chief Justice Parker. This seems to be the reverse of the proposition that every man is

presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 891; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 851, 865; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 872, 891; *Marsh v. Russell*, 66 N. Y. 288; *Phlippen v. Stickney*, 8 Met. 384, 389.

Proceeding, then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulations, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at the next monthly meeting, and all members shall be bound by the decision of the association, "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding \$100 in any case. Article 8 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4

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prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employees and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on 30 days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the Interstate Commerce Commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the

traffic embraced by the agreement are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think, that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the Interstate Commerce Act has prohibited such changes with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it, even under the operation of the agreement. It is much more probable that, under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than ten days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this was one of the

main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of the association open, fair, and honorable. All of these are objects that are in line with the true spirit of the Interstate Commerce Act and an intelligent public policy.

The result is that this contract, in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the Anti-Trust Act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that Act, evidenced by this contract. So far as can be learned from it, the association has never intended to have, and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses required to pay its officers and employes. It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration. So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such a competitor at its peril; but these provisions were necessary for the protection of members of the association against the attacks of non-members. Without such provisions unreasonably low rates established by the latter would draw away the business of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the fifteen days' notice in case of a warfare upon it by a non-member.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the

region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. *Re Greens*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.* 10 U. S. App. 98, 51 Fed. Rep. 309, 317-321; and it is unnecessary to repeat them here. It goes without saying that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for forty days unchanged. Practically the fifteen representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not perceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a thirty days' notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after fifteen days' notice of an intention to make the modifications and changes notwithstanding its ac-

tion. It is true that there is a provision in the second article of the agreement that regular meetings of the association shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the remark of the counsel for the government that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely, by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances, the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the Anti-Trust Act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the Anti-Trust Act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the Interstate Commerce Act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the Anti-Trust Act applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed, without costs.

Thayer, D. J., concura.

Shiras, D. J., dissenting:

I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such nonconcurrence.

Assuming that the Anti-Trust Act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into by the railway companies forming the Trans-Missouri Freight Association is in contravention of the statute, in that it deprives the public of the benefit of free competition between the associated railway companies, and thereby subjects the commerce of the regions tributary to these lines of railway to the possibility, if not the certainty, of paying increased rates for the transportation of freight over the same.

It is doubtless entirely true that at the present time a more liberal rule prevails than in the earlier days in regard to contracts affecting the business carried on by private citizens or corporations, when the same is essentially of a private nature, and only indirectly affects the public at large. As is pointed out in the opinion of the court, the use of steam and electricity in connection with the mercantile and commercial business of the world has so greatly increased the facilities for commercial intercourse that contracts which a century ago would have been in fact an unreasonable restriction upon trade in its then condition would not now produce the same result, and hence would not fall within the condemnation of the principle which declares unlawful all contracts or combinations which work an unreasonable restriction upon trade and commerce. The principle itself, however, remains in force at the common law even in regard to business enterprises which deal only with matters of private interest, and only incidentally affect the community at large. At an early day a distinction was recognized at the common law between the rules applicable to business pursuits of a purely private nature and those connected with matters directly affecting the community at large; as, for instance, the dealing in commodities forming the necessities of life. Contracts or combinations tending to create a monopoly in the latter articles were condemned as contrary to public policy, when like contracts affecting other kinds of property were held to be valid; and the same principle holds good at the present time. Another distinction which is now firmly established and enforced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combinations in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein. Thus in *Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 82 L. ed. 979, the Supreme Court, speaking by Mr. Chief Justice Fuller, declared that—

"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. . . . Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 463) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 23 W. Va. 600; *Chicago Gas-*

light & C. Co. v. People's Gaslight & C. Co. 121 Ill. 530; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781. . . . Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld."

In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 23 W. Va. 600, it is said:

"If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 121 Ill. 530, it is declared that—

"The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city."

It is not necessary to extend the citation of authorities upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of eminent domain, a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has

misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition therein laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods, or other like articles primarily owe no duty to the public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfill public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community, and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argument nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market. The merchant must use the same agency in bringing to his place of business the merchandise in which he deals. Practi-

cally the business of the community, whether in connection with articles of prime necessity, like food or fuel, or the other articles which are produced or dealt in by the people at large, becomes of necessity wholly dependent upon the facilities for transportation furnished by the given railway. As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.

Certainly, if it be true, as held in *Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 83 L. ed. 979, that the supplying of gas for illuminating purposes is a business of a public nature, because it supplies a public necessity, and that it is of such a character that contracts between companies engaged therein, looking to a regulating of competition, cannot be sustained because inimical to the public welfare, then it must also be true that the furnishing facilities for the transportation of the products of the country by means of railways is likewise a public business, and one of such character that contracts or combinations between the corporations engaged therein, intended to limit the effect of free competition upon the rates charged the public, must be held to be prejudicial to the public interests, and therefore to be invalid. It is said in the opinion of the court that—

"We find that it has long been settled that contracts or combinations of producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts or combinations between such producers or dealers to divide their profits in certain fixed proportions and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void."

Are not railway companies engaged in the transportation of articles of prime necessity to the people? Do they not handle the food products of the country, the fuel, and all the other necessities of life? Do not the rates charged for the transportation of these articles have as much to do with determining the prices paid by the community as the rates charged by those engaged in buying and selling the same upon the open market? If combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and void, why are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to

the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is therein admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime necessity to the people, tending to monopolize the supply or enhance the price, are contrary to public policy and therefore void; and yet it is maintained that public corporations like railway companies may combine to fix the rates to be charged for the transportation of the like commodities, which, of necessity, affects the cost to the consumer as well as the value to the producer, and that contracts thus arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid, unless it be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any contract affecting them affects the public; and clearly public corporations are under a more stringent rule in this particular.

Unlike private parties engaged in private pursuits, which only incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern form of public highways owe primarily a duty to the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the people and property of the country, and they are under constant obligation to use their corporate powers in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts or combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the Supreme Court in *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 33 L. ed. 979, are of such a public character that presumably they

cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom to contract or combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the interests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further, by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is, in my judgment, clearly contrary to the public welfare, and therefore illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this particular the public has relied upon the effect of competition in

keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation, in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation, expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to the two railway corporations to combine together, and by contract establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free and unrestrained competition between the companies engaged in the transportation business of the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates for the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intended to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation affording other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railway without placing the welfare of the public in subjection to the interests or supposed interests of those managing these corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained com-

petition, and not those which are agreed upon by the railway companies in the absence of competition. In the absence of legislation establishing a standard for reasonable rates, and in the absence of rates fixed by free competition, what practicable criterion is there for determining whether a tariff of rates agreed upon by railway companies is or is not reasonable with reference to the public? If it be the law that railway companies may combine together, and by contract agree upon the schedule of rates to be charged, and bind themselves under penalties not to depart from the schedule thus established, and if the individual citizen can obtain no relief against the exaction of rates thus fixed, unless he can in each instance prove to a court and jury that the rate charged is unreasonable, then he is in fact wholly without remedy. The great cost and other evils of litigation of this character would ordinarily deter the private citizen from the effort to maintain his rights by an appeal to the courts.

But if the citizen should assume these burdens, and should contest the rightfulness of the charges complained of, he would, under the view advanced in the majority opinion, be compelled to establish by competent evidence that the rate complained of was unreasonable. By what criterion is the question of the reasonableness of the rate charged to be determined? The article shipped is perhaps a carload or two of livestock or of wheat or other like products. Is the citizen to be compelled to attempt to prove what it really costs the railway company to transport these cars? Is the inquiry to embrace an investigation into the cost of the construction of the road, of the equipping the same, and of operating the road on the one hand, and into the total amount and character of the business done by the road, and of the amounts received therefrom, so as to ascertain whether a due relation exists between the income and expenditure? It must be apparent to any one that it would be wholly impracticable to enter upon such an investigation, and, if it was entered upon, the citizen would be at such a disadvantage as to amount to a total denial of justice to him. If it be said that the reasonableness of the rate charged is to be ascertained by comparison with the rates charged for like services by other railroads, then the rates accepted as the standard of comparison must be such as are the result of free competition, because it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value, and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority a very full and careful analysis is made of the various

provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it?

I can place no other construction upon this contract than that its main object was to remove the question of rates from the field of competition. In my judgment, it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admits that the defendant companies entered into the contract in question, and the main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent upon its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which was to bind all the contracting companies, and which each company was bound to enforce as against its patrons; thus depriving the public of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be wholly reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved from the effects of free and fair competition in the carrying on of the public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide

when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted for that afforded the public by the operation of the principle named.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the Interstate Commerce Act, it is therein argued that this Act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I must yet be permitted to say that it seems to me that the opinion always loses sight of the distinction existing at the common law between parties following private pursuits and public corporations engaged in public enterprises.

The Interstate Commerce Act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligation to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable, and not exorbitant, compensation for the services rendered by them. The purpose of the Interstate Commerce Act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of the railway companies, and to enforce compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the Interstate Commerce Act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there are evils of this nature of great magnitude is not to be denied, but the Interstate Commerce Act was not enacted for their eradication.

The primary purpose of that Act was to deal with the relations existing between the common carriers and the public, and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the Act was, in the language used by the Supreme Court in *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896, intended "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all ship-

pers on an absolute equality." The uniformity and equality of rates sought to be secured by that Act are not between the schedules of rates charged by the several companies, but between the charges actually made by each railway company to its patrons. The Act does not require the schedule of rates adopted by one company to conform to that of a rival company. What it does demand of each company is that, in dealing with its customers, it shall make no unjust discrimination, but shall, for the like service performed under similar circumstances, charge the same rate to all. The Act provides that all charges for the transportation of persons or property from state to state shall be reasonable and just, but no standard for ascertaining whether a given rate is reasonable or not is established by the Act.

I fail, therefore, to perceive the force of the argument that the adoption of the Interstate Commerce Act worked a radical change in the relations existing between railway companies and the public, and that one effect thereof was to authorize the former to combine together for the purpose of escaping the effect of competition upon the rates to be charged the public for the services rendered. Before the adoption of that Act the community was certainly entitled to the protection derived from free competition between the lines of railway engaged in interstate traffic, and there is nothing in that Act which deprives the public of this safeguard. That Act was intended to secure to the public the enjoyment of the pre-existing right to reasonable rates upon interstate commerce, and to defend the public against the evils resulting from unjust discrimination on behalf of favored parties, localities, or classes of business.

In the opinion of the court are found citations from the reports of the Interstate Commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and dis-

aster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in, does not show that it was the intent of Congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates.

There are three general methods by which these rates may be established. It may be done by direct legislative enactment (whereby either fixed rates or a maximum or minimum limit are enacted by the statute or by provisions for the adoption of rates by a commission) or the rates may be adopted by the independent action of each company, acting under the spur of self-interest, and controlled by the effect of free competition, or the rates may be fixed by means of agreements or combinations between the rival lines of railway, whereby each contracting company is bound to charge the rate thus fixed and agreed upon. Congress has not yet undertaken to establish a standard of rates, either directly or through the action of a commission or the equivalent. Neither, in my judgment, has Congress, in enacting the interstate commerce statute and the amendments thereto, conferred upon the railways the right to enter into combinations for the purpose of compelling the members to charge the rates fixed by a committee of the association, in whose deliberations the public have no part, and the avowed purpose of which is to evade the operations of the law of competition, which is as yet the only safeguard upon which the public can rely for the securing of the adoption of reasonable charges upon interstate traffic. I had always supposed that the enactment of the interstate commerce statute was the result of a popular demand, which insisted upon relief being given to the community as against the methods pursued by the railway companies which, in some particulars at least, were deemed to be inimical to the public interests. Looking at the causes which brought about the enactment of this statute, and the evils at which it was aimed, it does seem clear that it is wholly wrested from its purpose when it is held that it creates numerous radical and effective changes in the public policy of the nation touching competition

between railroad companies engaged in interstate commerce. For the better protection of the rights of the public, and to sweep away the system of discriminations in favor of localities, individuals, or classes of business which had come into vogue, the Interstate Commerce Act was intended to introduce radical changes in railway methods, but it never was intended to curtail the rights of the public and enlarge those of the railway corporations in any substantial particular. The argument of the majority is that, even if it were admitted that under common law principles all contracts or combinations between public common carriers for the establishment of rates would be held to be contrary to public policy, nevertheless the enactment of the Interstate Commerce Act revolutionized the law in this particular, and authorized railway companies to enter into combinations for the purpose of establishing reasonable restrictions upon the freedom of interstate commerce.

Reading that Act in the light of the causes leading to its enactment, I cannot find in any of its provisions foundation for the theory that it was intended to confer upon railway companies the right to enter into combinations which, under the principles of the common law, would be illegal, because contrary to public policy. The reasoning of the court is to the effect that "the interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Congress has thereby expressed its conviction that absolutely free competition between carriers is not at the present time conducive to the public welfare, and that other things are more essential to the public good."

I do not quarrel with the proposition that the Interstate Commerce Act imposes important restrictions (not upon the right, however) but upon the practice of railway companies to do as they please in the matter of making and altering rates. But how does that fact tend to show that the Act places restrictions upon the rights of the public? The Congress of the United States may place restrictions upon the rights of the railway companies and upon the rights of the public, but the fact that Congress may enact laws which are intended to change the methods pursued by the companies in certain particulars does not necessarily restrict the rights of the public. But if it be admitted that by some possible mode of construing the Interstate Commerce Act, and the action of the Commission created thereby, it can be held that under its provisions the railway companies became clothed with the right to combine together, and by mutual agreement to create restrictions upon the freedom of interstate commerce so long as the same are reasonable,—which is the position of the court,—then would it not follow that the right thus created by the Interstate Commerce Act is abrogated by the later enactment found in the Anti-Trust Act, which expressly declares, not that unreasonable contracts, combinations, or restrictions are illegal, but that every contract, combination in the form of

trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal? The statute declares that restraint of interstate commerce, all restraints, every restraint of such trade and commerce brought about by contracts, combinations in the form of trusts or otherwise, or by conspiracy, are illegal. The statutory declaration in effect is that interstate trade and commerce are to remain free from restriction. The declaration of the court is, in effect, that railway companies engaged in interstate commerce may place restrictions upon such commerce; that the right so to do, if not existing under the common law, is conferred upon railway companies by the provisions of the Interstate Commerce Act; that such restrictions cannot be held to be illegal unless it is shown that they are unreasonable, and the presumption is in favor of their reasonableness and consequent legality. I cannot believe that such is the meaning of the Interstate Commerce and the Anti-Trust acts. When the latter Act was adopted, it had been declared by the Supreme Court of the United States to be the law that, with regard to the classes of business that are of a public nature, and are carried on to meet a public necessity, contracts imposing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such public character as of necessity places it in the class declared by the Supreme Court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the Anti-Trust Act, is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the Supreme Court? The Interstate Commerce and Anti-Trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared, then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefore lawful. If the natural tendency is to check competition in the matter of rates, and to place

a restraint, though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that railway companies, by combinations between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the exaction of unreasonable rates, but we know that the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations; that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific railway companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying trade belonging to the business in which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that 20 or 50 or 500 miles from his place of business there is another railway line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted, may work out its legitimate results, but this is not true of persons engaged in business at noncompetitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact no competing line. Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition, and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate noncompetitive points are reasonable or not, and the provisions of the Interstate Commerce Act forbidding a greater

charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and noncompetitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect of free competition, how fares it with the citizen residing at the noncompetitive point? By the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway therefore has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has the exclusive control of the rates to be charged; and if the company, by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers, whereby it is agreed that they will not bid against one another, but the property shall be bid off at an agreed price for the common benefit of all the contracting parties, are illegal, and a sale thus made is voidable, because all fair competition is prevented by such combination. If the competitors for the transportation business of a given locality agree that there shall be no competition between them on the subject of rates to be charged, does not the same evil result? In the one case it is sought to deprive the owner of his property, without paying to him the fair value that would probably be bid in case competition was not stifled by the agreement between the purchasers. In the other the citizen is subjected to the payment of charges which are not the result of free competition, but are the result of combinations and mutual agreements, entered into for the express purpose of eliminating competition as an element in the determination of the rate to be charged. Thus points and localities which are competitive so long as there is active rivalry between the railway lines seeking the business of the region cease to be such when the rival lines combine and become, in effect, but one upon the subject of the charges

to be demanded of the citizens. In such event the citizen becomes subject to a monopoly as complete and absolute as though there was but a single line of railway within his reach. Thus is found in the contract and combination entered into by the defendant companies elements which directly tend to the establishment of a monopoly, complete and absolute, over the transportation traffic in the region traversed by the lines of the defendant companies, due to the undeniable fact that the price charged for the transportation of the property of the community exercises a controlling influence over the question of the success or failure of the various business pursuits and avocations upon which the citizens are dependent for a livelihood, and, moreover, it directly affects and controls the cost to the public of all the necessities of life.

The declaration found in article I. of the contract shows upon its face the main purpose of the combination, it being therein recited that "the traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof passing between points in the following described territory," etc. Does not this clearly show that the main purpose of the contracting parties is to deal with that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential element in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee may in fact be?

Another feature observable on the face of this contract is that by the exceptions contained in article I. the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the

results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discriminations for or against particular localities? But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed intent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of a public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case then the only safeguard against unreasonable rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public, of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the Anti-Trust Act of July 2, 1890.

Reversed 166 U. S. 290, 41 L. ed. 1007.

SOUTH CAROLINA SUPREME COURT.

Sidney J. KOHN *et al.*, *Respts.*,
v.
RICHMOND & DANVILLE R. CO., *Appt.*

(37 S. C. L.)

1. A demand of goods in the hands of a carrier by virtue of a chattel mortgage after condition broken but without any legal process made by a constable acting merely as agent of the mortgagees will not make the carrier liable for conversion if it refuses to surrender them where the goods were received from a third person who has a bill of lading therefor.
2. No admission as to the ownership of chattels in possession of a carrier is shown by the fact that the one holding the bill of lading remains silent when an unsuccessful demand is made by a third person for them upon the carrier in his presence under alleged title papers, which will make the carrier's refusal to comply with the demand wrongful.

(Pope, J., *dissents.*)

(November 18, 1892.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Newberry County affirming a judgment of a trial justice in favor of plaintiffs in an action brought to recover damages for the alleged conversion of certain chattels. *Reversed.*

The facts are stated in the opinion.

Mr. J. F. J. Caldwell, for appellant:

A refusal upon demand is no evidence of conversion, if the party bona fide and reasonably refuse on the ground of his not being satisfied that the party making the demand is the real owner of the goods, etc.

1 Chitty, Pl. *160.

In action of trover against bailee (hirer) of slave by bailor, the bailee should not be allowed to prove ownership of property in a third person, being held incapable of disputing the title of his bailor.

Manning v. Norwood, 2 Mill. Const. 374.

He is responsible if he delivers to a third person who afterwards appears not the rightful owner.

8 *Walt*, Act. & Def. 623; *Robertson v. Woodward*, 3 Rich. L. 251; *The Idaho*, 93 U. S. 575, 23 L. ed. 978.

A carrier cannot dispute title of deliverer of goods for shipment by setting up adverse title in himself or another, which is not being enforced against him.

Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473; *Great Western R. Co. v. McComas*, 33 Ill. 185.

Carrier is liable for goods lost by misdelivery, whether by mistake or fraud practiced upon him.

Little Rock, M. R. & T. R. Co. v. Glidewell, 39 Ark. 487; *Scheu v. Erie R. Co.* 10 Hun, 498;

Houston & T. O. R. Co. v. Adams, 49 Tex. 743, 30 Am. Rep. 116.

But seizure of goods on legal process justifies delivery.

Savannah & G. N. A. R. Co. v. Wilcox, 48 Ga. 432; *Robinson v. Memphis & O. R. Co.* 10 Fed. Rep. 57; *Ohio & M. R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 737.

Mr. George S. Mower, for respondents: In *Spriggs v. Camp*, 2 Speers, L. *181, it was also held that the mortgagor had no more than a permissive possession under a license resulting from the covenant in the mortgage. It would seem to follow that where the mortgagor parted with the possession, the mortgagee would be entitled to recover upon a refusal to deliver the property upon demand. There is no doubt that after breach of condition the legal title vests in mortgagee.

Reese v. Lyon, 20 S. C. 20; *McClendon v. Wells*, Id. 520; *Levi v. Legg*, 23 S. C. 284.

Nor that the mortgagee can recover for a conversion of the property.

Williams v. Dobson, 26 S. C. 110.

Any withholding of the property against the will of the owner is evidence of a conversion.

Jones v. Dugan, 1 McCord, L. 480. See also *Hutchinson v. Bobo*, 1 Ball. L. 546; *Harris v. Saunders*, 2 Strobb. Eq. 370.

A refusal by the mortgagor to deliver possession of the property on demand amounts to a conversion of it, and action for the conversion will lie.

Fletcher v. Neudeck, 30 Minn. 125; *Cutter v. Copeland*, 18 Me. 127; *Bates v. Wilbur*, 10 Wis. 416; *Badger v. Batavia Paper Mfg. Co.* 70 Ill. 302.

Wrongful intent is not an essential element of the conversion.

Lavery v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184.

In the case at bar there was a refusal to deliver the property to the owner upon demand.

Lewis v. Mobley, 20 N. C. 323, 34 Am. Dec. 379.

The appellant could not, even if an adverse claim had been made by Clendenning, defend or defeat respondents' action by asserting that it had decided in favor of Clendenning, and had aided him in removing the property against the will of the respondents, who were clearly entitled to the property under their mortgage.

The Idaho, 93 U. S. 575, 23 L. ed. 978; *Hutchinson*, Carr. §§ 406-408.

McIver, Ch. J., delivered the opinion of the court:

The plaintiffs bring this action to recover damages for the conversion of certain personal property alleged to belong to plaintiffs. The facts may be briefly stated as follows: On the 13th of October, 1887, one Clendenning delivered to the agent of defendant company at Prosperity the property in question, consisting

NOTE.—The decision that a demand by virtue of a chattel mortgage after default is not such that a carrier must yield to as in case of a demand under legal process seems to be entirely new.

For the necessity of paying freight charges before suing a carrier for conversion of goods, see *Baltimore & O. R. Co. v. O'Donnell* (Ohio) 21 L. R. A. 117; and note; also *Miami Powder Co. v. Fort Royal & W. C. R. Co.* (S. C.) 21 L. R. A. 122.

of a lot of household goods, to be shipped by defendant's train to Laurens. After said agent had received and receipted for said goods, defendant's agent was notified by an agent of plaintiffs not to ship said goods, as they belonged to plaintiffs under a mortgage given by Clendenning to plaintiffs, the condition of which had been broken. The goods were, however, placed on the cars, and the cars sealed. Soon after this, and just before the arrival of the train for Laurens, one Hair, a constable, appeared at the depot with the mortgage, upon which an indorsement had been made by a trial justice, purporting to authorize said Hair to take possession of the goods, and demanded them from defendant's agent, who refused to deliver them, upon the ground that the paper was not sufficient; "that I ought to have had a distress warrant." Clendenning was present at the time, but, so far as appears from the evidence, neither said nor did anything. The goods remained at the depot, in the car in which they had been placed the evening before, until 1 o'clock the next day, when they were sent on to Laurens; no further steps having in the meantime been taken by plaintiffs to obtain possession of said goods. The mortgage above spoken of was given by Clendenning to the plaintiffs to secure the payment of a note which fell due on the 1st of May, 1887. The plaintiffs having obtained judgment for the value of the goods, defendant appeals upon the several grounds set out in the record, which need not be specifically stated, as the case turns upon the single question whether a common carrier who has received goods for transportation from one person, and given him a bill of lading therefor, is bound to surrender them upon demand to a third person, who claims to be the true owner thereof, under pain of being liable to an action for the conversion of said goods at the suit of such third person. It is conceded that under the stringent rule of the common law a common carrier is liable as an insurer for goods committed to his charge for transportation, and nothing but the act of God or the public enemies will excuse him for failure to deliver the goods at their destination to the person to whom he has contracted to deliver them,—the consignee. Under this rule it is very obvious that the carrier would be liable to his bailor even if the goods were taken from his possession by process of law, and much more so if he voluntarily delivered them to the true owner, for this would not be either the act of God or of the public enemy. But it is claimed, and, we think, justly, that this stringent rule has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, provided the carrier gives prompt notice of such seizure to his bailor; for, as it is well put by Campbell, *Ch. J.*, in *Pingree v. Detroit, L. & N. R. Co.*, 66 Mich. 143: "If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority." See also *Stiles v. Davis*, 66 U. S. 1 Black, 101, 17 L. ed. 33. And the same doctrine is, at least impliedly, recognized, though the point was not distinctly raised, in our own case of *Faust v. South Carolina R. Co.*, 8 S. C. 118. It is also contended

that the rule is still further modified so as to excuse the carrier from liability to his bailor for the nondelivery of goods intrusted to him for transportation if he can show that he has delivered the goods to a third person, who was the true owner, and entitled to the possession thereof, and the case mainly relied upon to establish this proposition is *The Idaho*, 93 U. S. 575, 23 L. ed. 978, though there are cases which have been decided in several of our sister states recognizing the same doctrine. In our own state, however, we have no case, so far as we are informed, which recognizes this modification of the rule as to a carrier's liability. It is true that the case of *Robertson v. Woodward*, 3 Rich. L. 251, does seem to recognize the doctrine that an ordinary bailee—not a common carrier—may dispute the title of his bailor in an action of trover brought by the latter by showing that his bailor had sold the subject of the bailment before the bailment arose, and that defendant was authorized to defend the action, for the benefit of the purchaser. But it seems to us somewhat difficult to reconcile that case with the previous case of *Manning v. Norwood*, 2 Mill. Const. 374. Be that as it may, however, and assuming, for the purposes of this case, that the stringent rule of the common law as to a carrier's liability has been thus further modified, as contended for by respondents, the question still remains whether the rule thus modified applies to this case. It will be observed that the cases which establish or recognize this modification of the rule only go to the extent of holding that a common carrier may deliver the goods intrusted to him for transportation to the rightful owner upon his demand, and, if he does, he may defend himself against an action brought by his bailor to recover damages for the nondelivery according to the contract of bailment by showing that he has delivered the goods to the rightful owner; but none of them go to the extent of holding that he is bound to deliver them to one who demands them as rightful owner, unless it be the case of *Wells v. American Exp. Co.*, 55 Wis. 23, 42 Am. Rep. 695. In that case a package of money was intrusted to the carrier to be delivered to Wells & Cartwright. When the package addressed to Wells & Cartwright reached its destination, the money was demanded by Wells alone, he claiming to be the sole owner, and that Cartwright had no interest in it, to which Cartwright, being present, assented verbally, though "there was no assignment by Cartwright of his apparent interest in the package to Wells, and no written order by Cartwright to deliver to Wells, and no offer of any receipt or acquittance from both." The defendant refused to deliver the money to Wells alone, and insisted also that the money had been subjected to garnishee proceedings against Cartwright. Wells then brought his action, not upon the bill of lading or express receipt, but for money had and received, and the court held that, "irrespective of the garnishment," the plaintiff, having established his individual right to the money, was entitled to recover. The authorities cited by the learned judge, while they do establish the doctrine that a common carrier may, with safety, deliver to the rightful owner, do not establish the doctrine that he is bound to do so; and his as-

sumption that the one follows from the other is not, in our judgment, well founded. In addition to this, the action in that case was for money had and received, which does not necessarily imply a tort on the part of defendant; while here the action is for the conversion of the goods, which does involve the idea of tort. Again, in that case it appeared that Cartwright, one of the persons named as consignee, was not only present when Wells, the other consignee, demanded the money, claiming it as his individual property, but actually assented to such claim, and hence the carrier had no excuse for refusing to comply with the demand.

It seems to us that the whole case turns upon the question whether a carrier, resting under very stringent obligations to his bailor, is bound to assume the burden, where a third person makes a demand upon him for goods intrusted to him for transportation, not enforced by legal process, of showing not only that such third person is the rightful owner, but is also entitled to the immediate possession of the goods. It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods; and has a right to assume that the person from whom he received possession of the goods was such rightful owner; possession of personal property being evidence of title. The most that could be properly required of the carrier would be to hold the goods, notifying his bailor of the demand which had been made upon him, and let the claimant contest with the bailor the question of ownership. Under these views, we do not think that the judgment below can be sustained. The goods were not seized or demanded under any legal process. The fact that the person selected as the agent of plaintiffs to enforce their mortgage claimed to be a constable cannot affect the question, for, even where a mortgage of personal property is placed in the hands of the sheriff, with instructions from the mortgagee to seize and sell the mortgaged property, the sheriff does not act officially, but merely as the private agent of the mortgagee. *Robins v. Ruff*, 2 Hill, L. 406. It is claimed, however, that the bailor, Clendenning, being present when the goods were demanded of the defendant's agent by the agent of the plaintiffs, and saying nothing, was an admission that plaintiffs were the rightful owners, and entitled to the immediate possession of the goods, and therefore defendant had no excuse for re-

fusing to comply with the demand. We cannot take that view. We do not see what obligation rested upon him to interpose in the colloquy between the agents of plaintiffs and defendant. He delivered the goods for shipment to the defendant, and held its bill of lading obligating defendant to deliver them according to its terms, and there was no occasion for him to speak. If he had stood silently by and allowed the defendant to deliver the goods to plaintiffs, claiming to be the rightful owners, without protest or objection, we can very well see how he might have been estopped from subsequently claiming them from defendant; but we do not see how his silence when plaintiffs were making an unsuccessful demand on defendant could possibly affect the question involved here.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

McGowan, J., concurring:

The amount involved in this case is not large, but the principle is important. After careful consideration, it seems to me that, when a common carrier is intrusted with property for transportation, his first responsibility is to the person who has intrusted him with the property, and, upon claim of the property by a third party, that he should not be required, at his risk, to judge between the parties as to the ownership of the property. He should, however, always and at once yield to the force of legal process, which intervenes and takes the property, thus relieving the carrier from the responsibility of being judge in the matter. I have not been able to satisfy myself that the paper presented to the official of the railroad in this case was in the proper sense "legal process." It seems to have been a simple mortgage of personal property, after condition broken, but there was about it none of the usual *indicia* of legal process, such as a summons, warrant, writ, or seal of the court. It did not appear that there had been any judicial determination of the matter, and the paper was in the hands of one who, on the occasion, was acting merely as the agent of the mortgagees. For this reason I concur in the opinion of the chief justice.

Pope, J.: I dissent, and will file a dissenting opinion.

NOTE.—This case has been held in type for the purpose of embodying the dissenting opinion in the report, but the opinion has not yet been filed and it is impracticable to wait longer for it. [ED.]

NEW YORK COURT OF APPEALS.

Andres W. KETCHAM *et al.*, *Respts.*,

v.

Henry NEWMAN *et al.*, *Appts.*

(141 N. Y. 206.)

1. Entry by contractors on the premises of another to shore up his build-

ing without license and against his protest is a trespass although the statute makes it necessary to protect his wall in cases of excavations "if afforded the necessary license . . . and not otherwise."

2. The owner of premises who contracts for excavations with agreement that the contractors shall do the necessary shor-

NOTE.—On the question of liability for acts of contractors, see, in connection with the present 24 L. R. A.

case, the note to Hawver v. Whalen (Ohio) 14 L. R. A. 828.

ing, etc., as required by law is not liable for an entry by the contractors on the premises of the adjoining property without license to do such shoring as the law requires them to do only when afforded the necessary license.

(February 6, 1894.)

A PPEAL by defendants from a judgment of the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment of the Trial Term in favor of plaintiffs in an action brought to recover damages for injuries to plaintiffs' property caused by third persons with whom defendants had contracted for the shoring up of adjacent buildings during the process of excavation for a cellar on defendants' land. *Reversed.*

Statement by Andrews, Ch. J.:

The plaintiffs were wholesale merchants, and lessees of the first floor and basement of No. 632, Broadway, New York city, where they conducted the business of the sale of millinery goods. The defendants owned the adjacent lot on the south, and, being about to erect a new building thereon, upon a plan which required their lot to be excavated twenty-two feet below the curb, entered into a written contract with the firm of F. & S. E. Goodwin, professional shorers, whereby that firm agreed as follows: "We agree to do the shoring, sheath piling, and bridging (as required by law) that is necessary to erect buildings Nos. 628 and 630 Broadway, running through to Crosby street; do the work, according to plans and specifications, for the sum of one thousand one hundred and seventy-five dollars; work to commence at once when ready (\$1,175), also agree to be responsible for any accident by improperly doing the work." The foundation of the southern wall of the building occupied by plaintiffs was nine feet below the surface, and, unless shored up in some way during the progress of the excavation on the defendant's lot, the wall would naturally be undermined, and would probably fall. The contractors entered upon the premises occupied by the plaintiffs, and inserted needle beams in the basement of the building, breaking the wall for that purpose, and occasioned serious damage to the stock of goods of the plaintiffs from dirt and their exposure to dampness, and greatly hindered them in the transaction of their business. There was conflicting evidence upon the question whether the contractors obtained permission from the plaintiffs to enter the premises for the purpose of shoring up the wall. The plaintiffs denied that such permission was given, and they gave evidence tending to show that they protested against such entry, and that the contractors, in defiance of their protest, invaded their premises, and committed the trespasses of which they complain. On the part of the defendants one of the contractors testified, in substance, that before commencing the work he informed one of the plaintiffs that he was employed to do the shoring, and pointed out what was necessary to be done; that he consented that the witness might proceed with the work. The judge submitted to the jury the question whether such consent was given, and charged them that if consent was given the

plaintiffs could not recover in this action. It was conceded that the Goodwins were independent contractors, and the judge so charged the jury. It was shown that they had large experience in this kind of work, and their competency was not questioned. One of the contractors testified that he had forty years' experience, and he further testified: "I know of no other way in which I could have shored up that brick wall than the way which was employed." It does not appear that the defendants gave any directions to the contractors during the progress of the work, or that they had any knowledge of the circumstances under which they entered the plaintiffs' premises, or whether such entry was with or without the license of the plaintiffs. Their connection with the transaction commenced and ended, so far as appears, with the making of the written contract above given, except that one of the plaintiffs, after the work had progressed for some time, asked one of the defendants to intercede with the contractors to do the work in a way which would cause them less inconvenience, which he promised to do. The defendants neither employed nor had any control of the men engaged in the work. They were employed and paid by the contractors. The court charged the jury that if the plaintiffs gave no license to the contractors to enter the premises to do this work the defendants were liable for the injury sustained by the plaintiffs.

Mr. Nathaniel Myers, for appellants:

The plaintiffs' building was not entitled to be supported by defendants' land.

Radcliff v. Brooklyn, 4 N. Y. 203, 58 Am. Dec. 357.

The judgment in this case can find no justification in anything contained in the Act of the legislature of 1855.

(a) Because that act is unconstitutional.

That statute imposes a servitude upon land not existing under the common law, and it finds no justification in the police power of the state or any other constitutional power.

(b) That the Act of 1855 applies only to a case where the one excavating is "afforded the necessary license to enter on the adjoining land, and not otherwise."

Goodwin was an independent contractor; and the defendants are not liable for his acts, they having simply contracted with him to do "necessary" things in a "lawful" way.

One contracting with another to do a lawful act is presumed to have contracted with him to do it in a lawful manner.

If the contract is a legal one the wrongful acts of the independent contractor are his own, and not those of the party with whom the contract is made, but who has no control over the details of the work nor over the means which the contractor employs to fulfill his contract.

It was error for the court to charge the jury that although they should find that plaintiffs had consented to the entry by Goodwin and to his inserting the needles, still their verdict should be for plaintiffs, if they found that Goodwin did his work negligently.

Butler v. Townsend, 126 N. Y. 105; *Wyllis v. Palmer*, 19 L. R. A. 285, 187 N. Y. 257; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 Am. Rep. 267; *King v. New*

York Ont. & H. R. R. Co. 66 N. Y. 181, 28 Am. Rep. 37.

Mr. Eugene S. Ives, for respondents:

The necessary effect of the contract whereby the defendants employed Mr. Goodwin was the trespass and the damage consequent thereupon.

Under such cases the employer as well as the contractor is liable.

Pierrepont v. Loveless, 72 N. Y. 211; *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161.

The claim of the appellants to the effect that the defendants had a right to enter upon the premises of the plaintiffs without permission is not sound.

Johnson v. Oppenheim, 55 N. Y. 286.

Andrews, Ch. J., delivered the opinion of the court:

The entry by the contractors upon the premises without the license and against the protest of the plaintiffs was a trespass, and rendered them liable for the damages sustained by the plaintiffs to their possession, and to the merchandise in the store, resulting from the unlawful entry. The liability would extend also to any person who advised or directed the unlawful acts. It was upon this principle that the court charged the jury that the defendants were liable if the entry was without the license of the plaintiffs. The court regarded the contract made by the defendants with the contractors as in law a direction by them to the contractors to commit the trespass complained of. If this view is well founded, there was no error in the charge. But we are of the opinion that the construction placed upon the contract by the trial judge is not warranted. The Goodwins were independent contractors. This was so ruled by the court on the trial, and was conceded on the argument here. This fact is only important to exclude any liability founded on the ordinary relation of master and servant. Where this relation exists, the master may be liable for the wrongful act of the servant, although committed without his authority, and even in violation of his instructions, provided it was committed in the business of the master, and within the scope of the servant's employment. *Higgins v. Waterliet Turnp. & R. Co.* 46 N. Y. 28, 7 Am. Rep. 293. But where a trespass has been committed upon the rights or property of another, by the advice or direction of a defendant, it is wholly unimportant what contractual or other relation existed between the immediate agent of the wrong and the person sought to be charged. The latter cannot shelter himself under the plea that the immediate wrongdoer did the act in execution of a contract, or that he came within the definition of an independent contractor as to the performance of the work in the execution of which the tortious act was committed. If he advised or directed the act, his liability is established. The contract entered into between the defendants and the contractors did not, as we construe it, authorize the contractors to commit a trespass upon the premises of the plaintiffs. In construing the contract, it is important to consider the situation. The defendants were about to tear down the old building on their premises, and erect a new one according to plans which required an excavation of their lot to the depth of twenty-two feet. They had a lawful right to make the excavation.

The excavation would probably endanger the adjacent wall of the building of the plaintiffs. No common-law duty was imposed upon the defendants to shore up or protect the wall from injury. The building of the plaintiffs had no easement of support by the land of the defendants. The rule of the common law placed the burden of protecting the wall from injury from the excavation upon the owners of the wall. The defendants were bound only to the exercise of reasonable care in making the excavation, doing no unnecessary damage. *Dorrity v. Rapp*, 72 N. Y. 308, and cases cited. Under the common law they had no right to enter upon the premises of the plaintiffs to shore up the wall, nor would they have been under any duty to do so, even if they were permitted by the owners of adjacent premises. The legislature, recognizing the hardships imposed upon owners of improved property by the rule of common law, intervened by the Act, chapter 6 of the Laws of 1855 as to the cities of New York and Brooklyn. By that Act the duty was imposed upon lot owners proposing to excavate their lots to the depth of more than 10 feet below the curb to protect at their own expense a wall on or near the boundary line of adjacent premises from injury from such excavation, "if afforded the necessary license to enter on the adjoining land, and not otherwise." The contract between the defendants and the contractors was made under this condition of the law. The defendants contemplated an excavation on their lot more than ten feet in depth. The Law of 1855 cast upon them the duty to protect the wall on the lot of the plaintiffs, "if afforded the necessary license to enter" for that purpose. The defendants made the contract, as is to be inferred, without having obtained the permission of the plaintiffs to enter upon their premises, but upon the assumption that the permission would be given. The contractors bound themselves to do the shoring "as required by law." They were not authorized by the contract to enter the adjacent premises without permission of the owners and occupants. It was necessarily implied that they were employed to discharge the obligation imposed upon the defendants by the Act of 1855, and it was a prerequisite that the consent of the owners or occupants should be obtained before entry could be lawfully made. The defendants neither in terms authorized an entry by the contractors as trespassers, nor can such intention be presumed. On the contrary, the contractors were to act "as required by law." It would have been a complete answer to a claim by the defendants for a breach of the contract by the contractors that the latter were unable to obtain the permission of the plaintiffs to enter the premises to do the work required, and that it could not have been done without such entry. If there was any evidence that the defendants advised or directed the trespass, other than that furnished by the contract, it should have been submitted to the jury. There was none to justify a ruling as matter of law that, in the absence of a license to enter, the defendants were liable. We think the trial judge erred, and that the judgment below should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur.

Sophia BOOTH, *Respt.*,

v.

ROME, WATERTOWN & OGDENSBURG
TERMINAL R. CO., *Appt.*

(140 N. Y. 287.)

1. Acts of a railroad or other private corporation in the execution of charter or statutory powers are not within the rule that legislative authority for acts causing consequential injury to private property is a bar to a claim for indemnity.
2. The use of explosives in blasting on one's own premises does not constitute a nuisance which will create a liability, without regard to negligence, where the blasting is the only proper mode of accomplishing a necessary work.
3. Injury to another's house by a mere concussion, without throwing rock or other material on the premises, occasioned by blasting on one's own premises in order to adapt them to a lawful use, when that mode is the only proper one and the work is transacted with due care and diligence, creates no liability.

(December 5, 1893.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Monroe County Circuit in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's property by blasting for defendant's right of way. *Reversed.*

Statement by **Andrews, Ch. J.**:

This appeal is from a judgment of the general term of the fifth department affirming a judgment on verdict for the plaintiff. The principal facts upon which the question presented arises are as follows: The defendant is a railroad corporation organized under the general railroad law of this state. In 1887 it owned a lot in the city of Rochester extending from the west side of St. Paul street to the Genesee river, adjacent to a lot owned by the plaintiff on the south, purchased by her in 1885, on which was a dwelling occupied by her, fronting on St. Paul street, the north side of which was about six feet south of the north line of her lot. The defendant projected an extension of its road from a point east of St. Paul street to the Genesee river, and thence across the river by a bridge. It obtained the consent of the municipal authorities to cross St. Paul street by a tunnel or cutting, and proceeded to extend its road across the street to the river. Its line crossed St. Paul street from a point on the east side of the street opposite the lot of the defendant, striking the center of defendant's lot on the west side, and thence ran longitudinally through the lot to the bank of the river. It became necessary, in order to comply with the conditions imposed by the city authorities, that the defend-

ant's roadbed at the crossing should be depressed 15 feet or more below the surface of the street. The excavation required for this purpose involved also the necessity of continuing the cutting through the lot of the defendant so as to procure a uniform grade. The soil extended about 10 feet below the surface, and underlying that was rock, which it became necessary to remove to the depth of about 4 feet. It was loosened by blasting with gunpowder. It was claimed by the plaintiff, and evidence was given tending to show, that in consequence of the blasting the plaintiff's house was seriously injured; that the foundations were cracked, the beams and joists pulled apart, the plaster loosened, and that, generally, the house was wrenched, and rendered insecure. It is not claimed that any rock or materials were thrown by the blasts upon the plaintiff's lot. In what particular way the injury was produced was not shown. It may be inferred that it was caused by the jarring of the ground or the concussion of the atmosphere created by the explosions, or by both causes combined. It was, however, affirmatively proven, without contradiction, that there was no disturbance of the earth on the sides of the excavation, and that gas and water pipes in the street, exposed by the excavation, were not displaced or injured. It was substantially conceded that the defendant exercised due care in conducting the blasting, and that it was necessary in order to remove the rock. There was evidence tending to show that the persons engaged in the work were informed from time to time during its progress that injury was being done to the plaintiff's house. The trial judge instructed the jury that the defendant, in using powerful explosives in blasting rock, used them at its peril, and that if the plaintiff's house was injured thereby the defendant was liable for the damages occasioned, and "that it made no difference whether the work was done carefully or negligently." Exception was taken by the defendant to this instruction. The jury found that the damage to the house from the blasting was \$1,750, and this sum was included in the verdict. The court overruled the contention of the defendant that in constructing its road it was acting under legislative authority, and was on that ground, in the absence of negligence, exempted from liability, even although, as between individuals, an action might be maintained.

Other facts are stated in the opinion.

Mr. F. M. French, for appellant:

The owner of land has the natural right to the use of the same in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and the owners of such adjacent lots have no right to destroy his land by removing their natural supports or barriers. Where a person in the exercise of ordinary care and skill, in making

NOTE.—The New York court of appeals in the present case not only reverses the decision below but overrules decisions of lower New York courts to which it does not refer but which are referred to in the note on injuries to land and buildings from blasting, with the case of *Benner v. Atlantic Dredging Co.* (N. Y.) 17 L. R. A. 220.

34 L. R. A.

As to duty of those engaged in blasting in respect to the safety of other persons, see *Blackwell v. Moorman* (N. C.) 17 L. R. A. 720, and note.

As to liability for acts of independent contractors in blasting, see that part of note to *Hawver v. Whalen* (Ohio) 14 L. R. A. beginning on p. 830.

See also 32 L. R. A. 588.

an excavation for the improving of his own lot, digs so near the foundation of the house on the adjacent lot as to cause it to crack and settle he will not be liable for the injury if such injury would not have injured the adjacent lot in its natural state.

Lasala v. Holbrook, 4 Paige, 170, 8 L. ed. 391, 25 Am. Dec. 524; *Radcliff v. Brooklyn*, 4 N. Y. 196, 53 Am. Dec. 357; 2 Washb. Real Prop. 4th ed. pp. 360, 362, *76; Boone, Real Prop. § 144; *Loose v. Buchanan*, 51 N. Y. 478, 10 Am. Rep. 623; *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 538, 14 Am. Rep. 322; *Wilde v. Minsterley*, 2 Rolle, Abr. 565, title *Trespass*; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Gilmore v. Driescoll*, 122 Mass. 201, 23 Am. Rep. 312; *McGuire v. Grant*, 25 N. J. L. 356, 47 Am. Dec. 49; *Hatch v. Vermont Cent. R. Co.* 25 Vt. 64; *Beard v. Murphy*, 87 Vt. 89, 86 Am. Dec. 693; *Richardson v. Vermont Cent. R. Co.* 25 Vt. 465, 60 Am. Dec. 283; *Charles v. Rankin*, 22 Mo. 566, 68 Am. Dec. 642; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Busby v. Holthaus*, 46 Mo. 161; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 640, 25 L. ed. 337; *Dixon v. Wilkinson*, 2 McArthur, 425; *Tiedeman*, Real Prop. ed. 1885, § 618.

The building of the railroad being of a public nature, and the defendant having acted under lawful authority, it had a right to dig and blast on its own land so long as such digging and blasting were done in a careful and prudent manner.

Bellinger v. New York Cent. Railroad, 23 N. Y. 42; *New York Cent. & H. R. Co. v. Kip*, 46 N. Y. 551, 7 Am. Rep. 385; *Atwater v. Canandaigua Trustees*, 124 N. Y. 602; *Conklin v. New York, O. & W. R. Co.* 103 N. Y. 107; *Moyer v. New York Cent. & H. R. Co.* 68 N. Y. 356; *Pierce*, Railroads, 143.

One cannot confine the vibration of the earth or air within enclosed limits, and hence it must follow that if in any given case they are rightfully caused their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless.

Benner v. Atlantic Dredging Co. 17 L. R. A. 220, 184 N. Y. 156.

In the case at bar the work was of a public nature whether we consider the blasting done on the defendant's land for the purpose of construction of its road.

Buffalo & N. Y. Cent. R. Co. v. Brainard, 9 N. Y. 100; *Bellinger v. New York Cent. Railroad*, 23 N. Y. 48; *New York Cent. & H. R. Co. v. Kip*, and *Moyer v. New York Cent. & H. R. Co.* *supra*; *Uline v. New York Cent. & H. R. Co.* 101 N. Y. 107, 53 Am. Rep. 123, note, 54 Am. Rep. 661; *Pierce*, Railroads, 143.

Or whether we consider the blasting done in the street for the purpose of restoring the highway so as not "unnecessarily to impair its usefulness."

Conklin v. New York, O. & W. R. Co. *supra*. There is no evidence in the case upon which the jury could be warranted in finding a verdict on this account to exceed six cents.

8 Sedgw. Damages, 8th ed. § 947.

Mr. David Hays, for respondent:

The blasting was a nuisance and defendant 24 L. R. A.

is liable to the plaintiff for the damage which she suffered from it.

Wood, Nuisance, § 142; Cooley, Torts, pp. 607, 608.

Each person should so use his own as not to injure his neighbor's property.

Carhart v. Auburn Gas Light Co. 23 Barb. 297.

The blasting by the defendant constituted a nuisance, for it directly and necessarily damaged the plaintiff's property, and the defendant is therefore liable, though the blasting may have been carefully done.

Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279.

The question is ordinarily one of reasonable use. Such use of property as necessarily destroys one's neighbor's property is *prima facie* unreasonable.

Cogswell v. New York, N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254; *Campbell v. Seaman*, 68 N. Y. 568, 20 Am. Rep. 587; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Bellinger v. New York Cent. Railroad*, 23 N. Y. 42; *Brennan v. Schreiner*, 28 Abb. N. C. 481; *McAndrews v. Collier*, 42 N. J. L. 189, 86 Am. Rep. 508.

There is an obvious distinction between the liability of a private corporation to public prosecution for a legalized nuisance and its liability to a private action for damages arising from such nuisance. In the one case, the legislative authority is a protection, and in the other it is not.

Wood, Nuisance, § 750; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 122 N. Y. 18; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623.

Where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies.

Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659.

A municipal corporation cannot license the erection or commission of a nuisance, by virtue of any implied or general powers.

Dill. Mun. Corp. § 521; *Orday v. Canisteo*, 66 Hun, 569; Cooley, Const. Lim. *194.

We are not to infer that the legislature intended to alter the common-law principles further than is clearly expressed or than the case absolutely required.

Sinnickson v. Johnson, 17 N. J. L. 144, 34 Am. Dec. 184; *Arthur v. Bokenham*, 11 Mod. 149; *Dwarris*, Stat. 695; *Crittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462.

The latter drift of the law is in the direction of greater security to life and property.

Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146.

Andrews, Ch. J., delivered the opinion of the court:

We entertain no doubt of the correctness of the ruling at the circuit that the defendant

stands in no better position in defending the action than if the controversy was between individuals. The rule that the legislature may, in the public interest and for public purposes, authorize and legalize acts causing consequential injury to private property, not amounting to a taking, without providing compensation, and that the legislative authority may be pleaded in bar of any claim for indemnity, although if the act had been done with such authority an action would lie, has no application to acts of a railroad or other private corporation in the execution of chartered or statutory powers. The rule adverted to, although operating in some cases with great severity, which compels an individual to bear a special loss for the benefit of the community at large, in place of distributing the burden, is an application of the maxim, "*solus populi est suprema lex*," and rests upon the transcendent power of the legislature, within constitutional limitations, to enact whether it may deem essential to the public welfare. But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad carries with it immunity from liability in executing the work for consequential damage to private property, to the same extent as pertains to the sovereign in executing public works, (*Bellinger v. New York Cent. R. 23 N. Y. 42*) it is now the settled doctrine in this state that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual, (*Cogswell v. New York N. H. & H. R. Co. 103 N. Y. 10, 57 Am. Rep. 701.*) This doctrine accords with reason, and with the presumed intention of the legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges, they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. There may be limited exceptions, as in cases of highway crossings, where an adjustment of the grade becomes necessary, working a consequential injury to adjacent landowners, which is remediless; and the legislative authority will also bar any remedy for certain discomforts consequent upon the necessary operation of the road, such as noise and smoke of passing trains. We therefore agree with the courts below that the right of the plaintiff to recover in this case, and the liability of the defendant, depend upon the same rule as would govern the parties if both were natural persons, and the injury to the plaintiff's dwelling had resulted from blasting by an adjacent owner on his land in the course of adapting it to individual uses.

The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that

witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving way before the excavation was commenced. But, the verdict having been affirmed by the general term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant, in using explosives, violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care. Wrong and damage must concur, to create a cause of action. If the injury was occasioned by the omission to use due care, this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. *Leader v. Moron, 3 Wils. 460; Lawrence v. Great Northern R. Co. 16 Q. B. 643-653; Leake, Real Prop. 248.*

The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable, in a business sense, for the defendant to have removed the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. There is evidence that rock from some parts of the excavation was loosened by the use of iron bars, and if this was practicable as to all of it, the jury might well have found that this means should have been adopted. So, also, if less powerful blasts might have been used, which, if used would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence. The mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action. The plaintiff, however, on this record, is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial, and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform to the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on his own premises in order to adapt them to a lawful use; the mode adopted being the only practicable one, and the work having been prosecuted with due care and

without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong, for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is, that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one, by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on the neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is, in the case supposed, injury, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property. *Wyatt v. Harrison*, 3 Barn. & Ad. 871; *Partridge v. Scott*, 3 Mees. & W. 220; *Lasala v. Holbrook*, 4 Paige, 170, 8 L. ed. 391, 25 Am. Dec. 524; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57.

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery is that the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that, according to the general rule of law, one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not challenged, but the right to use the destructive agency of gunpowder in the work of excavating, liable to produce injury, and which did occasion it, is denied. The exception is not to the thing done, but to the mode of doing it. It is to be observed, however, that, under the concessions in the case and the rulings on the trial, it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was therefore of the substance of the right, if the right existed at all. It has been frequently said that the right of an owner of land to use his property as he likes does not justify the maintaining of a nuisance or the commission of a trespass; and Blackstone after stating that

where one, by smelting works on his own land, causes noxious vapors, which injure the corn or grain on his neighbor's land or damages his cattle, this would be a nuisance, proceeds to say "that if you do any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive." 2 BL. Com. chap. 13, p. 218.

There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of, one's own premises, constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place, and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort, or injury to his neighbor, which are *damnum absque injuria*. The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein, and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property, followed by damage to the property of another, for which no action lies. *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. N. S. 876; *Wilson v. Waddell*, L. R. 2 App. Cas. 95. In referring to these cases in *Hurdman v. North-Eastern R. Co.* L. R. 3 C. P. Div. 168, the court said: "The owner of lands holds his right to the enjoyment thereof subject to such annoyance as is the consequence of what is called the 'natural use by his neighbor of his land,' and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained, if this is the result of a natural use by a neighbor of his land." Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitute nuisances, and such use is not justified by the right of property. *Fish v. Dodge*, 4 Denio, 811, 47 Am. Dec. 254; *McKeon v. Sea*, 51 N. Y. 300, 10 Am. Rep. 659; *Cognell v. New York, N. H. & H. R. Co. supra*.

These and like cases are those where the property of the owner is appropriated to a permanent use, which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous, and temporary acts, which are resorted to in the course

of adapting premises to some lawful use. For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises; but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy?

The rule announced by the trial judge, that the use, by an owner of property, of explosives, in excavating his land, is at his peril, and imposes liability for any injury caused thereby to adjacent property, irrespective of negligence, is far-reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property. The first occupant, in building on his lot, exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Thurston v. Hancock*, *supra*; *Tipping v. St. Helen's Smelt. Co.* 1 Ch. App. 66; *Campbell v. Seaman*, 68 N. Y. 568, 20 Am. Rep. 567. The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279, that the right of

property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This, the court held, could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 230, was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate; and it was held that the injury is remediless, for the reason that the defendant was acting under the authority of the government of the United States, by virtue of a contract authorized by congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. So, also, it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 406; *Scott v. Bay*, 3 Md. 481. Many of the cases cited by counsel are cases of the permanent appropriation of property, for damages, or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary, and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 557, 14 Am. Rep. 322, the opinion of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom, in the absence of negligence on the part of the defendant in conducting the work. Judge Folger, in that case, said: "Whatever it is necessary for him [defendant] to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the propo-

sition is probably too broad. One may do in a barren waste many things which he could not lawfully do in or near an inhabited town. But the defendant here was engaged in a lawful act. It was done on its own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land; but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use; that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent land-owners in the use of their property seeks an

adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested, also, in the preservation of property and property rights from injury. Will it, in this case, protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless! We think not.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

NEW YORK SUPREME COURT (Special Term.)

Re Petition of the Trustees of the WORTHINGTON COMPANY.

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Payne's Arabian Nights, Fielding's Tom Jones, the works of Rabelais, Ovid's

Arts of Love, The Decameron of Boccaccio, The Heptameron of Queen Margaret of Navarre, Rousseau's Confessions, Tales from the Arabian, and Aladdin, are not so immoral that a receiver will be prevented from disposing of them when found among the assets which come into his hands.

NOTE.—*Unlawfulness of obscene and indecent publications.*

The above case, though it reports a mere special term order made for the guidance of a receiver, was made, as the court states, after consultation with other judges; and is of so much public interest that it ought not to be omitted from this series, in view of the improbability of getting a decision on the precise question from the court of last resort.

At common law.

So long ago as 1770 John Wilkes was convicted "of an obscene and impious libel," consisting of his "Essay on Women." *Rex v. Wilkes*, 4 Burr. 2527.

Again in *Rex v. Curl*, 7 Strange, 788, an obscene book was held indictable at common law. One judge, Fortescue, was of a different opinion, basing it on the case of *Queen v. Read*, 8 Ann. in B. R., which was a case not brought to judgment, but one in which the question was made as to such an offense being punishable in the temporal courts, on the ground that it was cognizable in the spiritual courts only. This question was, however, settled in *Rex v. Curl*.

Indecent pictures.

The same doctrine was followed in *Com. v. Sharpless*, 2 Serg. & R. 31, 7 Am. Rep. 632, in which the exhibition of indecent pictures for money was held indictable at common law.

So in *Dugdale v. Reg.* 1 EL. & Bl. 425, 17 Jur. 548, Dears. C. C. 64, 22 L. J. M. C. 50, it was held to be a misdemeanor at common law to procure indecent prints with intent to publish them, but not to keep them without such intent.
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Somewhat akin is the decision in *Reg. v. Grey*, 4. Post. & F. 73, that an offensive and disgusting figure of a man naked down to the waist, covered with eruptive sores, exposed by a herbalist, though with innocent motive, and though the exhibition was not indecent, was a nuisance.

But under the Illinois Criminal Code, § 223, the mere possession of indecent and obscene pictures constitutes an offense. *Fuller v. People*, 32 Ill. 182.

Under U. S. Stat. 1857, chap. 63, imported stereoscopic slides were condemned to be destroyed as indecent. *United States v. One Case of Stereoscopic Slides*, 1 Sprague, C. C. 467.

Under New York Penal Code, § 817, photographs, as well as other pictures, books, and writings of an obscene and indecent character, cannot lawfully be sold. The section also prohibits that they be given away, or kept for that purpose. *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635, affirming 32 Hun, 209.

The sale of an obscene print in private is indictable, although the object of the purchaser was to get evidence to prosecute the seller. *Reg. v. A. Carille*, 1 Cox, C. C. 229.

The introduction of an obscene print into a school is indictable, under Tenn. Code, § 4847, making such introduction into a family, school, or place of education, as well as the sale or distribution thereof an offense. *State v. Pennington*, 5 Lea, 506.

Tests of decency.

In *Reg. v. Hicklin*, L. R. 3 Q. B. 360, 16 Week. Rep. 801, 37 L. J. M. C. 59, 11 Cox, C. C. 19; *S. C. Reg. v. Woolverhampton*, 18 L. T. N. S. 365, the test of obscenity is thus stated: "Where the tendency of the matter

June 21, 1891.)

PETITION by the trustees for the voluntary dissolution of the Worthington Company

for leave to sell certain assets which had come into their possession as the property of the company. *Permission granted.*
The facts are stated in the opinion.

charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall," and "where it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of an impure and libidinous character."

The same language, substantially, is used in *United States v. Slenker*, 32 Fed. Rep. 691; *United States v. Clarke*, 58 Fed. Rep. 732; *United States v. Harmon*, 45 Fed. Rep. 414.

So in *United States v. Bennett*, 16 Blatchf. 338, the court uses similar language.

In *United States v. Harmon*, *supra*, the court says: "While there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such, cannot be allowed as a standard by which its obscenity is to be tested. Rather is the test, 'What is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls?'"

And in another case the court said: "That which shocks the ordinary and common sense of men as an indecency, is the test." *United States v. Davis*, 2 Fed. Rep. 336.

In this case it is said that one can be vulgar without being indecent, within the meaning of the statute. *Ibid*.

So a letter may be indecent and not obscene. See *United States v. Clarke*, *supra*.

The court in the case of *United States v. Harmon*, *supra*, referring to a newspaper report of an opinion by the supreme court of New South Wales, holding that a pamphlet on "The Law of Population" by Mrs. Besant was within the pale of legitimate discussion, said that it had no access to the pamphlet to determine the character of the language employed, and proceeded to say concerning the newspaper publication which was before it for decision: "The problem of population and other questions of social ethics and the sexual relations, may be publicly discussed on such a high plane of philosophy, thought, and fitness of language as to make it legally unexceptionable. They may be discussed so as to be plain yet chaste, so as to be instructive and corrective without being coarse, vulgar, or seductive. But when such publication descends to the low plane of indecent illustrations and grossness of expression as adopted by Dr. O'Neill, it loses all claim to respectability."

In *People v. Muller*, 32 Hun, 209, the court said in respect to vicious and immoral photographs: "The difference between such photographs and pictures and those which avoiding all decency of position are calculated by their symmetry, beauty, or purity simply to inspire admiration, or produce emotions of chaste pleasure, is striking and apparent to all. In the one case the effect is coarse, demoralizing, and sensual, while in the other the chaste elegance and beauty would not be debasing but refining by the degree of admiration produced by it."

And the court of appeals in the same case declared "mere nudity in painting and sculpture is not obscenity" and that "the proper test of obscenity in a painting or statue is whether the motive of the painting or statue, so to speak, as indicated by it, is pure or impure." *People v. Muller*, 96 N. Y. 493, 48 Am. Rep. 686.

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Following the idea that the common sense of mankind should decide the question, it is held in the same case that the opinion of artistic experts as to the obscenity of photographs is not admissible. *Ibid*.

Although in the case of *Re WORTHINGTON COMPANY*, the books in question are compared by the court with Shakespeare, Chaucer, Sterne, and the Old Testament Scriptures for the sake of determining their character, and this is clearly a valuable test in determining the question, the courts have refused to allow the jury to make comparisons of this sort. Thus in *United States v. Clarke*, 38 Fed. Rep. 732, the court directed the jury that they were not called upon to decide whether the Bible, Shakespeare, Chaucer, Sterne, Suetonius, must be excluded from the mails, but were to judge only of the publication involved in that case.

So in *Montross v. State*, 73 Ga. 261, 53 Am. Rep. 840, counsel were not allowed to read other articles and show other pictures to the jury for comparison with the publications involved in that case.

Under Texas Penal Code, § 343, respecting words "manifestly designed to corrupt the morals of youth," a composition so intended need not be on its face and of itself manifestly of this character. *Smith v. State*, 24 Tex. App. 1.

Questions for court and jury.

It is generally held that the question of obscenity in any particular publication is for the jury and not for the court. *United States v. Bennett*, 16 Blatchf. 338; *United States v. Clarke*, 38 Fed. Rep. 500; *Com. v. Landis*, 8 Phila. 453.

So in respect to photographs or other pictures, the obscenity is a question for the jury. *People v. Muller*, 32 Hun, 209, affirmed in 96 N. Y. 406, 48 Am. Rep. 636; *United States v. One Case of Stereoscopic Slides*, 1 Sprague, C. C. 167.

This rule is limited in *United States v. Smith*, 45 Fed. Rep. 476, by holding that the question is ordinarily for the jury, but that it is within the province of the court to determine whether a verdict establishing the obscenity would be set aside as against evidence and reason.

While in *McNair v. People*, 89 Ill. 441, this question is declared to be for the court and not for the jury.

Motives and object of publication.

Where a publication is manifestly obscene, the defendant's motive in publishing it is immaterial. *United States v. Bennett*, 16 Blatchf. 338; *United States v. Harmon*, 45 Fed. Rep. 414; *Reg. v. Hicklin*, L. R. 8 Q. B. 360, 16 Week. Rep. 801, 37 L. J. M. C. 89, 11 Cox, C. C. 19; *S. C. Reg. v. Wolverhampton*, 13 L. T. N. S. 395.

Thus in *Reg. v. Hicklin*, *supra*, the fact that the sincere motive of a person in selling an obscene book entitled "The Confessional Unmasked" was to expose what he deemed errors of the Church of Rome, was held not to relieve him from an indictment for selling the book indiscriminately, although with no purpose of gain.

But the purpose with which a book is published may have a bearing on the question whether or not it is indecent, as the cases agree in holding that books which are perfectly lawful when published for scientific and medical purposes may, especially when accompanied by illustrations, be indecent and obscene for purposes of general circulation. *Com. v. Landis*, 8 Phila. 453; *United States v. Chesman*, 19 Fed. Rep. 497; *United States v. Harmon*, *supra*; *United States v. Clarke*, 38 Fed. Rep. 500; *United States v. Smith*, 45 Fed. Rep. 476.

Mr. James M. Fisk for petitioners.
Mr. Anthony Comstock filed a brief in opposition to the petition.

O'Brien, J., delivered the opinion of the court:

After consultation with some of my brethren

And the sale of a pamphlet, which is a substantially correct report of the trial of a person for selling the obscene book called "The Confessional Unmasked," is within the Statute, 20 & 21 Vict. chap. 83, prohibiting the sale of obscene publications. *Steele v. Brannan*, 7 L. R. C. P. 261, 41 L. J. M. C. 85, 23 L. T. N. S. 509, 20 Week. Rep. 607.

Mailing obscene letters.

A letter was held in *Thomas v. State*, 103 Ind. 419, to be a "paper" within the meaning of Ind. Rev. Stat. 1881, § 1997, prohibiting mailing or otherwise sending any obscene book, paper, pamphlet, etc.

But this case follows *United States v. Gaylord*, 17 Fed. Rep. 438, which was subsequently overruled. In addition to *United States v. Gaylord*, which held that a letter was a "writing," within U. S. Rev. Stat., § 3893, prohibiting the mailing of obscene writings, the same decision was made in *United States v. Hanover*, 17 Fed. Rep. 444; *United States v. Britton*, Id. 731; *United States v. Morris*, 18 Fed. Rep. 800; *United States v. Thomas*, 27 Fed. Rep. 682.

But these decisions were contrary to other decisions in the federal courts, and were overruled in *United States v. Chase*, 135 U. S. 255, 34 L. ed. 117, which held that obscene matter in a sealed letter, with only the address on the outside, was not unmailable as a "writing," within the meaning of U. S. Rev. Stat., § 3893; and to the same effect were the decisions in *United States v. Mathias*, 36 Fed. Rep. 862; *United States v. Loftis*, 8 Sawy. 194, 12 Fed. Rep. 671; *United States v. Comerford*, 25 Fed. Rep. 902; *United States v. Williams*, 3 Fed. Rep. 434; *United States v. Huggett*, 40 Fed. Rep. 636.

This section 3893 was amended in 1888 so as to prohibit the mailing of a "letter" as well as other publications named.

And while it was held in *United States v. Wilson*, 58 Fed. Rep. 768, that a private letter, which is sealed, although containing obscene matter, is not within that section as amended, since the letter must be a "publication" to be prohibited thereby, all other federal cases since that amendment have held that a letter, although sealed, is within the prohibition of that section, if it contains obscene matter. *United States v. Andrews*, 58 Fed. Rep. 861; *United States v. Gaylord*, 50 Fed. Rep. 410; *United States v. Martin*, Id. 918; *Re Wahl*, 42 Fed. Rep. 822.

And even an absence of any words which are in themselves obscene will not relieve a letter from a charge of illegality, under said section 3893, if the meaning of the letter is plainly improper, as in case of a proposal, however guardedly worded, for illicit intercourse. *United States v. Martin*, *supra*.

So a charge on a postal card of such relations between the person addressed and a third person is indecent or scurrilous. *United States v. Pratt*, 2 Am. L. T. N. S. 223.

And the same rule applies to letters giving prohibited information as to where obscene pictures may be obtained, though the letters did not in themselves show that the pictures are obscene. *United States v. Grimm*, 50 Fed. Rep. 523.

And a similar rule applies to a newspaper advertisement by a physician of unlawful treatment, although the unlawful purpose is guardedly expressed. *United States v. Kelly*, 3 Sawy. 566.

A sealed letter is also "notice" within the clause of U. S. Rev. Stat., § 3893, as to prohibited information. *United States v. Foote*, 13 Blatchf. 418.

And the fact that the information in respect to prohibited matters under that section which a letter

purports to give is false in respect to the place at which the unlawful articles can be procured, or as to the effect of such articles, is immaterial. *United States v. Bott*, 11 Blatchf. 346.

A letter may be indecent and not obscene under U. S. Rev. Stat., § 3893, as amended in 1888, and if not obscene cannot be excluded from the mails as a "publication of an indecent character." *United States v. Clark*, 43 Fed. Rep. 574.

Under the New Jersey statute prohibiting the sending of indecent letters to women, a letter is "sent to" a woman when enclosed in an envelope directed to her husband with a request that he hand it to her. *Larson v. State*, 49 N. J. L. 256, 60 Am. Rep. 608.

Constitutionality of statutes.

That the act of congress prohibiting the mailing of obscene matter is not an unconstitutional abridgment of the freedom of speech or of the press has been expressly decided in *United States v. Harmon*, 45 Fed. Rep. 414, and *Harman v. United States*, 50 Fed. Rep. 921.

The same question in substance was decided in respect to mailing lottery circulars, in *Re Jackson*, 96 U. S. 727, 24 L. ed. 877.

And although the statute was held to be unconstitutional, the court sustained a conviction under Ill. Crim. Code, § 223, for the mere possession of an obscene and indecent picture. *Fuller v. People*, 92 Ill. 182.

Propriety of legislation.

The necessity and reasonableness of legislation against obscene publications is very well stated by the court, in *United States v. Harmon*, 45 Fed. Rep. 414, in the following language: "To the pure all things are pure, is too poetical for the actualities of practical life. There is in the popular conception and heart such a thing as modesty. It was born in the Garden of Eden. After Adam and Eve ate of the fruit of the tree of knowledge they passed from that condition of perfectibility which some people nowadays aspire to, and, their eyes being opened, they discerned that there was both good and evil; and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.' From that day to this civilized man has carried with him the sense of shame,—the feeling that there were some things on which the eye—the mind—should not look; and where men and women become so depraved by the use, or so insensate from perverted education, that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic."

One extreme illustration of nastiness is enough to convince any one who really thinks and who is not altogether corrupt in thought that the words above quoted truly indicate the relation of law to indecency. While overzealous or overnice people may attempt undue interference with publications that are not condemned by people of average sentiment and thus discredit the law in popular estimation, and on the other hand people of coarse mind or impure character may condemn the law as an unwarrantable interference, the "aggregate sense of the community" must determine what is obscene or indecent in the same way that it is in the final event the test of all questions of reasonableness or propriety including the most common of all, that of negligence.

B. A. R.

ren, we have concluded that the following views should be expressed concerning the merits of this motion: This is an application made by the receiver of the Worthington Company for instructions concerning the final disposition of certain books which were found among the assets of that company, and which are now in his custody and respecting which it is alleged by certain parties that they are unfit for general circulation and come under the designation of immoral literature, and as such should be excluded from sale. That these books constitute valuable assets of this receivership cannot be doubted, and the question before the court for decision on this motion is, whether or not they are of such a character as should be condemned and their sale prohibited. The books in question consist of Payne's edition of "The Arabian Nights," Fielding's novel "Tom Jones," "The Works of Rabelais," "Ovid's Art of Love," "The Decameron of Boccaccio," "The Heptameron of Queen Margaret of Navarre," "The Confessions of J. J. Rousseau," "Tales from the Arabic," and "Alladin."

Most of the volumes that have been submitted to the inspection of the court are of choice editions, both as to the letter press and the bindings, and are such, both as to their commercial value and subject matter, as to prevent their being generally sold or purchased, except by those who would desire them for their literary merit, or for their worth as specimens of fine book-making. It is very difficult to see upon what theory these world-renowned classics can be regarded as specimens of that pornographic literature which it is the office of the society for the suppression of vice to suppress; or how they can come under any stronger condemnation than that high standard literature which consists of the works of Shakespeare, of Chaucer, of Laurence Sterne, and of other great English writers, without making reference to many parts of the Old Testament Scriptures, which are to be found in almost every household in the land. The very artistic character, the high qualities of style, the absence of those glaring and crude pictures, scenes, and descriptions which affect the common and vulgar mind, make a place for books of the

character in question, entirely apart from such gross and obscene writings as it is the duty of the public authorities to suppress. It would be quite as unjustifiable to condemn the writings of Shakespeare, and Chaucer, and Laurence Sterne, the early English novelists, the playwrights of the Restoration, and the dramatic literature which has so much enriched the English language, as to place an interdict upon these volumes which have received the admiration of literary men for so many years. What has become standard literature of the English language,—has been wrought into the very structure of our splendid English literature,—is not to be pronounced at this late day unfit for publication or circulation and stamped with judicial disapprobation as hurtful to the community. The works under consideration are the product of the greatest literary genius. Payne's "Arabian Nights" is a wonderful exhibition of oriental scholarship, and the other volumes have so long held a supreme rank in literature that it would be absurd to call them now foul and unclean. A seeker after the sensual and degrading parts of a narrative may find in all these works, as in those of other great authors, something to satisfy his prurency. But to condemn a standard literary work because of a few of its episodes would compel the exclusion from circulation of a very large proportion of the works of fiction of the most famous writers of the English language. There is no such evil to be feared from the sale of these rare and costly books as the imagination of many even well-disposed people might apprehend. They rank with the higher literature, and would not be bought nor appreciated by the class of people from whom unclean publications ought to be withheld. They are not corrupting in their influence upon the young, for they are not likely to reach them. I am satisfied that it would be a wanton destruction of property to prohibit the sale by the receiver of these works; for if their sale ought to be prohibited, the books should be burned; but I find no reason in law, morals, or expediency, why they should not be sold for the benefit of the creditors of the receivership. The receiver is therefore allowed to sell these volumes.

NEW YORK COURT OF APPEALS.

Jacob LORILLARD, *Resp't.*,

v.

William P. CLYDE *et al.*, *Appls.*

(142 N. Y. 458.)

1. A guaranty of dividends of a corporation for a term of years made by the

NOTE.—The effect of the dissolution of a corporation as affecting a contract guaranteeing its dividends presents in respect to such guaranty a case akin to those as to intervening impossibility of performance as to which, see *note to Stewart v. Stone* (N. Y.) 14 L. R. A. 216; also the later cases of *Anderson v. May* (Minn.) 17 L. R. A. 556; *Remy v.* 34 L. R. A.

manager to persons who were formerly his competitors in business which the corporation has been formed to continue under what is substantially a partnership arrangement, while both parties are prohibited from becoming interested in competing business during that period, implies the existence of the corporation during the time specified, capable of earning and declaring dividends.

Olds (Cal.) 21 L. R. A. 645. Also the similar subject of recovery for services interrupted by sickness or death, *Parker v. Macomber* (R. I.) 16 L. R. A. 858.

As to implied conditions, see further, *Genet v. Delaware & H. Canal Co.* (N. Y.) 19 L. R. A. 197.

2. A defense to a guaranty of corporate dividends that the corporation has been dissolved, cannot be defeated on the ground that the dissolution was caused by defendant's own misconduct, where it was adjudged on the application of the plaintiff for technical breaches of corporate duty, for some of which he was as much responsible as the defendant.

(June 5, 1894.)

APPPEAL by defendants from a judgment of the General Term of the Superior Court for the City of New York affirming a judgment of a trial term in favor of plaintiff in an action brought to recover the amount of dividends which it was alleged that defendants had contracted to pay the plaintiff. *Reversed.*

The facts are stated in the opinion.

Mr. James C. Carter, for appellants:

The contract upon which the action was brought clearly contained the condition, although it was unexpressed, that the corporation should continue to exist during the period embraced by it.

Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; *Taylor v. Caldwell*, 8 Beat & S. 826.

Wherever there is a contract for the sale of specific personal chattels, the continued existence of the chattel is an unexpressed condition and the destruction of the chattel by an accident, like fire, prior to the time of the performance of the contract puts an end to it.

People v. Globe Mut. L. Ins. Co. 91 N. Y. 174; *Farrow v. Wilson*, L. R. 4 C. P. 744; *Wolfe v. Howes*, 24 Barb. 174; *Stewart v. Loring*, 5 Allen, 307, 81 Am. Dec. 747.

The dissolution and consequent destruction of the corporation before the time when the dividends in respect to which the action was brought could have fallen due put an end to the contract. The consideration entirely failed at that point.

People v. Globe Mut. L. Ins. Co., *Dexter v. Norton*, *Taylor v. Caldwell*, *Farrow v. Wilson*, *Wolfe v. Howes*, and *Stewart v. Loring*, *supra*; *Knight v. Bran*, 22 Me. 531; *Benjamin, Sales*, § 570; *Melville v. De Wolf*, 4 El. & Bl. 844.

The direct and immediate cause of the destruction of the corporation was the judgment of the supreme court in the suit in the name of the people, not the wrongful acts of the defendants.

People v. Globe Mut. L. Ins. Co. supra.

The attorney-general was the person alone authorized by law to determine whether a suit for a dissolution should be brought, and he was clothed in this respect with a discretion to act or not to act, as the public good might seem to demand.

People v. Globe Mut. L. Ins. Co. supra; *Morawetz, Priv. Corp.* § 1028; *People v. Bristol & R. Turnp. Road*, 23 Wend. 222.

The suit was instituted, prosecuted, and carried on immediately and directly by the plaintiff himself, and at his expense. This is fatal to him.

When in tracing back the chain of causation, we come upon independent human agency, we must stop.

Whart. Neg. §§ 134, 135; *State v. Scates*, 50 N. C. 420; *People v. Globe Mut. L. Ins. Co. supra*; Whart. Crim. L. § 940.

24 L. R. A.

The law cannot enter upon the examination of, or inquiry into, all the concurrent circumstances which may have assisted in producing the injury, and without which it would not have occurred.

Michigan Cent. R. Co. v. Burrows, 33 Mich. 15.

Messrs. Asa Bird Gardiner and Richard L. Sweezy, for respondent:

The unlawful acts of defendants in the management of the company which furnished cause for and resulted in the intervention of the people and the dissolution of the corporation, were violations by defendants of their contract with plaintiff, as that contract has been construed by the courts, and really the only question in this case is whether plaintiff's acts in laying the facts relating to defendant's unlawful conduct before the proper public authorities and in aiding and assisting the public officers to carry on the suit, was a violation of the contract on his part, so as to prevent a recovery by him.

A person who has destroyed the subject-matter of a contract by his own act, or who has made performance thereof impossible by his own wrong, can found no defense thereupon.

3 Am. & Eng. Encyclop. Law, p. 907; *Woolner v. Hill*, 98 N. Y. 576; *Hawley v. Keeler*, 58 N. Y. 114; *Crist v. Armour*, 34 Barb. 378; *James v. Burchell*, 82 N. Y. 108; *Niblo v. Binsess*, 3 Abb. App. Dec. 775.

Andrews, Ch. J. delivered the opinion of the court:

The validity of the contract upon which the action is brought was adjudicated in the case reported in 86 N. Y. 384. The divisible character of the obligation of the defendants, and the right of the plaintiff to maintain separate actions for successive payments on the guaranty as they fell due has also been settled, 122 N. Y. 41. The plaintiff in the actions heretofore brought has recovered under the contract dividends, or the equivalent of dividends on his stock, at the rate of seven per cent per annum from July 1, 1874, to July 1, 1879, a period of five years antecedent to the dissolution of the corporation. The present action is to recover such dividends for the two succeeding years, which complete the term of seven years specified in the guaranty.

The effect of the dissolution of the corporation upon the contract of guaranty as to payments subsequently accruing thereon presents the new question involved in the present litigation. Its solution rests primarily upon an interpretation of the contract. The object of the contract, as stated therein, was the consolidation of the interests of the respective parties in the business of water transportation between New York and Philadelphia. They were competitors in the business. The plaintiff owned and ran steamships between these ports by the outside route, and the defendants conducted their business between the same ports by means of tugs and barges running upon the canals and inside water routes. The outside business could be carried on during the whole year. The business by the inside routes was of necessity suspended

during the time the canals were closed by frost. The plan of combination was to organize a corporation to which each of the interests would contribute an equal amount of capital in the properties then employed by each in the business of transportation at an agreed valuation, any difference in value to be equalized by payment by the one party to the other. The written contract embodied the scheme. It provided for the organization of a corporation under the law of New York, with a capital of \$800,000; designated the vessels to be contributed by each interest and fixed their value; provided for the payment by the Clydes to the plaintiff of \$20,000 for equality of interest. Among other provisions is the following: "William P. Clyde & Co. to have the management of said corporation and business, and in consideration thereof to guarantee to Jacob Lorillard a dividend of not less than seven per cent per annum for seven years, and to receive for such management the usual commission of two and one-half per cent in and five per cent out at each end of the freights earned." The corporation was organized; a board of five directors was designated in the certificate of incorporation; one half of the stock, being fifteen hundred shares, was issued to the plaintiff, and the other half to W. P. Clyde & Co., except that three shares of the par value of \$100 each were, by the direction of the Clydes, taken from their one half and certificates issued to three clerks, who were named as directors in order to qualify them under the statute. The business of the corporation was carried on under the management of W. P. Clyde & Co. until April, 1879, when a suit was brought in the name of the people by the attorney-general to dissolve the corporation and a temporary receiver appointed. The case was tried and resulted in a judgment dissolving the corporation and the appointing of a permanent receiver. It is unnecessary to enter into greater detail at this time of the facts disclosed by the record. Other facts will be hereafter referred to.

The question whether the obligation of the defendants under their guaranty, continued in force as to the part of the seven years unexpired at the time of the dissolution of the corporation, in the absence of any responsible agency of either party for the causes which led to the dissolution, must be determined by the intention of the parties as ascertained from the language of the contract, and, if ambiguous, from such language and the surrounding circumstances. The contract contains no explicit statement on the subject. It assumed that the corporation would be in existence during the whole period over which the guaranty extended. The guaranty was not for the yearly payment of a sum equal to seven per cent on the capital of the plaintiff in the corporation, or on the nominal amount of his stock. It was, that the dividends of the corporation should annually for seven years equal that sum. The plaintiff would under the contract and by virtue of his right as a stockholder be entitled to dividends declared by the company, whether they should be more or less than seven per cent per annum, and if dividends less than

that amount should be made, the liability of the defendants on their guaranty would be limited to a sum sufficient to make up the deficit. In case the dividends equaled or exceeded seven per cent there would be no liability, and in case no dividends were declared then the guaranty would stand in lieu of dividends. The contract provided that "accounts shall be made up and dividends when earned shall be declared and paid quarterly," and it is also provided that during the seven years neither party should be interested "in any competing steam water line between New York and Philadelphia without the consent of the other party in writing." The fact that guaranty was of "dividends" which implies the existence of the corporation during the time specified capable of earning and declaring dividends, and the prohibition against either party becoming interested in competing lines during the same period, inserted for the protection of the corporate business, plainly indicate that the parties were dealing upon the assumption of corporate existence during the period covered by the guaranty. But this becomes much more plain when the nature of the transaction in which the parties were engaged and the consideration upon which the guaranty rested are considered. The real purpose of the parties was to combine their properties and conduct the transportation business between New York and Philadelphia as a joint business, each contributing the same amount of capital and being equally interested in the vessels. The arrangement was substantially a partnership with a corporate organization. The consolidation would prevent competition and presumably benefit both interests. The management of the business was, by the contract, to be vested in W. P. Clyde & Co., and "in consideration thereof," and of their right to receive the usual commissions on inward and outward bound freight which was given them, they agreed to guarantee to the plaintiff dividends at the rate and for the time specified.

It is incontrovertible that the right to manage the business of the corporation and to earn and to receive the commissions on freight were the considerations upon which the guaranty rested. The plaintiff conceded these rights to the Clydes for this equivalent. The defendants could receive the benefits of the contract only in case the corporation should continue in being during the running of the guaranty. The death of the corporation would terminate their management, prevent their earning commissions; the business would end, and the court, in administering the assets, would return to each party his proportion of the capital remaining for distribution. The death or dissolution of the corporation would withdraw all the capital invested, so far as it remained, and take away for the future the whole consideration upon which the guaranty was based. There would thereafter be no corporation earning or capable of earning dividends, and nothing left upon which the obligation to pay them could be predicated. The general doctrine that when a party voluntarily undertakes to do a thing, without qualification, perform-

ance is not excused because by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing which he agreed to do, is well settled. This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of *Paradise v. Jane, Aleyn*, 26, is that as against such contingencies the party could have provided by his contract. See *Harmony v. Bingham*, 12 N. Y. 99, 63 Am. Dec. 142; *Ford v. Cotesworth*, L. R. 4 Q. B. 184; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644. But it is now well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. Executory contracts for personal services, for the sale of specific chattels, or for the use of a building, are held to fall within this principle. *Dexter v. Norton*, 47 N. Y. 62; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174; *Taylor v. Caldwell*, 3 Best & S. 826.

These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the courts, in accordance with the manifest intention, construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrives. So, if after a contract is made the law interferes and makes subsequent performance impossible, the party is held to be excused. *Jones v. Judd*, 4 N. Y. 412.

It must be conceded that it is difficult to draw the line and to determine the exact limitations of the principle. When the executory contract relates to specific chattels, and the subject-matter is destroyed without fault of the party, the implied condition arises and excuses performance. But where the contract is based on the assumed existence and continuance of a certain condition, or upon the continuance of a subject-matter which, however, is not the direct object of the contract, is the principle in such cases excluded? The present case illustrates what we have in mind. The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven years period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If in the one case the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life? There is in the present case, we think, an element which strengthens the conclusion we have reached, that the obligation of the

contract terminated prima facie with the dissolution of the corporation. There is something more than an implied and wholly unexpressed condition that the corporation should continue in life during the seven years. It is the fair construction of the language of the contract itself. The contract was not unilateral. It contains mutual stipulations. These mutual stipulations, by their terms, look to the continuance of the corporation, and the mutual obligations into which the parties entered are qualified by this understanding.

The plaintiff, however, seeks to avoid the force of the proposition that, by the true construction of the contract, the obligation of the guaranty as to future payments did not survive the dissolution of the corporation, by the claim that the causes of the dissolution of the corporation were the wrongful acts of the defendants, and that they cannot interpose the judgment of dissolution brought about by their own misconduct as a defense. We think the answer to this claim is that, as between these parties and in this action, the plaintiff himself must be considered as having procured the dissolution of the corporation. The grounds upon which the court in the people's action proceeded in adjudging the dissolution are set forth in the judgment which is an exhibit in this action. The Act of 1852, under which the corporation was organized, is a general law for the incorporation of steam ocean navigation companies. The act offers to any seven or more persons the opportunity to organize a corporation thereunder. It specifies what the certificate to be filed shall contain, and, among other things, that it shall specify "the ports between which the vessels (of the corporation) are intended to be navigated." Sec. 1. The incorporators may insert one or many routes at their pleasure. The act also directs that the corporation shall be managed by not less than five nor more than nine directors, who shall be shareholders and citizens. Sec. 8. The sixth section makes the stockholders severally individually liable for the debts of the corporation to an amount equal to the amount of the stock held by them respectively "until the amount of its capital stock shall have been paid in and a certificate thereof shall have been made and recorded." The seventh section makes it the duty of the president and a majority of the directors, within thirty days after the payment of the last installment of the capital stock, to make and verify a certificate of the fact, "and within said thirty days record the same in the office of the clerk of the county in which is located the principal business office of the corporation." The grounds of forfeiture upon which the judgment in the people's action was based, as near as can be gathered from the record, were (1) that three of the five directors were disqualified, not being stockholders in the company; (2) that no certificate of the payment in full of the capital stock of the corporation had been made and filed as required by the seventh section of the act, although fully paid up in 1874; (8) that annual meetings of the stockholders for the election of directors had not been held; (4)

that the corporation had at times diverted some of the seagoing vessels from the route designated in the certificate to other sea routes. In support of the first ground of forfeiture it was shown on the trial of the action that the defendants, after making a transfer on the books of the corporation of one share of stock to each of the three clerks who were named as directors, took back an assignment from each in blank of the share standing in his name and continued to hold the same until the dissolution. As between the plaintiff and defendants this accomplished the purpose which was an essential part of the agreement between them, that each of the parties should hold an equal amount of the stock of the corporation. The fourth ground of forfeiture was based on the fact that ships from time to time belonging to the corporation were employed on other routes than the one mentioned in the certificate of incorporation. The contract between the parties contemplated that during the summer months, when the business could be carried on by the inside route, the outside vessel might be employed on some route other than that specified in the certificate, and the contract provided that "the managers may temporarily divert any of the property of the corporation where it can be more profitably employed." In pursuance of this authority, the plaintiff, during the first year, ran vessels on behalf of the company on other routes than the one designated. Assuming that the several acts and omissions adjudged in the people's action were violations of corporate obligation and duty, which under section 480 of the Code of Procedure in force when the proceedings to annul the charter of the corporation were taken, authorized the state to bring and maintain that action, it is difficult to see how any public interest required a resort to this remedy. The irregularities and omissions, so far as appears, would have been corrected on notice to the corporation, but no such notice was given. The section of the Code referred to makes it the duty of the attorney-general, upon leave granted, to bring an action to annul the charter of a corporation for any of the acts or omissions specified in that section, "in every case of public interest;" but in other cases, only where "satisfactory security shall be given to indemnify the people of this state against the costs and expenses to be incurred thereby." The section discriminates between violations of corporate duty affecting "public interests," or as was said in *Thompson v. People*, 28 Wend. 583, where a corporation has committed "some misdemeanor in the trust injurious to the public," and technical, incidental, or immaterial violations, which, although strictly involving liability to forfeiture, might not seem to require this drastic procedure. In the one case the attorney-general is bound to act. In the other, only when required to act by the intervention of some other party, and he indemnifies the state and assumes the burden of the litigation. The plaintiff in this action was the active promoter of the people's action. The suit was instituted upon his application; he gave the bond required by the attorney-general and

verified the complaint; the suit was carried on and tried by private counsel employed by him. It is safe to say that unless for his active intervention the suit would never have been prosecuted. If you go back of the judgment to inquire for the cause of the dissolution, you come to the plaintiff as the proximate and efficient agency in procuring it. He owed no public duty to the state to bring to the notice of its officers the technical breaches of corporate duty upon which the judgment proceeded. For some of them he seems to have been as much responsible as the defendants, and that in doing what he did he was not actuated by a regard for the public interest, or by a sense of public duty, the record contains ample evidence. We think that the finding that the defendants forfeited their management of the corporation by their own wrongful acts is not sustained by the evidence, in the sense that they were wrongful as to the plaintiff, or that as between these parties they were the cause of the dissolution. Even if the true construction of section 480 is that it is only in cases where the proof of violations of corporate duty is uncertain that the attorney-general is not bound to bring an action, this would not, we think, change the result. The plaintiff procured it to be brought, and he must be regarded as the responsible cause of the dissolution.

The judgment should be reversed and a new trial ordered.

All concur.

PEOPLE of the State of New York, *Resp't.*,

Thomas A. WELCH, *App't.*

(141 N. Y. 266.)

1. The same act may be an offense against both state and federal governments, punishable in each jurisdiction under its laws.
2. Manslaughter committed within the territorial limits of a state by the misconduct or negligence of a pilot, licensed under federal laws, in charge of a vessel which comes into collision with another, causing the death of a person, is punishable under state laws, although by U. S. Rev. Stat., § 5344, it is made an offense against the United States.

(February 27, 1894.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York County Court of General Sessions convicting him of manslaughter in the second degree. *Affirmed.*

The facts are stated in the opinion.

Mr. Lorenzo Semple, for appellant:

The congress of the United States has declared the act charged against the defendant in the indictment to be an offense against the United States, and provided for the apprehension, trial, and conviction of any person charged with the commission of the said offense.

It is within the constitutional power of congress to confine to the courts of the United

NOTE.—For state jurisdiction over lands of the United States within a state, see *Barrett v. Palmer* (N. Y.) 17 L. R. A. 730, and *note*.

States exclusive jurisdiction over offenses arising under the laws of the United States.

Clayton v. Houseman, 93 U. S. 130, 23 L. ed. 833; *The "Moses Taylor" v. Hammons*, 71 U. S. 4 Wall. 411, 18 L. ed. 397.

State courts can exercise no jurisdiction whatever over crimes and offenses against the United States unless where in particular cases the laws of the United States otherwise provided.

By the express terms of the Judiciary Act, § 629, Rev. Stat., par. 20, enacted in 1789, the United States circuit court was given exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein.

Kent, Com. 12th ed. p. 398.

Under title 70, § 5328, enacted in 1795, the mere fact that a certain act is declared by some section in title 70 to be an offense against the United States shall not take away or impair the jurisdiction of the courts of the several states under the law thereof.

This provision was not a removal of the disability imposed by section 629 upon the state courts to try persons for all crimes and offenses made criminal by title 70.

The jurisdiction vested in the courts of the United States in the case at bar by section 711 of the Revised Statutes of 1878 is exclusive of the courts of the several states.

Section 711. "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:

"First—Of all crimes and offenses cognizable under the authority of the United States."

In order to bring the case at bar within the exact scope of this provision only two things are necessary:

First—the act charged must be a crime against the United States.

Second—It must be cognizable under the authority of the United States.

To give any effect to section 5328 taken in conjunction with section 711 it must be construed to mean that the mere fact that a certain act is declared by title 70 to be an offense against the United States shall not of itself alone prevent the state court from punishing a different offense involved in the same act.

People v. Fonda, 62 Mich. 401; *Com. v. Felton*, 101 Mass. 204; *Ex parte Bridges*, 2 Woods, C. C. 428; *Brown v. United States* (Ga.) 14 Am. L. Reg. N. S. 536; *Ex parte Houghton*, 7 Fed. Rep. 657; *Cross v. North Carolina*, 132 U. S. 132, 33 L. ed. 288; *First Nat. Bank of Charlotte, N. O. v. Morgan*, 132 U. S. 141, 33 L. ed. 283; *United States v. Buskey*, 38 Fed. Rep. 99; *Re Loney*, Id. 101, 134 U. S. 372, 33 L. ed. 949.

Messrs. John D. Lindsay, and Henry B. B. Stapler, with Mr. John R. Fellows, for respondents:

The case at bar falls within the well-recognized class of cases in which the state courts and the United States courts exercise concurrent jurisdiction; the same act constituting an offense against the state and also against the federal government.

21 L. R. A.

United States v. Marigold, 50 U. S. 9 How. 560, 13 L. ed. 257; *Moore v. Illinois*, 55 U. S. 14 How. 13, 14 L. ed. 306; *United States v. Amy* (July, 1859) Quart. L. J. 163; *Holt, Concurrent Jurisdiction*, p. 26; *Hoke v. People*, 122 Ill. 511; *Cross v. North Carolina*, 132 U. S. 131, 33 L. ed. 287; *Fox v. Ohio*, 46 U. S. 5 How. 410, 12 L. ed. 213; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

There is no force in the contention of the relator that the application of the rule would involve a violation of the constitutional provision, that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb."

Ex parte Siebold, 100 U. S. 389, 25 L. ed. 723; *Blatchley v. Moser*, 15 Wend. 215; *Greenwood v. State*, 6 Baxt. 567, 32 Am. Rep. 539; *State v. Gordon*, 60 Mo. 383; *Chicago Pkg. & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545.

Section 711 of the Revised Statutes of the United States should not be construed so as to divest the state courts of jurisdiction in the case at bar.

No such effect should be held to result from the insertion of this section at the time of the revision, in reference to a crime which had been declared to be such by the state of New York forty-six years before.

N. Y. Rev. Stat. 1st ed. 1827, 1828.

Killing in hot blood without intent and without dangerous weapon, and killing by culpable negligence, were criminal under the common law, and constituted manslaughter.

Whart. Crim. L. §§ 351-355; *Rigmaden's Case*, 1 Lewin, C. C. 181.

Such construction takes away all potency and effect from section 5328, of the title "crimes" which especially preserves the rights of the state courts as to crimes specified in that title, of course meaning crimes primarily against the states.

In *Ex parte Geisler*, 4 Woods, C. C. 381, the rule is laid down directly contrary to that in *Ex parte Houghton*, 7 Fed. Rep. 657, and the state courts are held to have jurisdiction by virtue of section 5328 even of counterfeiting cases.

See also *Re Loney*, 134 U. S. 375, 33 L. ed. 951; *Fox v. Ohio*, *United States v. Marigold*, *Moore v. Illinois*, *Ex parte Siebold*, and *Cross v. North Carolina*, *supra*; *Dashing v. State*, 78 Ind. 357.

Congress has no power under the constitution to divest the state courts of jurisdiction of such crimes as that in the case at bar.

Curtis, Jurisdiction of U. S. Courts, 245; *Moore v. Illinois*, 55 U. S. 14 How. 18, 14 L. ed. 308; *United States v. Bevans*, 16 U. S. 3 Wheat. 336, 4 L. ed. 404; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *Conkling, U. S. Courts*, p. 296; *United States v. Durkee*, 1 McAll. 196; *United States v. Wells* (Mo.) 11 Am. L. R. N. S. 424.

That the states of the Union did not grant to the United States exclusive jurisdiction over crimes of the nature of the one here under consideration, would seem to have been conceded at the time of the adoption of the Constitution.

Hamilton in No. 82 of the "Federalist"; *Martin v. Hunter*, 14 U. S. 1 Wheat. 337, 4 L. ed. 105; *United States v. Lathrop*, 17 Johns. 6.

Section 5344 of the Revised Statutes of the United States has no application to the case.

If a federal statute undertakes to include in one indiscriminate condemnation classes of acts which congress can constitutionally punish, and classes of acts which congress cannot constitutionally punish, it is unconstitutional and void.

United States v. Reese, 92 U. S. 214, 23 L. ed. 563; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766; *United States v. Steffens*, 100 U. S. 82, 25 L. ed. 550; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Leloup v. Port of Mobile*, 127 U. S. 647, 32 L. ed. 314.

Andrews, Ch. J., delivered the opinion of the court:

The defendant was convicted at the court of general sessions held in and for the city and county of New York of the crime of manslaughter in the second degree, upon an indictment charging him with having, on the 15th of June, 1891, upon the Hudson river, in said city and county, feloniously and wilfully propelled and forced the steam tugboat *F. W. DeVoe*, upon which he then was, against the yacht *Amelia*, on which was one Francis Jackson, thereby forcing the said Francis Jackson into the river, and causing his death by drowning. The record contains an agreed statement of the facts found, in substance, that the defendant Welch was duly licensed to act as a second-class pilot on steam vessels by the United States local board of inspectors of steam vessels for the district of New York; that while said license was in full force, and while the defendant was engaged in the actual performance of his duties as pilot under said license, a collision occurred June 15, 1891, on the Hudson river, in the county of New York, between the steam towboat on which the defendant was employed, and which at the time was under his control and management as pilot, and the sloop yacht *Amelia*, which collision was caused by the wilful misconduct, negligence, and inattention to his duties on said *F. W. De Voe* of the defendant; that said collision so caused resulted in the sinking of the yacht *Amelia*, and in the destruction of the life of Francis Jackson, who was at the time on board of the yacht, by drowning.

The sole question presented on this appeal is as to the jurisdiction of a state court to entertain jurisdiction of the offense established by the evidence, the claim in behalf of the defendant being that the federal courts have exclusive jurisdiction of the offense of which he was convicted. Section 5344, Rev. Stat. U. S., is as follows: "Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, inspector, or other public officer through whose fraud, connivance, misconduct, or violation of law the life of any person shall be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years." It is plain that the

circumstances found bring the case within this section. The defendant was a licensed pilot. He was in charge of the steam tugboat as pilot at the time of the collision. The collision, which resulted in the death of Jackson, was caused by the misconduct, negligence, and inattention to his duties of the defendant; and, moreover, his misconduct was, as the jury found, wilful,—an element which does not seem to be necessary to constitute the crime defined in the statutes of the United States. In the consideration of the question of the jurisdiction of the state court there are certain indisputable propositions which it is important to bear in mind. The Hudson river is within the territory of the state of New York, and is subject to its legislative jurisdiction. The criminal laws of the state apply to offenses committed on the waters of the river, whether above or below the ebb and flow of the tide, to the same extent as to like offenses committed upon the land, except in so far as the laws of congress, under the Constitution of the United States, have asserted an exclusive jurisdiction. In *United States v. Bevans*, 16 U. S. 3 Wheat. 336, 4 L. ed. 404, the defendant had been indicted and convicted of murder in the United States court of Massachusetts, committed on board of a man of war of the United States in Boston harbor, he being at the time a marine on the vessel. The conviction was reversed by the Supreme Court of the United States on the ground that the place where the murder was committed was within the territorial limits of Massachusetts, and that, as no law of congress had made a murder within the territorial jurisdiction of a state, on tide water or elsewhere, an offense against the United States, the state court alone had jurisdiction. In *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269, *Mr. Justice Curtis*, referring to the grant of admiralty and maritime jurisdiction in the United States Constitution, said: "We consider it to have been settled by this court in *United States v. Bevans* that this clause in the constitution did not affect the jurisdiction nor the legislative power of a state over so much of their territory that lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or the laws of the United States." The rights of a state to exercise jurisdiction over navigable waters within its limits, and to subject persons and property therein to the civil and criminal jurisdiction of its courts, in the absence of any prohibition in the Federal Constitution or laws, has passed unchallenged, and is an undoubted right of sovereignty.

Another proposition equally beyond question is that the crime of which the defendant was convicted is one defined by a statute of the state of New York; and that, independently of any statute, the facts established the crime of manslaughter at common law. The revised statutes, after defining the crime of murder, and what shall constitute the crime of manslaughter in the highest degree, proceeded to declare (2 Rev. Stat. p. 662, § 19): "Every other killing of a human

being by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in the act to be murder or manslaughter of some other degree shall be deemed manslaughter in the fourth degree." It is scarcely necessary to cite authorities to show that the statute above quoted was simply declaratory of the rule of common law that a killing of a human being by culpable negligence is manslaughter. Whart. Crim. L. §§ 861-865, and cases cited.

The courts of this state, on the adoption of the State Constitution of 1777, became vested with the jurisdiction over offenses cognizable at common law, and this jurisdiction is unimpaired and in full force, except in so far as it has been modified by state legislation, or was surrendered to the United States by the Federal Constitution, or has been taken away by act of congress lawfully enacted in execution of the power conferred by that instrument. It is an accepted canon in the constitution of powers granted to the general government by the Federal Constitution that state authority existing when the constitution was adopted is not excluded by the mere grant of similar powers to congress. The powers granted by the Federal Constitution are not exclusive unless made so in terms, or prohibited to the states, or are incompatible with the exercise of a concurrent jurisdiction. But the principle has been grafted upon the subject that, although powers conferred by the constitution upon congress are not in terms or in their nature exclusive of the power of the states, they may be made so by national legislation excluding the jurisdiction of the states in the particular matter, although within their original and antecedent authority. In *Martin v. Hunter*, 14 U. S. 1 Wheat. 304, 4 L. ed. 97, Judge Story, referring to the judicial power of the United States, said: "It is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others may be made so at the election of congress." The Judiciary Act of 1789 (1 Stat. at L. chap. 20) was framed upon this construction of the power of congress, and the jurisdiction of the courts of the United States was in some cases made exclusive; and in others, the jurisdiction of the state courts, not being in terms excluded, was left unaffected, and was concurrent with the courts of the Union as to matters over which the state courts could, by their own powers and constitution, exercise jurisdiction. A distinction has been suggested as to the power of congress to make the jurisdiction of the United States courts exclusive between cases in which the state courts had jurisdiction antecedent to the adoption of the constitution, and where the right involved or the liability incurred arises exclusively under a law of congress, and without which it would have had no existence. See *Curtis, Const. § 141*. But the recent cases of *The Moses Taylor*, 71 U. S. 4 Wall. 411, 18 L. ed. 397; and *Clafin v. Houseman*, 98 U. S. 180, 28 L. ed. 838, seem to be adverse to the distinction suggested, and to hold that it is competent for congress

to exclude the jurisdiction of the state courts in respect of all subjects upon which congress may legislate. In *The Moses Taylor* it seemed to be conceded that the proceeding there under review was a matter as to which the original states through their courts could have exercised jurisdiction antecedent to the adoption of the Federal Constitution, and the decision was placed on the ground that the jurisdiction was excluded by force of the ninth section of the Judiciary Act of 1789, and vested exclusively in the district courts of the United States. See 1 Kent, Com. 400. But it is obvious that, to exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, the intention of congress to exercise this power should be distinctly manifested, and that the legislation relied upon to deprive the state courts of jurisdiction should be clear and unambiguous. There can be no presumption that state authority is excluded from the mere fact that congress has legislated. There must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject. See *Curtis, Const. § 121*.

It must, we think, be conceded that section 5844 of the Revised Statutes of the United States was in its general purpose and enactment within the power of congress, under the constitutional grant of power to "regulate commerce with foreign nations and among the several states" (art. 1, § 8), and the grant of judicial power in case of "admiralty and maritime jurisdiction" (art. 3, § 2), and the authority vested in Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers vested in congress by the constitution (art. 1, § 8, subd. 18). The Hudson river is within the admiralty jurisdiction of the United States. *The Genesee Chief*, 59 U. S. 12 How. 443, 13 L. ed. 1058. The power to regulate commerce extends to the persons who conduct navigation as well as to the instruments used, and the United States courts may be invested by congress with jurisdiction over offenses committed upon waters within the admiralty jurisdiction. *Cooley v. Philadelphia Port Wardens*, 58 U. S. 12 How. 299, 13 L. ed. 996; *United States v. Combs*, 37 U. S. 12 Pet. 72, 9 L. ed. 1004; *Curtis, Const. § 47*. The legislation of which section 5844 is the culmination had its origin in the Act of Congress of July 7, 1838 (5 Stat. at L. 304), entitled "An Act to Provide for the Better Security of the Lives of Passengers on Board of Vessels Propelled in Whole or in Part by Steam." It was extended by the Act of February 28, 1871 (16 Stat. at L. 456, § 57), and the provision in its present form was enacted in the Revision of 1873, and forms section 5844 of title 70 of the United States Revised Statutes, entitled "Crimes." The power of congress to enact rules for the government of vessels on waters within the admiralty jurisdiction, to prescribe the qualifications and duties of captains, pilots, and other persons employed thereon, to supervise the construction of steam vessels with a view to secure the safety of passengers and others, to require licenses to be obtained by those engaged in navigation,

and the inspection of steam boilers at recurring intervals, has been exercised without challenge, and a large body of rules covering these and cognate subjects have been enacted by congress, or under its authority, and are to be found in the Revised Statutes of the United States. The power to enact rules on a specified subject carries the power to enforce penalties for their violation. The primary purpose of section 5844 was to secure by criminal sanctions the observance by owners, officers, employés of vessels, inspectors, and other public officers, of the duties imposed upon them in connection with the business of navigation for the security of human life. Whether the section has, as is claimed, a broader application than is justified by the power of congress, we deem it unnecessary to consider. We have no doubt that, as applied to licensed officers or pilots, the enactment does not transcend its power.

It remains to consider whether the offense defined in the section is exclusively punishable in the courts of the United States. The states do not enforce the criminal laws of the United States. *United States v. Lathrop*, 17 Johns. 4. The state, in punishing the defendant, is not enforcing a statute of the United States. It is enforcing its own laws, which had an existence coeval with the formation of the state constitution. The crime of which the defendant was convicted was primarily a crime against the peace and good order of the state. It was only a crime against the United States because congress, in the interest of navigation, had seen fit to enact a law making one species of homicide, when committed by an officer, pilot, etc., manslaughter punishable in the courts of the United States. There is nothing in the enactment itself which makes the jurisdiction exclusive. There is no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide. The jurisdiction of the United States courts is not exclusive unless there are found elsewhere in the legislation of congress provisions, of clear and unmistakable import, taking away the jurisdiction of the courts of the state. The principle that congress may lawfully exclude the jurisdiction of the state courts of offenses punishable under federal statutes was first applied by section 11 of the Judiciary Act of 1789, which declared that the circuit courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides or the laws of the United States shall otherwise direct." The jurisdiction of the state courts to punish under state laws offenses which are cognizable by the circuit courts of the United States was made by this section to depend upon affirmative legislation by congress, giving the state courts concurrent jurisdiction. Subsequent to the Act of 1789 laws were passed by congress punishing the counterfeiting of the current coin of the United States and the uttering of the same. Laws 1806, chap. 49; Laws 1807, chap. 20; Laws 1816, chap. 44; Laws 1825, chap. 65. These acts contain the following provision:

"And be it further enacted that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this act." In 1847 the question whether the courts of Ohio could entertain jurisdiction under the laws of that state of the offense of passing counterfeit current coin of the United States came before the Supreme Court of the United States in the case of *Fox v. Ohio*, 46 U. S. 5 How. 410, 12 L. ed. 213, upon writ of error, after the conviction of the defendant in the state court of that offense. It was urged that the proviso in the federal statutes above referred to did not affect the exclusive jurisdiction of the United States courts under section 11 of the Judiciary Act of 1789. The supreme court sustained the jurisdiction of the state court, and the decision necessarily adjudged that the proviso in these statutes was a law of the United States, excepting cases of passing counterfeit coin from the clause in the Act of 1789, giving exclusive jurisdiction to the United States courts of offenses cognizable under the laws of the United States. *Mr. Justice Washington*, in *Houston v. Moore*, 18 U. S. 5 Wheat. 26, 5 L. ed. 25, gave the same construction to the proviso in the acts referred to. The case of *United States v. Marigold*, 50 U. S. 9 How. 560, 18 L. ed. 257, brought into question the jurisdiction of the courts of the United States to punish the crime of passing counterfeit coin, under the federal statute, and in this case also the jurisdiction was affirmed. The two cases of *Fox v. Ohio* and *United States v. Marigold* established the proposition that the same act may be an offense both against the state and the United States, and punishable in each jurisdiction under its laws. The same principle has been declared in other cases. *Moore v. Illinois*, 55 U. S. 14 How. 18, 14 L. ed. 306; *Chief Justice Taney*, *United States v. Amy* (July, 1859), 4 Quart. L. J. 163; *Ex parte Stebold*, 100 U. S. 371, 25 L. ed. 717. Section 5828 of the United States Revised Statutes, which is one of the general provisions of title 70, entitled "Crimes", declares: "Sec. 5828. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Later on in this title is section 5844, making the misconduct, negligence, or inattention to his duties of a captain, pilot, etc., manslaughter. The provision as to exclusive jurisdiction contained in section 11 of the Judiciary Act of 1789 is incorporated in substance into the United States Revised Statutes in the twentieth subdivision of section 629, which declares that the circuit courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it may be otherwise provided by law."

If the question of the jurisdiction of the state courts in the present case depends solely upon the construction of the clause in section 629, just quoted, and of section 5828 of the United States Revised Statutes, there could be little ground, under the decisions of the Supreme Court of the United States, construing

ing the proviso in the counterfeiting acts, for denying such jurisdiction. Section 5328 is, in legal effect, a re-enactment of the proviso in those acts applicable to the crime, mentioned in title 70 of the Revised Statutes of the United States. The proviso in the counterfeiting acts was held to withdraw the crimes therein mentioned from the operation of the eleventh section of the Judiciary Act of 1789, and to create an exception to the general rule declared in that section, excluding the jurisdiction of the state courts of offenses cognizable in the courts of the United States. The same construction, applied to section 5328, would make the jurisdiction of the state courts of the offense now in question concurrent. But the confusion and uncertainty attending the subject is produced by another section of the Revised Statutes of the United States, first enacted at the time of the revision, being section 711. That section declares: "The jurisdiction vested in the courts of the United States in the case hereinafter mentioned, shall be exclusive of the courts of the several states: First, of all crimes and offenses cognizable under the laws of the United States." Construing this section upon its language alone, and without reference to the other sections mentioned, it would exclude the jurisdiction of the state courts over the offense of manslaughter committed by a pilot or other person employed on vessels, under the circumstances mentioned in section 5344. If such construction is imperatively required, it would result in the apparent anomaly of leaving to the state courts jurisdiction of the crime of murder committed on board of a vessel on navigable waters within the territory of the state, whether by an officer, pilot, or other person, and depriving them of jurisdiction of the crimes of manslaughter, defined in section 5344. If the defendant had murdered Jackson, the state court would have had undoubted jurisdiction of the crime. Manslaughter is one of the grades of criminal homicide. Can it be reasonably supposed that congress, by an act which was primarily intended to enforce the observance by persons engaged in navigation, of the rules it had established for the security of life and property, intended further to oust the jurisdiction of the state courts over one grade of the offense of manslaughter, of which they before had undoubted jurisdiction, and where the offense, whether committed by a pilot or any other person, was primarily an offense against the state? It was made an offense against the United States also, by reason of the relation in which the offender stood to the United States, under its rules and regulations, which he was bound to observe. We think section 5328 must be construed as exempting from the operation of section 711 the cases specified in title 70, which were also offenses punishable under the laws of the several states. Under section 711, the states could not enforce the criminal statutes of the United States, as was attempted, in substance, under the law of Pennsylvania involved in *Houston v. Moore*, 18 U. S. 5 Wheat. 7, 5 L. ed. 20. Nor, under section

711, could a state make an act criminal and punishable in its courts, which in its nature was an offense only, because made so by a law of congress. Section 5328 may perhaps be construed as confining the concurrent jurisdiction of the state courts, of offenses specified in title 70, to such offenses as were such under the laws of the states existing when that section was enacted, leaving the section to operate to prevent future legislation by the states concerning the crimes mentioned in that title, not before cognizable under state laws. But, whatever may be the true construction of that section, to give it the broad application claimed would, we think, ignore the true scope or meaning of section 5328, interpreted in the light of the previous decisions of the Supreme Court of the United States. We are not satisfied with the view taken in some of the circuit and district courts of the United States, that section 5328 was intended merely to permit a state court to punish a different offense involved in the same act. Such a distinction is very difficult to apply, and it grafts on the section a qualification of its general language. Many of the crimes specified in title 70 are, in their nature exclusively offenses against the United States. Such offenses are withdrawn from state jurisdiction, because they are not, and cannot be, offenses against the state. We have seen that where the exercise of state authority is incompatible with the exercise of federal authority granted by the Constitution of the United States, the state authority is superseded without express words. This principle applies as well to judicial as to legislative powers. Federalist, No. 82, by Hamilton. It was upon this principle, as we understand, that it was held by the Supreme Court of the United States (*Re Loney*, 134 U. S. 372, 33 L. ed. 949) that a state court had no jurisdiction to punish perjury committed in a contested election case, of a member of the house of representatives, under a proceeding regulated by a law of the United States. The learned justice who delivered the opinion in that case, after stating that the power of punishing a witness for perjury in a judicial proceeding belongs peculiarly to the government in whose tribunals the proceeding was had, said: "It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded," etc. The cases of *People v. Fonda*, 62 Mich. 401, and *Com. v. Felton*, 101 Mass. 204, held that the state courts have no jurisdiction of the crime of embezzlement by an officer of a national bank of the funds of such bank. It is sufficient to say that the offense of embezzlement, under the national bank acts, was subject to the provisions of section 11 of the Judiciary Act, and is not one of the crimes exempted from its operation by section 5328 of the Revised Statutes of the United States. The contention that section 711 excludes the state

courts from jurisdiction of all crimes enumerated in title 70, if sustained, takes from the state courts the power to punish the passing of counterfeit money of the United States,—a concurrent jurisdiction, which they have exercised from the commencement, and which, as was assumed by Mr. Justice Gray in the case *Re Loney*, still exists. Upon the whole case we are of opinion that the state court had jurisdiction to punish the defendant for the crime proved. Its jurisdiction has not, we think, been taken away by the legislation of congress. It would be a more satisfactory state of this law than now exists if it could be held that the court first acquiring jurisdiction should retain it, and that the judgment of one court in such a case as this could be pleaded in bar of a further prosecution for substantially the same offense in the courts of the other jurisdiction.

The judgment and conviction should be affirmed.

All concur.

Hugh Merancy MURPHY, *Respt.*,

v.

James W. WHITNEY *et al.*, *Appts.*

(140 N. Y. 541.)

1. An agreement between brothers and sisters to whom lands descend in common to own the same as joint tenants and that upon the death of either the land shall pass by devise or descent to the survivors with a subsequent agreement at a family meeting, reaffirming the prior agreement and providing that upon the death of the last survivor the land shall by devise or descent pass to the child of the only married one of such brothers and sisters who is then in being, is not void as creating a perpetuity under 1 N. Y. Rev. Stat., 723, §§ 14, 15, declaring void every future estate which shall suspend the absolute power of alienation for a longer period than during the continuance of not more than two lives in being and declaring that such power is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed, since all the brothers and sisters uniting with such child can at any time convey a perfect, indefeasible title to the land.

2. An agreement between brothers and sisters to whom land has descended in common that the same shall be held by them as joint tenants and pass to the survivors by devise or descent and at the death of the last survivor shall pass by devise or descent to the child of the only married one of them, is sufficiently performed to be taken out of the operation of the statute of frauds by its substantial keeping by all the parties thereto until the land has become vested in the survivor who has received all the fruits thereof which are to come to her and to make it enforceable by such child.

3. A contract by brothers and sisters to whom land has descended in common to hold the same as joint tenants and that it shall pass to the survivor by descent or devise and at the death of the last survivor shall pass to the child of one of such brothers by descent or devise, is not rendered unenforceable by such child by the fact that the last survivor has conveyed all the property, where the grantees had knowledge of the rights of such child; especially where he obtained the property by fraud without paying any consideration therefor.

4. An action to establish an agreement by brothers and sisters to whom land has descended in common to hold the same as joint tenants and that it shall pass by descent or devise to the survivor and from the latter to a child of one of the brothers, and to set aside conveyances of the land by the survivor, is not prematurely brought by such child on the ground that the survivor is not yet dead and that his child is not entitled to possession, since if the agreement is valid, he has a vested remainder in the property and the right to protect the estate so that he may receive the same when it should come to him by the terms of the agreement.

5. An agreement by brothers and sisters to whom land has descended in common to hold the same as joint tenants and that it shall pass to the survivor and from the latter by descent or devise to a child of one of the brothers, is enforceable by such child, although he was not a party thereto.

(January 16, 1894.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Special Term for Genesee County overruling a demurrer to the complaint in an action brought to establish and enforce an alleged family agreement as to the disposal of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. Quincy Van Voorhis, for appellants:

The arrangement, understanding, or agreement was and is void, because it contemplated and required an unlawful suspension of the power of alienation of the land in question.

1 Rev. Stat. 723, §§ 14, 15; 3 Birdseye, Stat. p. 2527.

By the terms of the agreement the four Murphy sisters, and the survivors of them, were required to retain the title of the farm until the death of the last survivor, so that it would then pass by inheritance to the plaintiff.

It was not in their power even with the co-operation of the plaintiff, to transfer the title, because the agreement required the title to remain in the Murphy family, so long, at least, as any of the four sisters should be living.

NOTE.—The transformation by a parol agreement of a tenancy in common into a joint tenancy with a further limitation on the last survivor's death to a child of one of the tenants is not only a remarkable transaction but presents interesting questions concerning perpetuities and the statute of frauds.

As to what constitutes an unlawful suspension of alienation, see *Miffin's App.* (Pa.) 1 L. R. A. 453, and note; *Cruikshank v. Home for the Friendless* (N. Y.) 4 L. R. A. 140, and note; *Armstrong v. Douglass* (Tenn.) 10 L. R. A. 85; *Re Lawrence's Estate* (Pa.) 11 L. R. A. 85, and note; *Bullard v. Shirley* (Mass.) 13 L. R. A. 110; *First Universalist Soc. of North Adams v. Boland* (Mass.) 15 L. R. A. 231; *Hope v. Brewer* (N. Y.) 18 L. R. A. 453; *Saxton v. Webber* (Wis.) 20 L. R. A. 509.

With last named case see note as to effect upon prior takers of the failure of a gift for violation of the rule against perpetuities.

Schettler v. Smith, 41 N. Y. 828; *Knox v. Jones*, 47 N. Y. 389; *Haynes v. Sherman*, 117 N. Y. 438; *Garcey v. McDevitt*, 72 N. Y. 556; *Hawley v. James*, 16 Wend. 61; *Dana v. Murray*, 123 N. Y. 604; *Fowler v. Ingersoll*, 127 N. Y. 472; *Genet v. Hunt*, 118 N. Y. 158; *Re Mayor*, 55 Hun, 204.

The agreement is void because not in writing.

See 2 Rev. Stat. 184, §§ 6, 8; 2 Birdseye Stat. pp. 1233, 1234.

A contract to convey land stands upon a very different footing from a contract made for the purpose of suspending the power to convey land.

No authority can be found which will justify the courts in lending their aid for the enforcement of an agreement which the statute forbids because it is against public policy.

Pratt v. Adams, 7 Paige, 615, 4 L. ed. 300; *Dewitt v. Brisbane*, 16 N. Y. 508; *Fowler v. Scully*, 72 Pa. 456, 18 Am. Rep. 699; Fry, Spec. Perf. 222, § 456; Pom. Cont. 360; Perry, Tr. 131; *Tracy v. Talmage*, 14 N. Y. 171, 67 Am. Dec. 182.

Even if the court has the power to enforce such a contract as this under any circumstances it should not be exercised in a case where, like this, the parties have entered into an agreement with the express and sole purpose and design, fully understood by them, of accomplishing the very thing which the statute condemns as being contrary to public policy, and unreservedly forbids.

Pratt v. Adams, *supra*.

Plaintiff cannot maintain the action as the beneficiary of a trust.

The statute does not authorize a trust for any such purpose as that contemplated by this agreement.

1 Rev. Stat. 727, § 55; 3 Birdseye Stat. 8178; *Greene v. Greene*, 125 N. Y. 506.

The statute to the effect that the beneficiary may enforce the performance of the trust in equity, does not help the plaintiff, because it expressly relates only to such trusts as are valid in their creation. The trust which the plaintiff claims was void in its creation because contrary to the statute.

Greene v. Greene, *supra*; *Marx v. McGlynn*, 88 N. Y. 357; *Ascho v. Ascho*, 118 N. Y. 232; *Bennett v. Garlock*, 79 N. Y. 302; *Haynes v. Sherman*, 117 N. Y. 433; *Garcey v. McDevitt*, 72 N. Y. 556; *Noyes v. Blakeman*, 6 N. Y. 567.

The plaintiff has no such interest as will authorize this action.

Mary Murphy is still living and there is no certainty that the plaintiff will outlive her, or ever acquire any vested interest.

Colton v. Fox, 67 N. Y. 349; *Leonard v. Burr*, 18 N. Y. 96; *Radley v. Kuhn*, 97 N. Y. 26; *Fowler v. Ingersoll*, 127 N. Y. 472; Fry, Spec. Perf. 677; 2 Story, Eq. Jur. p. 352, § 1040.

As far as plaintiff is concerned, the agreement was voluntary and without consideration, and the owners of the property could revoke or cancel it without his consent.

Fry, Spec. Perf. 45; Perry, Tr. § 163; *Gooding v. Brown*, 35 Hun, 148.

Mr. Myron H. Peck, Jr., for respondent:

Plaintiff's ancestors fulfilled on his part by 24 L. R. A.

allowing his portion of the property to remain for the use and benefit of the defendant Mary Murphy, and by supplying large sums of money to protect and to keep intact the body of the estate. It appears from a fair inference from the statements in the complaint that he had conveyed his interest in the home property to his sisters for that express purpose and having fulfilled on his part he would be in a condition to insist upon a performance by the other parties of the agreement alleged in the complaint.

Brennan v. Brennan, 21 N. Y. Supp. 195; *Kenyon v. Youlen*, 53 Hun, 591; Willard, Eq. Jur. point 4.

The taking under such circumstances must be deemed to be for the benefit of the plaintiff.

Fairchild v. Fairchild, 64 N. Y. 471; *Fulton v. Whitney*, 66 N. Y. 548; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Mitchell v. Reed*, 61 N. Y. 123, 19 Am. Rep. 252; *Baldwin v. Humphrey*, 44 N. Y. 608; *Bennett v. Austin*, 81 N. Y. 308; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640.

The payment by the father of the plaintiff of large sums of money in reliance upon the agreement that the property should eventually descend and belong to the plaintiff, is not unlike the advancement of money on an agreement to give security therefor, which a court of equity will enforce according to the terms of the agreement.

Smith v. Smith, 125 N. Y. 224.

The agreement between the heirs constituted a valid trust which a court of equity will enforce under the circumstances of this case.

Willard, Eq. Jur. Potter's ed. chap. 5, pp. 260, *319; *Moyer v. Moyer*, 21 Hun, 67; *Siemon v. Schurck*, 29 N. Y. 598; *Foots v. Bryant*, 47 N. Y. 544; *Reits v. Reits*, 80 N. Y. 538; 13 Abb. N. C. note p. 122; 18 Abb. N. C. note p. 334; *Judd v. Burrell*, 22 N. Y. Supp. 212.

If the defendant, Mary Murphy, had died without a will, the plaintiff would have the right, as the heir to the estate, to maintain an action to set aside the transfers set forth in the complaint.

Kerr, Fraud & Mistake, p. 371; 3 Wait, Act. & Def. p. 478; *Youngs v. Carter*, 10 Hun, 194; *Piper v. Hoard*, 107 N. Y. 73; *Pomeroy v. Pomeroy*, 54 How. Pr. 228; *Johnstone v. O'Conner*, 21 N. Y. Supp. 487.

The invalidity of the contract is no answer by way of demurrer to the cause of action stated in the complaint.

Moyer v. Moyer, *supra*; *Korminsky v. Korminsky*, 21 N. Y. Supp. 611; *Thompson v. Simpson*, 128 N. Y. 270.

Earl, J., delivered the opinion of the court:

The defendants' demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, having been overruled in the courts below, they have appealed to this court. The complaint is very verbose and lengthy, occupying more than fifty pages of the printed record. We will not attempt to make a precise or comprehensive abstract of it. It is sufficiently accurate for the present purpose, and for the exposition of the principles of law applicable to this case.

to state that it alleges, in substance, the following facts: That Hugh Murphy died in the town of Le Roy, in this state, in 1826, leaving three sons and four daughters, of whom the defendant Mary Murphy, now about 95 years old, is the last survivor; that none of these brothers and sisters was ever married except the father of the plaintiff, who was married in 1837, and died in 1861, leaving the plaintiff, his only child and heir-at-law; that plaintiff was born in 1839; that, at and after the death of Hugh Murphy, his seven children became and were tenants of a farm situated in the village of Le Roy; that they all lived together upon the farm, until the marriage of the plaintiff's father, and he, sometime after his marriage, moved to the state of Michigan; that prior to that time, they had made valuable improvements upon the farm, and had mutually agreed to own the same together as joint tenants, and that upon the death of either, the farm should pass by devise or descent to the survivors; that after the birth of the plaintiff, and in or about the year 1857, at a family meeting of all the brothers and sisters, there was a mutual agreement entered into by parol, as we may assume, by which the prior agreement was reaffirmed, and it was then mutually again agreed that the farm should be owned together, and that, as fast as either of them died, it should by devise or descent pass to the survivor, and, upon the death of the last survivor, it should by devise or descent pass to the plaintiff, and belong to him; that this agreement was kept and performed by brothers and sisters until, by the successive deaths, the title became vested in the defendant Mary, the last survivor of them; that the defendants, Whitney and Moore came to live in the Murphy family many years before the commencement of this action, and, several years before, they commenced by fraud, falsehood, undue influence, and coercion to obtain from the defendant Mary conveyances of portions of the real estate to themselves and to others; that the defendant Mary is feeble in body and mind, and incompetent to manage her affairs, and that, by fraud, artifice, undue influence and coercion, they have procured her to convey away all of the real estate, and that they are appropriating the proceeds thereof to themselves; that during all this time they were well aware of the family arrangement and agreement which had been made for the benefit of the plaintiff in reference to the Murphy farm; and that their fraudulent acts were intended and designed to entirely deprive the plaintiff of the benefit of that agreement; and the plaintiff asked for relief, among other things, that the conveyances of the real estate made to the defendants Whitney and Moore be set aside and vacated, and that they be required to account for the proceeds of the real estate sold, and that a receiver be appointed, and for other relief.

We think it cannot be said that the complaint, although imperfectly and unartificially drawn, failed to allege a cause of action. It is claimed on the part of the defendants that the agreement alleged in the complaint as to the holding and transmission of the real estate was against public policy, as contravening the statutes against perpetuities. 1 Rev. Stat. p.

723, §§ 14, 15. Section 14 is as follows: "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this article. Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." And section 15 is as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single instance mentioned in the next section."

This agreement, assuming it to be valid and binding upon the parties, does not violate either of these sections. The absolute power of alienation is not suspended, because there were at all times persons in being who could convey an absolute fee in possession. All the brothers and sisters, uniting with the plaintiff, could at any time have conveyed a perfect indefeasible title to the real estate. Estates can be rendered inalienable by vesting them in trustees upon some one of the valid trusts mentioned in section 55 of the article upon "Trusts;" so that they become inalienable, under section 65, for a period of more than two lives in being at the creation of the trust, or by the creation of future, contingent, or expectant estates, so that there are no persons in being during the two lives who can convey a perfect title. *Smith v. Edwards*, 88 N. Y. 104. Here none of these conditions existed. The agreement did not contemplate that the persons interested were bound to keep and hold the land. It was an agreement for the benefit of all the brothers and sisters and the plaintiff, and no other persons were interested therein; and if they should all at any time unite in a sale and conveyance of the land, a perfect title would pass, and no rights under the agreement would be violated.

It is further claimed on the part of the defendants that the agreement was void, under the statute of frauds, because not in writing. But here there was part performance sufficient to take the agreement out of the statute of frauds. The agreement alleged in the complaint had been substantially kept by all the parties thereto until the land became vested in the defendant Mary, and she had thus been largely benefited by the agreement, and had received all the fruits thereof which were to come to her. She could not, therefore, urge against this agreement that it was void, under the statute of frauds, because not in writing.

It is no answer to this action, assuming that the plaintiff is able to establish the agreement which he alleges, that the real estate has all been conveyed, and that the title to the farm has thus passed out of the defendant Mary. As the agreement related to land, the plaintiff is bound in this action to show that the facts are such that he would have been entitled to maintain the action if the defendant Mary had still retained the land; and, having established such a state of facts, he can pursue the land in the possession of those who have taken it with knowledge of the agreement; and, where the land has been converted into money, he has the same right

to pursue the proceeds thereof. This is not a case where the plaintiff was bound to pay anything more for the land, or to perform any further act on his part. The defendant Mary, before she made the conveyances of the land, had received the whole consideration which upholds the plaintiff's rights, and whoever takes and withholds the land or its proceeds from him with knowledge of his rights is, in equity, just as liable to him as the defendant Mary herself can be; and this is certainly so as against the defendants Whitney and Moore, who are alleged to have obtained the property by fraud, and to have paid no consideration therefor.

It is no defense to this action that the time has not yet come when the plaintiff could come into possession of the property, under the terms of the agreement. The time had come when, assuming the validity of the agreement, he had a vested remainder in the property, and the right that the defendant Mary had to the real estate or its proceeds was a life estate,—the right to the income thereof during her life. As a remainderman, he had the right to protect the estate, so that he might receive the same when it ought to come to him by the terms of the agreement. If the defendant Mary still held the land, and there was danger, in consequence of her age and feeble mind, and the undue influence, artifice, and fraud of the other defendants, that she might convey it to a bona fide purchaser, ignorant of the agreements, he could come into a court of equity, and restrain the conveyance thereof; and, so far as the land has been converted into money and the defendants Whitney and Moore are appropriating the same to their own use,

and there is danger that it may be dissipated and diverted from the plaintiff, so that he may not be able to get it at the death of Mary, it would be a reproach to equity if its jurisdiction were not sufficient to give him some relief, so that the proceeds of the real estate may be preserved, not only to Mary during her life, but for his benefit at her death.

Although the plaintiff was not a party to the agreement alleged in the complaint, it was made ultimately for his benefit, as finally the whole Murphy estate, under the agreement, was to reach him. The defendant Mary having received the full consideration of the agreement made for his benefit, it cannot be questioned, under many authorities, that he has a standing to enforce it on his own behalf. *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195. We do not now determine what relief the plaintiff shall have, nor the extent, nature, or measure thereof. The defendants must answer the complaint, and if the plaintiff, under the principles of law herein announced, shall be able to establish a cause of action upon the trial, the relief to which he may be entitled will depend upon the case he will be able to make. All we determine now is that, upon the facts alleged, he is entitled to some relief. The judgment should therefore be affirmed, but with leave to the defendants to withdraw their demurrer, and answer within twenty days, upon payment of all the costs of the action subsequent to the interposition of the demurrer.

Judgment affirmed.

All concur, except Bartlett, J., not sitting.

SOUTH CAROLINA SUPREME COURT.

STATE of South Carolina

v.

Wash WELDON *et al.*, *Appts.*

(.....S. O.....)

1. A note found on burglarized premises the morning after the burglary in which the addressee is invited to join in the burglary is not competent evidence against him in the ab-

sence of any testimony tending to connect him with it.

2. Evidence of former burglaries upon the same premises committed by one under indictment for burglary is competent against him when he is shown to have declared that he did not intend to work and that if he did not make his support out of the prosecuting witness he would make it out of some one else.
3. An untutored deaf mute may be per-

NOTE.—Deaf and dumb persons as witnesses.

Deaf and dumb persons were, in the olden times, looked upon and considered as presumed, in law, idiots. Hale, P. C. 84.

In 1 Blackstone's Commentaries, page 804, it is stated that a man who is born deaf and dumb and blind is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas. Co. Litt. 42.

In 1 Hale, P. C. 84, it is stated: "A man that is *urdus et mutus a nativitate* is in presumption of law an idiot, and the rather, because he hath no possibility to understand what is forbidden by law to be done, or under what penalties, but if it can appear that he hath the use of understanding, which many of that condition discover by signs to a very great measure, then he may be tried, and suffer judgment and execution, though great caution is to be used therein. See also Steel's Case, 1 Leach, C. C. 452, *et infra*."

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The above principles were followed by the court in *Rex v. Jones*, 1 Leach, C. C. 102, where the prisoner, who was arraigned for a capital offense, could be intelligently communicated with by signs.

But these ancient doctrines have been relaxed, and it has been held, and the principle is established, that deaf and dumb persons are competent witnesses, and may communicate and give evidence through the means of one capable of reading their signs and correctly interpreting them to the court, such party being sworn.

So, if such persons can read and write, their evidence may be taken by way of written questions and answers.

And such examination by signs has been held preferable to an examination in writing. *State v. De Wolf*, 8 Conn. 98, 20 Am. Dec. 90, *et infra*.

He will be examined as to the nature of an oath, and if of sufficient discretion, and a proper sense of the sanctity of an oath be shown, his evidence

mitted to testify by signs through an interpreter who is not an expert, if it is satisfactorily shown that the latter can correctly interpret the communications which the witness attempts to make.

(May 22, 1893.)

APPEAL by defendants from a judgment of the General Sessions Circuit Court for Sumter County convicting defendants of housebreaking and larceny. *Affirmed as to Weldon; reversed as to Prescott.*

The facts are stated in the opinion.

Messrs. T. B. Fraser, Jr., and H. L. B. Wells, for appellants:

Before a paper can be shown or spoken of it must be proved.

State v. McCoy, 2 Speers, L. 714; 1 Greenl. Ev. § 569, note 1.

A defendant ought not to be convicted of the offense charged simply because he has been guilty of another offense.

Whart. Crim. Ev. § 30.

While a deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness.

1 Greenl. Ev. § 365.

Persons deaf and dumb from their birth are, in presumption of law, idiots.

1 Greenl. Ev. § 366.

The uninstructed deaf and dumb mute has not participated in the benefits of modern science.

The intellectual capacity of a deaf and dumb person should be tested by a written colloquy.

Whart. & S. Medical Jurisp. § 462.

Mr. John S. Wilson for the State.

McIver, Ch. J., delivered the opinion of the court:

In this case the defendants were indicted and tried jointly for housebreaking and larceny, alleged to have been committed on the 20th December, 1892, by breaking open the window of the prosecutor's store, and stealing

by way of signs will be received. *Snyder v. Nations*, 5 Blackf. 295.

Such a party is competent, if possessed of sufficient reason to have intelligence conveyed to him, even though not able to write. *People v. McGee*, 1 Denio, 19.

If, however, he has no knowledge, except such as is inferential, and there is no exact mode of communication between the parties, and the mute has no knowledge of the sanctity of an oath, and is incapable of having the same made known to him, and knows nothing of the nature of a falsehood, his evidence is not admissible. *Territory v. Duran*, 3 N. M. 124.

Where the supposed victim of the outrage of the prisoner who was deaf and dumb was sworn and testified by a sworn interpreter and instructor in the deaf and dumb asylum, through signs adopted as a medium of communication by that class of persons, it was objected by the prisoner's counsel, that as it appeared by the testimony of the interpreter that the witness could read and write and communicate her ideas imperfectly by writing, and understood the language of signs, and was capable of relating facts correctly in that manner, she ought to testify in her own words in writing. The court, however, overruled the objection, and held that the mode adopted by the court (examination by signs) was the next best mode to an oral examination, which was preferable in that case, owing to infirmity, to an examination in writing. *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

In a prosecution for assault and battery and false imprisonment, a deaf and dumb person was produced as a witness, and objected to, the court through a sworn interpreter examining him by signs, touching the extent of his knowledge of the nature of an oath, which it appeared he understood and that perjury was punishable at law, but had no conception of the religious obligation of an oath. The court held that the fact of a witness being deaf and dumb formed no objection to his admissibility, as such a person could communicate by signs, and was a competent witness at common law, if he had sufficient discretion and a proper sense of the sanctity of an oath. *Snyder v. Nations*, 5 Blackf. 295.

In *Com. v. Hill*, 14 Mass. 207, the defendant was indicted for larceny, and it appearing that he was deaf and dumb, but of sufficient capacity to be a proper subject for a criminal prosecution, the court allowed an acquaintance to be sworn and to interpret the indictment to him, and the trial pro-

ceeded as on a plea of not guilty, the indictment being explained by signs.

In *People v. McGee*, 1 Denio, 19, the prosecutor upon whom the offense was committed, was of weak understanding, being deaf and dumb, but it appeared that she could make signs and had understanding enough to take care of herself, and to communicate her wants and observe things that occurred about her, informing witness of them by signs which he was able to comprehend, and had no difficulty in carrying on ordinary conversation. The court held there was no objection to her competency as a witness, to give evidence through the medium of a witness as an interpreter by signs, she having sufficient reason to have intelligence conveyed to her by the witness and to communicate facts to the understanding of the witness, although she was not able to talk or write, she could be sworn and testify through signs.

In the above case it appeared that the witness who acted as interpreter, had a previous knowledge of the understanding and capacity of the person whose evidence was sought to be obtained through his aid.

So where the principal witness offered for the prosecution upon an indictment for murder was a deaf and dumb child, less than nine years old at the time of the commission of the offense, but a little over that age at the time he gave evidence, and was the only eye witness offered, and his evidence was objected to on the ground of physical infirmities, and of his being wholly uneducated in the deaf and dumb language, the mother of the child testifying to such want of education, but stating that she could make herself understood to the child by signs, and that generally she could understand the child, the court held, it appearing from the testimony given by the mother that the only knowledge of what the child said was inferential, based upon a familiarity with the signs and gestures, no exact mode of conversation existing between them, and that the child had no intelligent idea of the sanctity of an oath, and that its nature could not be explained to him, or the consequences of telling a falsehood made known to him, that his evidence ought not to have been taken in the court below, as he was not a competent witness in a capital charge. *Territory v. Duran*, 3 N. M. 124.

In the above case, however, *Bristol, J.*, dissented, holding that if he could not be considered competent as an ordinary witness because he could not be communicated with and made to understand the legal and technical obligation of an

therefrom sundry articles mentioned in the indictment, of a value exceeding \$20. The jury having found both defendants guilty, they appeal upon the following grounds: "(1) Because his honor erred in admitting the note purporting to have been written by Wash. Weldon to Henry Prescott, without any proof that it had been written by Wash. Weldon or received by Henry Prescott. (2) Because his honor erred in admitting testimony of a separate and distinct offense, said to have been committed by the defendant Wash. Weldon some time before the offense charged in the indictment. (3) Because his honor erred in admitting the testimony of an uninstructed deaf mute without expert testimony as to his competency."

As to the first ground of appeal, the facts, as gathered from the "case," appear to be as follows: On the morning after the store had been broken into, the prosecutor, D. A. Outlaw, picked up from the floor of the store a piece of paper, purporting to be a note written

by the defendant Weldon to his codefendant, Prescott, dated on the 20th December, 1892 (the day on which the testimony showed the store to have been robbed,) in which the former proposed to the latter to join him in robbing the store. When this note was first offered in evidence the circuit judge declined to receive it; suggesting to the solicitor that he had better offer some evidence of the handwriting, but saying that he would not then make any ruling upon the point, but would wait until further testimony was adduced. Subsequently a fellow prisoner with defendants testified that he heard a conversation in the jail between the two defendants, in which Weldon said to Prescott "that if he had come when he got that note, they could have gotten away with the goods before being caught. Then answered Mr. Henry Prescott that he did not have anything to do with the goods." The witness further stated that the note referred to "was a note that Wash. Weldon said that he wrote to Henry Prescott for him to

oath, yet it ought to be received as circumstantial evidence, proven by his mother who understood his signs, in precisely the same manner as tracks for a trail leading to identification of the murderers, might be proven.

The English cases follow the same doctrine.

In *Bartholomew v. George*, decided by Lord Campbell at the Kent spring assizes, 1861, Ms., cited in note to *Best on Evidence*, vol. 1, page 226, Morgan's edition, the prosecutor was deaf and dumb, but was able to write, and letters written by her were allowed in evidence, her examination in court being carried on by signs when understood, and by writing when not understood.

So in *Martin's Case*, Allison's Pr. Crim. Law of Scotland, 486, a deaf and dumb person, who understood the nature and obligation of an oath, and the duty of speaking the truth, was allowed to testify by means of signs, in the science of which she had been instructed.

And in *Ruston's Case*, 1 Leach, C. C. 408, where a person deaf and dumb from his birth was offered as a witness for the prosecution, on an information for grand larceny, and his sister was examined on the *voir dire*, she and her brother understanding each other by means of signs and motions, which time and necessity had invented between them, although such signs and motions were not significant of letters, syllables, words, or sentences but were expressive of general propositions and entire conception of the mind, the subject of conversation between them being generally about domestic concerns and familiar occurrences in life, the witness believing that the brother had a perfect knowledge of the tenets of Christianity, and that she could communicate true notions of the moral and religious nature of an oath, and of the temporal danger of perjury,—the court allowed such witness to be sworn and to give evidence in the cause, the witness being sworn to depose the truth and his sister "well and truly to interpret" the questions and demands of the court and his answers.

In *Steel's Case*, 1 Leach, C. C. 452, the prisoner was mute by the visitation of God, and it was held that such fact was not an absolute bar to her being tried for felony; a person *surdus et mutus a nativitate*, was, in contemplation of law, incapable of guilt upon the presumption of idiotism, yet that such presumption might be repelled by evidence of capacity to understand by signs and tokens.

Where the party was deaf and dumb, but, except the mind was in that sense dull, perhaps more so than the minds of persons who were afflicted with

such calamities generally are, but not in any degree unsound, it was stated to be clearly the law that the presumption was always in favor of sanity, and that there was no exception to the rule in the case of a deaf and dumb person, the onus of proving such unsoundness resting on those disputing such sanity, and that there was nothing to lead to the conclusion that deaf and dumb persons were generally of unsound mind, the numerous asylums in which such persons find a refuge furnishing abundant instances to the contrary. *Harrod v. Harrod*, 1 Kay & J. 2.

So, in *Morrison v. Lennard*, 3 Carr. & P. 127, the mode of examining a witness, deaf and dumb, by means of signs made with the fingers, was held to be receivable, even in capital cases, but the court inclined to the opinion that where such a witness could write, it would be better for him to communicate his answer to the question in that manner.

In *Rex v. Pritchard*, 7 Carr. & P. 308, where the prisoner was tried on a capital felony, the court instructed the jury that if they thought that there was no certain mode of communicating the details of the trial to the prisoner, so that he could understand them and be able to make a proper defense to the charge, they ought to find that he was not of sound mind, and that it was not known that he had a general capacity of communicating on ordinary matters.

In *Dyson's Case*, 1 Lewin, C. C. 64, the prisoner, a deaf and dumb girl, was indicted for murder, and the court instructed the jury that they were impaneled to try whether the prisoner was sane, not whether she was at that moment laboring under lunacy, but whether she had at that time sufficient reason to understand the nature of the proceedings, so as to be able to conduct her defense with discretion.

In *Thompson's Case*, 2 Leach, C. C. 137, the prisoner was indicted for horse stealing, and upon an arraignment stood mute. The jury were sworn to try whether he was mute by malice, or by the visitation of God. It appearing to the court that he was able to read, the indictment was handed to him, when he wrote down not guilty upon a piece of paper, and also wrote down, in answer to questions, that he had no objection to the jury, the judge's note of the evidence being handed to him after the examination of each witness, and he was asked in writing whether he had any questions to put to the evidence.

E. W.

come and assist him carry off some goods." After this and other testimony, not relating to the note in question, had been adduced, the solicitor again offered the note in evidence, saying that he could not prove the handwriting, and upon objection the court ruled as follows: "I will allow it to be read. I will allow it read as a circumstance. It will be read as a paper found in the store the morning after the robbery." The note was then read, of which the following is a literal copy, preserving the misspelling and want of any punctuation marks: "Mister henry prescut I dos want u to meett me att old Outlaw store hee is gone to, belo Sumter ann wee wold hav itt oll our wa henry Span will go into wid uss I woud had u wid uss befour but I dint no u wuod like it now u meet mee dar shour and we will had it all rite dount lett no body see dis. I will be dar sure—Wash Weldon. too mister henry prescut. December 20, 1892." While we think there was enough in the testimony to justify the admission of the note as evidence against the defendant Weldon, who was shown by the testimony to have written such a note as that offered in evidence, we are unable to discover any testimony which in any way connects the defendant Prescott with the note. On the contrary, he seems to have denied any connection with the matter when he was upbraided by the other defendant in the conversation in jail. It seems to us that it would be a dangerous doctrine to hold that, simply because a note purporting to be addressed to a third person was picked up in a store on the morning after such store was robbed, it would constitute even a circumstance tending to show that the person to whom the note purported to be addressed was implicated in the robbery, for such a doctrine would put it in the power of a malignant person to implicate the most innocent individual in a crime. It seems to us, therefore, that, while the note was properly received as evidence against Weldon, it was incompetent evidence as against Prescott, in the absence of any testimony tending to connect him with the note. For this reason we think the defendant Prescott is entitled to a new trial.

Coming, then, to the second ground of appeal, it appears from the "case" that the prosecutor, when on the stand, testified that, owing to the fact that his store had been previously broken into, he had taken special precautions to fasten up his store securely, as he supposed, on the day before the robbery was committed for which these defendants were indicted, but he then said nothing as to who had committed the previous robberies. Subsequently, however, he was permitted to testify, against the objection of counsel for the defendants, that the defendant Weldon admitted to the prosecutor that he had previously robbed the store while he was in the employment of the prosecutor, for which he was discharged. While it is quite true that the general rule is that, where a person is on trial for one offense, it is not competent to receive evidence tending to show that he had previously committed other offenses, even of the same character, yet there are exceptions to this rule; and, where the evidence tends to show that the series of offenses

are so connected together as practically to constitute a continuous transaction, then it is competent to receive evidence of such continuous offenses. See Whart. Crim. Ev. § 81 *et seq.*; *Reg. v. Cobden*, 3 Fost. & F. 838; *Reg. v. Rear-den*, 4 Fost. & F. 76. See also *State v. Robinson*, 35 S. C. 340.

Now, in view of the fact that Weldon had been discharged from the service of the prosecutor, Outlaw, on account of these previous robberies, and especially in view of the fact that he had declared "that he did not intend to work and that if he did not make his support out of old Outlaw, he would make it out of somebody else," we are not prepared to say that the evidence objected to was incompetent as against Weldon.

The third ground of appeal cannot be sustained. In Wharton, Criminal Evidence, § 875, it is said: "Deaf and dumb persons were formerly regarded as idiots, and, therefore, incompetent to testify; but the modern doctrine is that if they are of sufficient understanding, and know the nature of an oath, they may give evidence, either by signs, or through an interpreter, or in writing. A deaf mute may be permitted to express himself in writing, if this be the mode in which he can be better understood, or through a sworn interpreter, by whom his signs can be interpreted. Such interpretation is not hearsay, nor is it excluded by the fact that the witness can write." See also 5 Am. & Eng. Encyclop. Law, 121, where the rule is thus stated: "Deaf and dumb persons may be witnesses if any person can be found who can interpret their signs to the court and jury upon oath, or if they can write and read writing, so that the questions and answers may be conveyed in writing." These authors seem to be well sustained by the cases which they cite. See especially *Ruston's Case*, 1 Leach, O. C. 408, where a deaf mute was examined as a witness in a case of larceny through his sister, as interpreter, who had acquired the facility of communicating with the witness by signs. None of the cases, so far as we have examined, require what is called expert testimony, but all of them recognize the doctrine that any person who is able to communicate with the deaf mute by signs may be sworn as an interpreter. In this case two witnesses were sworn as interpreters,—one the prosecutor, and the other a disinterested third person,—both of whom testified that they at different times had had the deaf mute in their employment, that he was very intelligent, and that they had but little difficulty in communicating with him by signs. It seems to us clear, therefore, that there was no error in receiving the testimony of the deaf mute through the medium of an interpreter.

The judgment of this court is that the judgment of the Circuit Court as against the defendant Wash. Weldon be affirmed, but as against the defendant Henry Prescott that it be reversed, and that the case be remanded to the Circuit Court for a new trial so far as said Henry Prescott is concerned.

McGowan and Pope, JJ., concur.

FLORIDA SUPREME COURT.

Rutledge GOULD *et al.*, *Appts.*,

v.

John T. CARR *et al.*

(33 Fla. 523.)

1. The establishment of a uniform rule by the commissioners acting under the act of congress for the collection of direct taxes that they would receive such taxes from no one but the owner of the land in person, avoids a sale by said commissioners under such proceedings, and a tender of the taxes was made unnecessary by such a rule.
2. The possession necessary to confer title under an adverse holding must be actual, continuous, and adverse to the legal title for the statutory period to bar the suit, and the adverse possessor must not yield or surrender his possession under the pressure of any legal procedure instituted to oust him, which he can successfully resist, and if he does so, and an entry adverse to him is made, the continuity of his possession will be broken. *Contra*, as to adverse possession interrupted by force or violence and promptly regained by legal methods. *Twinsand v. Edwards*, 25 Fla. 523, examined and limited.
3. At common law the death of a sole plaintiff in real actions before judgment abated the suit, and such actions can only be revived in the name of the heir-at-law in whose favor a new cause of action arises upon the death of the ancestor, by legislative authority.
4. The Act of November, 1838 (§ 77, p. 830, McClal. Dig.), declaring what actions shall die with the person and what shall survive, provides that those that do survive may be maintained in the names of the representatives of the deceased. Real actions are among those that survive the death of a plaintiff, and under rules 94 and 95 specially made for the government of circuit courts in actions of ejectment, such an action may be revived in the names of the heirs-at-law.

(May 1, 1864.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for St. Johns County in favor of defendants in an action brought to recover possession of certain real estate. *Reversed.*

Statement by MABRY, J.:

A suit of ejectment was instituted on the 3d day of January, 1876, in the circuit court for St. Johns county by James M. Gould, for the use of Jacob Vanderpool, against Henry and Wiley Jenkins to recover possession of a certain described lot of land situated in the city of St. Augustine in said county.

The plea of not guilty, and also a further plea that neither the plaintiff, his ancestor, predecessor, nor grantor had been seised or possessed of the premises in question within seven years before the commencement of the suit,

*Headnotes by MABRY, J.

were filed by the named defendants on the rule-day in March, 1876, and no further proceedings were had in the case till February, 1889. Notice was served on counsel for defendants on the 16th day of February, 1889, that application would be made to the circuit judge on the 25th day of that month for an order making Geo. B. Vanderpool administrator of the estate of Jacob Vanderpool, deceased, and Rutledge Gould, Edward Gould, James Gould, Hester Flynt, Sarah Gould, and Lydia Gould heirs-at-law of James M. Gould, deceased, plaintiffs in said suit upon the suggestion of the deaths of the original plaintiffs. An order was made on the 26th of the same month reciting that the deaths of James M. Gould and Jacob Vanderpool had been suggested, and that certified copy of the letters of administration granted to Geo. B. Vanderpool on the estate of Jacob Vanderpool, deceased, had been filed, and directing that the said heirs-at-law of James M. Gould, deceased, be made parties-plaintiffs in the suit in place of the said deceased Gould, and that Geo. B. Vanderpool, administrator, be made party plaintiff in place of Jacob Vanderpool, deceased.

Subsequently the cause was referred to John C. Cooper, Esq., an attorney at law, as referee for trial, and the following agreement in writing signed by counsel for plaintiffs and defendants was filed in the case with the referee, viz.:

"In Circuit Court—St. John's County.

"Rutledge Gould *et al.*, for use
of Geo. B. Vanderpool,
Admr., etc.

vs.
Henry Jenkins, Wiley Jenkins,
Henry Emmerly and John T.
Carr, Executors, etc., of the
estate of Delphi Emmerly.

Stipulation
of
parties.

"It is hereby stipulated and agreed by the parties to the above action as follows, to wit:

"First. That the lands and premises in controversy in said action were sold in December, A. D. 1863, for taxes under the direct tax laws of the United States of America then in force; that at said sale James W. Allen became the purchaser, to whom a certificate of purchase was issued by the tax commissioners under said laws, and that on or about January 4, 1864, the said James W. Allen, for value received, assigned and transferred such certificate to one Edmund Hill, who was at once admitted to the possession of the said lands and premises by the said Allen. This admission shall not prejudice the plaintiffs from making proof of any fact or facts that will impeach the validity of such sale.

"Second. That Edmund Hill on or about the sixteenth of April, A. D. 1881, being then in full possession, executed and delivered to Delphi Emmerly, his daughter, a deed of conveyance of the said lands and premises whereby all the right, title, interest, and estate of said

NOTE.—The decision in the present case that the continuity of adverse possession is interrupted by surrender of the premises in obedience to a writ of possession, although the judgment on which the 24 L. R. A.

writ was based is reversed and the premises restored subsequently, seems to be one of first impression.

Hill in said lands were conveyed to said Emmerly; that under such conveyance the said Emmerly was let into the possession of said lands and premises and held the possession thereof until she died, to wit: 16th day of February, 1886.

"Third. That on the 22d day of December, 1885, Delphi Emmerly duly executed her last will and testament, whereby she devised the said lands and premises to her two children, Edward M. Thomas and E. M. Emmerly; that by said will the defendants, Henry M. Emmerly and John T. Carr, were duly appointed executors thereof, and that they duly qualified as such executors on the — day of —, A. D. 1886, and thereupon entered upon the discharge of their duties as such executors; that said will was duly admitted to probate in the proper office and was properly executed.

"Fourth. That Edmund Hill died before the death of the said Delphi Emmerly.

"Sixth. That the plaintiffs who sue for the use of Geo. B. Vanderpool, as administrator of Jacob Vanderpool, are the lawful heirs-at-law of James M. Gould, and that on and prior to December 21st, 1863, the said James M. Gould was lawfully in possession of the said land and premises under a valid claim of title as sole heir of Elias B. Gould, deceased.

"Seventh. That James M. Gould and Jacob Vanderpool are dead, and that Geo. B. Vanderpool is the duly constituted administrator of the estate of the said Jacob Vanderpool, deceased.

"Eighth. That on or about the 18th day of March, A. D. 1870, the said James M. Gould executed and delivered to Jacob Vanderpool a deed of conveyance of said lands and premises, and that at the time of the execution and delivery of said deed Edmund Hill was in the possession of the said lands and premises, claiming adversely and in hostility to the title of the said James M. Gould, conveyed all his right, title, and interest in the lands to said Vanderpool.

"Ninth. That John T. Carr and Henry M. Emmerly, as executors, etc., shall duly appear and be made parties defendants to said action before the trial thereof."

In compliance with the stipulation, Henry M. Emmerly and John T. Carr, as executors of the will of Delphi Emmerly, deceased, appeared and filed a plea of not guilty.

The second plea of the defendants, Henry and Wiley Jenkins, setting up the statute of limitations, was stricken out by the referee on motion of plaintiffs, on the ground that such defense could be proven under the general issue, and upon final hearing judgment was rendered in favor of defendants. Plaintiffs appealed to this court.

The other facts necessary to be stated will appear in the opinion of the court.*

*The following is the report and finding of the referee from the decree in accordance with which the appeal was taken:

This is an action of ejectment for a lot of land in the city of St. Augustine, Florida. The facts as to the title to the property are as follows:

Up to December, 1863, James M. Gould was seized and possessed in fee of said property. In December, 1863, an attempted sale was had of said property for the non-payment of United States direct taxes to one James W. Allen, and the said Allen, 24 L. R. A.

Messrs. B. C. Rude and W. W. Dewhurst, for appellants:

The Statute of February 27, 1872, was only intended to bar those who, being entitled to maintain an action, neglect to bring it.

Branch v. Cole, 18 Fla. 877; *Spencer v. McBride*, 14 Fla. 408; *Wade v. Doyle*, 17 Fla. 532.

Since Gould was not entitled to maintain an action against Hill, or any one in privity with him when the Act of February 27, 1872, was passed, the bar of that statute does not affect him or his heirs.

Angell, Limitations, § 370; *Thompson v. Proche*, 44 Cal. 508; *Hari v. Bostwick*, 14 Fla. 176; *School District No. 3 of Thompson v. Lynch*, 88 Conn. 334; *Jackson v. Schoonmaker*, 4 Johns. 390.

There must be a continuous possession for seven years.

Wood, Lim. Act. p. 575, and *note 5*, p. 571, and *note 1*; *Sedg. & W. Trial of Title to Lands*, §§ 737-743; *Bishop v. Truitt*, 85 Ala. 376; *Ross v. Goodwin*, 88 Ala. 390; *Seymour v. Crenwell*, 18 Fla. 29.

The plaintiffs in this suit are and were the owners in fee of the lands in question by a strictly legal title. Therefore they are conclusively presumed to have been in the possession thereof at all times when no actual adverse and hostile possession is shown in some one else.

McClell. Dig. p. 781, § 4; *Levy v. Cox*, 23 Fla. 546; *Doe v. Butler*, 3 Wend. 149.

Even if in any way Hill and Vanderpool could be considered as together occupying the lands from 1871 to 1875, yet the presumption in favor of the legal title of Gould whose deed Vanderpool held, would carry the exclusive possession and seizure to Vanderpool.

Wood, Lim. Act. § 261, *note 2*.

It necessarily follows that to make good the defense of the statute of limitations, the defendants must show affirmatively a continuous, open, unequivocal, notorious, and hostile possession for seven years.

Wood, Lim. Act. § 258, *note 1*, § 269 and *note 3*, p. 578, and cases there cited; *Thomp. Trials*, § 1410; *Ross v. Goodwin*, 88 Ala. 390; *Holliday v. Oromwell*, 37 Tex. 437; *Stephens v. Leach*, 19 Pa. 265; *Doyle v. Wade*, 23 Fla. 90; *Caro v. Pensacola City Co.* 19 Fla. 766; *Sedg. & W. Trial of Title to Lands*, §§ 738, 757, and cases cited; *San Francisco v. Fulde*, 37 Cal. 853, 99 Am. Dec. 278; *Armstrong v. Morrill*, 81 U. S. 14 Wall. 148, 20 L. ed. 772.

In this case not only was Hill shown out of possession from 1871 to 1875, but Jacob Vanderpool was shown in possession. This fact alone would break the continuity of Hill's possession for James M. Gould, the ancestor of the present plaintiffs being shown the then legal owner of the legal title, Vanderpool's possession is presumed to have been in subordination to Gould's title.

January 5, 1864, conveyed the said lot to one Edmund Hill who together with his wife and his daughter Delphi (afterwards married to an Emmerly), and known on the record as Delphi Emmerly, went into immediate possession of the said property; that on the 18th of March, 1870, James M. Gould executed a deed of all his interest in said lot to Jacob Vanderpool, while Hill and Delphi Emmerly were in adverse possession of the property. That about the 7th day of December, 1870, Jacob Vanderpool commenced an action of eject-

Add to this that it expressly appears that Hill was by legal process dispossessed by Vanderpool by virtue of a hostile and paramount title, held or claimed by Vanderpool, and the possibility that Vanderpool held under Hill, is absolutely excluded.

Bishop v. Truitt, 85 Ala. 376; *Walt, Act. & Def. Supp.* pp. 505, 508; *Sedgw. & W. Trial of Title to Lands*, §§ 737-743, 745.

Every presumption being in favor of the legal title, when that is shown in Gould, every presumption is against Hill.

Even if Hill had held the legal title and

Vanderpool had by fraud, deceit, force, or other illegal means, obtained the actual possession of said lands, hostile to Hill, it would be an adverse possession to Hill and could not be construed for Hill.

Townsend v. Edwards, 25 Fla. 532; *Humbert v. Trinity Church*, 24 Wend. 587; *Wood, Lim. Act. § 275, note 3*; *Overfield v. Christie*, 7 Serg. & R. 177; *Durell v. Tennison*, 81 La. Ann. 538; *San Francisco v. Fulde*, 87 Cal. 349, 99 Am. Dec. 278; *Orispen v. Hannavan*, 50 Mo. 536.

How much more clear is it that the posses-

sion against Edmund Hill by filing a complaint, but service perfected by publication for six weeks thereafter to recover possession of said property, and on the 25th of October, 1871, obtained judgment in said suit, and on the 30th of October, 1871, was put in possession of said property, upon a writ of possession upon said judgment. That on May 5, 1875, at the term of the supreme court of the state of Florida, the said judgment in favor of said Vanderpool was reversed and set aside, and on the 9th day of June, 1875, said Hill and said Delphi Emmerly and her mother were restored to the possession of said lot; that on the 23d day of September, 1875, the plaintiff in the suit of Jacob Vanderpool v. Edmund Hill took a nonsuit. That on the 3d day of January, 1876, the suit of James M. Gould for the use of Jacob Vanderpool against Henry Jenkins and Wiley Jenkins, tenants of the said lot, was commenced, service being had on Henry Jenkins January 8, 1876, and Wiley Jenkins January 25, 1876. That on the 16th of April, 1881, Edmund Hill executed to Delphi Emmerly, his daughter, a deed of said lot, and she continued in possession of said property up to her death, on the 16th of February, 1886, and the defendants Henry Emmerly and John T. Carr are the duly qualified executors of the last will of said Delphi Emmerly, deceased. That on the 18th day of February, 1889, an order was made by the judge of the circuit court, St. Johns county, Fla., substituting the present plaintiffs the heirs of James M. Gould for the use of George B. Vanderpool as administrator of estate of Jacob Vanderpool, deceased, as plaintiff in this cause for the original plaintiff James M. Gould for the use of Jacob Vanderpool, against Henry Jenkins et al. That the defendant Henry Emmerly and John T. Carr as executors of Delphi Emmerly by their attorney came in and were made parties defendant as the landlords of said Henry Jenkins and Wiley Jenkins claiming the said Jenkins to have been tenants of Delphi Emmerly.

James M. Gould died on the 4th of February, 1876, and Jacob Vanderpool died before February, 1889, and Geo. B. Vanderpool is his administrator. Edmund Hill died previous to the death of Delphi Emmerly, but after the execution of the said deed from him to Delphi Emmerly to this lot. This statement of facts enables us now to consider the question of title and possession of the property.

The legal title was in James M. Gould in December, 1863, and I find that as a matter of law it was not divested by the attempted sale for non-payment of United States direct taxes, upon the ground that a tender was made of the taxes and refused, and that the United States direct tax commissioners established a rule contrary to law that they would not receive the taxes except from the owner, which rule under the circumstances relieved the owner from making any tender of the taxes.

I also find that the title of Gould was transferred to Jacob Vanderpool. In reference to the possession and right of possession of the property the main question to be decided is as to the effect of the possession of Jacob Vanderpool from the 30th of October, 1871, to 9th day of June, 1875, upon the continuity of possession of Edmund Hill and Delphi Emmerly, defendants' testatrix.

The evidence establishes that Edmund Hill and those claiming under him were in possession of this property from January, 1864, up to the 30th of October, 1871, when they were put out of possession under a writ on the case of Jacob Vanderpool v. Edmund Hill and after the reversal of the judgment in this case possession was restored to them on or about the 9th of June, 1875.

The reversal of the judgment in this cause in effect decided that the judgment and writ under

which Hill was ejected was illegal, and that he ought never to have been put out of possession, and, therefore, in my opinion the continuity of his possession was not broken, in the eye of the law, by this illegal action.

The statute of limitations of the state has been held to have been suspended from 1861 up to the passage of the Act approved February 23, 1872, Fla. Laws, chap. 1899. That under section 19 of that act all actions which would be barred in sixty days after the passage thereof, became affected by the limitation of that act, and barred within six months after the date of the approval of the act. There can be no doubt that, but for the illegal dispossession of Hill by Vanderpool, any action brought by Gould against Hill must have been brought within six months from the date of the Act of February 27, 1872, because Hill's possession commenced January, 1864, and at the time of the passage of the act of February 27, 1872, Hill and those claiming under him had been in adverse possession more than seven years.

Under this state of facts the judgment in favor of Vanderpool and against Hill having been reversed, Hill and those claiming under him ought not to be prejudiced or lose any of their rights on account of this illegal judgment, or of Vanderpool's possession.

Therefore, the suit of James M. Gould for the use of Jacob Vanderpool ought to have been brought against Hill or those claiming under him within six months from the passage of the act of February 27, 1872, and in my opinion it makes no difference that at the time Vanderpool was in possession of the property.

Certainly after Hill and those claiming under him were put back in possession of the property on the 9th day of June, 1875, the suit of Gould, commenced thereafter, should have been commenced within six months after the change of possession, which was not done.

The suit of Gould for use of Vanderpool v. Jenkins et al. was not commenced until the 3d of January, 1876, more than six months from date of Hill's being put back into possession.

Gould died on the 4th day of February, 1878, and no attempt was made to revive the suit or substitute parties plaintiff until the 26th day of February, 1889. We have here then a case in which the parties defendant and those claiming under them have been in adverse possession of this property since January, 1864, up to the time of this trial, with the exception of the time Vanderpool was on the premises, under an improper and illegal proceeding, and to my mind it would be destroying the salutary effects of the statute of limitations to allow the plaintiffs in this case to recover by brushing aside all of this adverse possession, for the supposed technical reasons suggested by the plaintiffs, which reasons do not seem to me of substance or true in law.

It is unnecessary to go into the question of the time and manner of substituting parties plaintiff in this suit. I hold that Gould and those claiming under him were barred of their right of recovery before the present parties plaintiff were substituted and I therefore find for the defendants.

It is considered and adjudged the plaintiff takes nothing by his said suit and that defendants go hence without day and recover of plaintiffs their costs in this suit to be taxed by the clerk of this court, including costs before the referee a statement of which is hereto appended, and that the clerk of said court enter formal judgment to the same effect.

Nov. 28, 1889.
Filed Dec. 7, 1889.

John C. Cooper,
Referee.

sion of Vanderpool, acquired even illegally, but under the legal title, cannot be construed for Hill, but is adverse to him and breaks the continuity of the possession.

Jackson v. Tibbitts, 9 Cow. 241; *Stout v. Taul*, 71 Tex. 438; *Hood v. Palmer*, 7 Rich. L. 188.

To make the possession of several successive occupants a continuous adverse possession a privity of estate must be shown between such occupants. In this case not a privity, but a direct hostility was shown.

Potts v. Gilbert, 3 Wash. C. C. 475; *Shuffleton v. Nelson*, 2 Sawy. 540; *Doe v. Campbell*, 10 Johns. 475; *Wood, Lim. Act. § 271*; *Sawyer v. Kendall*, 10 Cush. 241; *Angell, Limitations*, § 418, and cases there cited; *Sedgw. & W. Trial of Title to Lands*, §§ 745, 746, and cases cited.

During these six years Hill had a remedy as effectual as would be ejectment or forcible entry proceedings in an ordinary case. As soon as Vanderpool got judgment from Hill, Hill could have stayed the execution of the judgment and kept possession of the place, by giving the usual supersedeas bond. He did not see fit to do so.

His failure to take the remedy provided by law to keep his possessions was his own fault.

An entry under a writ of possession issued on a judgment in ejectment does give an adverse possession—adverse to the defendant in such judgment.

Wood, Lim. Act. § 270, note 5; *Graft v. Weakland*, 34 Pa. 304; *Florida Cent. R. Co. v. Bisbee*, 18 Fla. 60.

Hill should not be permitted to escape the consequences of his neglect of the proper remedy by counting Vanderpool's possession of his own, and thus robbing us of three years to assert our rights which, during that three years we were unable to assert, on account of that very omission.

Angell, Limitations, § 381.

Hill's possession being without any title, should not be helped out by construction.

Angell, Limitations, § 385, and cases cited, *note 2*, § 410, and cases cited; *Wood, Lim. Act. § 257, note 1*; *Fairchild v. Barrette*, 73 Wis. 463, and cases cited, especially *Miller v. Shaw*, 7 Serg. & R. 143; *Hart v. Bostwick*, 14 Fla. 178, and cases cited.

Mr. H. Bisbee, for appellees:

The possession gained under a judgment which was erroneous and lost on its reversal does not break the continuity of possession and interrupt the statute.

In order to interrupt the statute by action the action must be successfully prosecuted.

Wood, Lim. Act. §§ 270, 272, notes 2, 5, 6, and pp. 574, 575; *Workman v. Guthrie*, 29 Pa. 495, 73 Am. Dec. 654; *Moore v. Greene*, 60 U. S. 19 How. 71, 15 L. ed. 534.

Possession gained by force or fraud if regained by judicial process does not interrupt the statute.

Wood, Lim. Act. chap. 22, pp. 574, 575, citing Ferguson v. Bartholomew, 67 Mo. 212; *Cary v. Edmonds*, 71 Mo. 523.

An entry by one having no right is of no avail.

Henderson v. Griffith, 80 U. S. 5 Pet. 158, 8 L. ed. 81. See *Chapin v. Hunt*, 40 Mich. 595; 24 L. R. A.

Bell v. Denson, 56 Ala. 444; *Steeple v. Downing*, 60 Ind. 478.

Possession must be peaceable in order to interrupt, if possession is regained by law.

Farmer v. Eslava, 11 Ala. 1028; *Townsend v. Edwards*, 25 Fla. 582.

A judgment of reversal was within one year from time when suit by J. M. Gould was brought; second suit was brought within time under sections 16 or 21 of Act of February 27, 1872. First suit was by Vanderpool; he took a nonsuit at second trial. Second suit brought by Gould neither of sections applies.

Doyle v. Wade, 23 Fla. 90.

Vanderpool must abide by his erroneous view of law.

Angell, Limitations, § 328, *note*, p. 346.

Neither section 16 nor section 21 applies, except when reversal is on such grounds that he cannot proceed to another trial in that suit, but must institute a new one.

Angell, Limitations, § 328, *note*, p. 344.

Gould should have brought his suit within six months after Hill was restored to possession.

The heirs of Gould (the appellant) were made the sole plaintiffs (not co-plaintiffs) by order of judge, February 26, 1889.

Such order did not operate to revive the suit but was in effect a new suit.

Macker v. Thomas, 20 U. S. 7 Wheat. 530, 5 L. ed. 515; *Green v. Watkins*, 19 U. S. 6 Wheat. 260, 5 L. ed. 256.

On death of sole plaintiff suit abates and can only be revived in the mode pointed out by statute and rules of court, that is by his administrator who is his legal representative.

McClel. Dig. 830, § 77, p. 329, § 74, Rules No. 35; *Brett v. Ming*, 1 Fla. 495.

Rules 87, 94, 95, have no application, for the reason that it is the death of a sole plaintiff, and Rule 35 provides for such a case. In such a case suit cannot be revived against an heir, much less by an heir, and if the heir is made a party without objection, and judgment rendered against him, he may reverse it for that error, although the point is not made in court below.

Macker v. Thomas, supra.

Suit having abated a new suit against the heirs was necessary.

Heirs have no title or cause of action until death of ancestor and then a new cause of action springs up.

Green v. Watkins, supra.

In *Sieard v. Davis*, 31 U. S. 6 Pet. 124, 8 L. ed. 342, declaration amended by adding new counts making heirs of ancestor through whom plaintiff claimed defendant's lessor (a fictitious pleading), and it was held as to this amendment it was a new suit and statute ran in favor of defendant to date of amendment.

Under an amendment making new parties the statute runs to date of such amendment. *Miller v. McIntyre*, 31 U. S. 6 Pet. 61, 8 L. ed. 320; *Alexander v. Pendleton*, 12 U. S. 8 Cranch, 462, 8 L. ed. 624.

Mabry, J., delivered the opinion of the court:

It appears from the admitted facts and the testimony in this case that James M. Gould,

as sole heir of Elias Gould, deceased, was rightful owner and in possession of the lot of land in question on the 21st day of December, 1868, and that the lot was sold in that month under the direct tax laws of the United States to James W. Allen, who received a certificate of purchase from the tax commissioners, and in January, 1864, conveyed the lot to Edmund Hill. Hill immediately took possession of the lot under his purchase from Allen and remained in possession until the 80th day of October, 1871, when he was dispossessed by the sheriff of St. Johns county by virtue of a writ of possession based upon a judgment in ejectment for the possession of said lot, rendered on the 25th day of that month in favor of Jacob Vanderpool, and against Hill. Vanderpool's action of ejectment was based upon a deed of conveyance of the lot to him from James M. Gould, bearing date March 18, 1870, but it is conceded that at the time of Gould's conveyance to Vanderpool, Hill was in the actual adverse and hostile possession of the lot. After Vanderpool had been put into possession, which, it appears was five days after the rendition of the judgment in ejectment, Hill prosecuted an appeal to this court and succeeded in having the judgment reversed and a new trial awarded. *Hill v. Vanderpool*, 15 Fla. 128. After the reversal of the judgment Hill was restored to the possession of the lot on the 9th day of June, 1875, by virtue of a writ of restitution issued by the circuit judge to the sheriff and Hill, and those claiming under him and his title have been in possession ever since.

On September 22d, 1875, Jacob Vanderpool entered a nonsuit in his ejectment action against Hill, and on the 3d day of January, 1876, suit of ejectment was commenced for the possession of the lot in the name of James M. Gould for the use of Jacob Vanderpool, against Henry and Wiley Jenkins, and out of this suit has grown the proceedings now before us. Pleas were filed for Henry and Wiley Jenkins in March, 1876. James M. Gould died on the 4th day of February, 1878. Jacob Vanderpool died some time between 1876 and April, 1888, and the proceedings to revive the suit in the names of the heirs-at-law of Gould and the administrator of Vanderpool, as shown by the statement herewith filed, were had in February, 1889.

Hill conveyed the lot in 1881 to Delphi, his only child, who first married Thomas, and after his death, H. M. Emmerly, and she died in February, 1886, leaving a will in which John T. Carr and H. H. Emmerly are named executors. Hill died between 1881 and 1885, and during the lifetime of his daughter Delphi.

The tax sale to Allen in 1868, under the direct tax proceedings, was void. If it cannot be affirmed on the testimony before us that a tender of the taxes assessed on the lot of land and for which it was sold, had been made before sale, it is clearly shown, we think, that the tax commissioners, or a majority of them, before the sale was made, established a uniform rule that they would receive the taxes assessed on property in the city of St. Augustine from no one but the

owner in person, and that where such owner was in the confederate lines he was required to appear in person and pay his own taxes. Under the decision of *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, and authorities there cited, the tax sale in question was void. This point is not much insisted on by counsel for appellees, but the main reliance for an affirmance of the judgment is placed upon adverse possession of the lot by Hill and those claiming under him for the statutory period to bar the suit.

The principal contentions for appellee are, first, that Hill's possession was not interrupted in consequence of his dispossession from October, 1871, to June, 1875, by virtue of the writ issued on the Jacob Vanderpool judgment subsequently reversed; and, second, should this not be correct, the proceedings in the names of the heirs of James M. Gould, deceased, cannot be regarded as a revivor of the suit commenced by said decedent, but must be considered as a new suit by the heirs from the time they were made parties plaintiffs, and that the statute of limitations will run against them from the death of their ancestor up to the commencement of their suit. An examination of the testimony has satisfied us that the possession of Hill from January, 1864, up to the time he was dispossessed in 1871 was adverse and that his possession after his restoration in 1875, as well as the possession of those claiming under him since, has been adverse and hostile to both Gould and Vanderpool and all others, and will sustain a claim of title by adverse possession if the limitations of the statute as to time have been fully met. If Hill's possession was not broken by his dispossession in 1871, and he and those claiming under him must be considered as still in possession from that time on, it is clear that the action commenced by Gould in January, 1876, was barred. The statute of limitations of 1872 went into effect on the 27th day of February of that year, and the action against Hill, if we consider him as remaining in possession, would have been barred in six months from the approval of the act. *Spencer v. McBride*, 14 Fla. 408; *Wade v. Doyle*, 17 Fla. 522. If Hill's dispossession operated to break his adverse holding, then it commenced anew from the time he was restored to possession in 1875. Suit was not brought by Gould within six months from the approval of the act, and hence the necessity of deciding the effect of Hill's dislodgment under the ejectment suit instituted by Vanderpool. The deed from Gould to Vanderpool in 1870 was void as to Hill for the reason that the latter was then in adverse possession of the lot. *Levy v. Coc*, 22 Fla. 546; *Edwards v. Parkhurst*, 21 Vt. 473; *Hamilton v. Wright*, 37 N. Y. 502; *Betsey v. Torrance*, 84 Miss. 132. The case was not reversed in this court on this account, but the facts stated are admitted, and Vanderpool realizing his situation, entered a nonsuit. The character of adverse possession essential to give title to land has been several times considered by this court, but the facts of the cases considered did not necessitate a decision of the point now presented. *Wade v. Doyle*, *supra*;

Seymour v. Creswell, 18 Fla. 29; *Townsend v. Edwards*, 25 Fla. 583, and *Watrous v. Morrison*, 33 Fla. 261.

It is said in *Townsend v. Edwards*, in speaking of adverse possession: "If interrupted, even by fraud or force, and the possession be recovered by a peaceable or forcible entry, or by process of law, the continuity is broken, and the statute begins to run only from the time of the re-entry." This, however, was said in argument, as will be seen by an examination of the case, its facts not calling for a decision of the point. In Missouri it has been decided that a forcible entry by the owner upon an actual adverse possession of another does not interrupt such possession, if an action for the forcible entry is commenced within a reasonable time and prosecuted to a successful termination. *Ferguson v. Bartholomew*, 67 Mo. 212; *Carry v. Edmonds*, 71 Mo. 523. In a case in Ohio it appeared that the adverse claimant improved a part of the tract and continuously occupied it by tenants from the spring of the year 1845 to the winter of 1863-64, when the house on the place was torn down by neighbors on account of objectionable tenants placed on the land, and the material of the building was moved away by the tenants early in 1864. About the same time most of the fencing was stolen, and the greater part of the cleared land was common. It also appeared that from the time the house was pulled down to the spring of 1865 no tenant actually resided on the land, but during that time the claimant, through his agent, continued to pay taxes and to exercise all other acts of ownership and control that was possible under the circumstances. No intention of abandoning the property was entertained, nor was any adverse entry or claim made. It was said by the court that no principle of law or equity would make such acts of lawlessness inure to the advantage of the plaintiffs. *Clark v. Potter*, 32 Ohio St. 49. Decisions in Alabama affirm that the forcible interruption by a naked trespasser redressed by legal remedies will not, as to him, avail to break the continuity of an adverse possession. *Ladd v. Dubroca*, 61 Ala. 25; *Beard v. Ryan*, 78 Ala. 87. In harmony with the views expressed in the decisions referred to is an able opinion of Judge Dillon in the case of *Pella v. Schotte*, 24 Iowa, 283, 95 Am. Dec. 729. No one, it would seem, should be allowed to avail himself of the advantage of the law which he has gained by its violation. But Vanderpool did not oust Hill by force. He was turned out by virtue of a writ of possession based upon a judgment in ejectment, subsequently reversed, it is true, and afterwards the suit discontinued. It is insisted that before such ouster can be considered as a break of Hill's possession it must be shown that the suit was successfully prosecuted and resulted finally in a change of possession. There is authority for the position that a judgment in ejectment establishes simply the right of plaintiff to the possession of the land sued for, and unless it is followed by entry into possession, either by writ of possession, or without it with the

consent, surrender, or abandonment of defendant, such judgment can have no effect on defendant's continued and uninterrupted adverse possession for the prescriptive period. *Doe v. Stevens*, 1 Houst. (Del.) 240; *Jackson v. Haviland*, 13 Johns. 229; *Carpenter v. Natoma Water & Min. Co.* 63 Cal. 616; *Smith v. Trabue*, 1 McLean, 87; *Doe v. Reynolds*, 27 Ala. 864. There are decisions to the contrary. There was no ultimate recovery by Vanderpool in his suit, and the possession which he gained on the judgment in the trial court was restored to Hill, but there was an actual possession by Vanderpool from October, 1871, to June, 1875. Counsel have not cited, nor have we been able to find, a direct adjudication as to the effect of such a possession on the adverse claim of an occupant. The statute declares that in actions of the character of this one, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for seven years before the commencement of such action. There is here a clear requirement of a continuity of possession on the part of the adverse claimant. It is said in *Groff v. Weakland*, 84 Pa. 804, that if there be one element more distinctly material than another in conferring title where all requisites are so, it is the existence of a continuous adverse possession for the statutory period. The adverse claimant must "keep his flag flying, and present a hostile front to adverse pretensions." *Stephens v. Leach*, 19 Pa. 262. The rule is stated in *Cors v. Faupel*, 24 W. Va. 238, as follows, viz.: "Upon every discontinuance of the possession of the wrongdoer, the possession of the rightful owner is, by operation of law, restored, and nothing short of an actual adverse and continuous possession for the statutory period can destroy his right or vest title in the wrongdoer. . . . He must show that such adverse possession has been continued, consecutive, and unbroken for the statutory period. It is something done by him, not merely that which is left undone by the owner, that is to be considered. There can be no constructive adverse possession against the owner, when there is no actual possession which he could treat as a trespass and bring an action for; unless the adverse claimant is so in possession of the land that he may at any time be sued as trespasser, the statute will not run in his favor; and although he may have taken actual possession, if he does not continue there so that he may be sued at any time as a trespasser during the prescriptive bar, he cannot rely on the statute of limitations." To the same effect is the decision in *Malloy v. Bruden*, 86 N. C. 251. The Supreme Court of the United States held in *Armstrong v. Morrill*, 81 U. S. 14 Wall. 120, 20 L. ed. 765, that where lands owned by one individual but in the adverse possession of another, were forfeited to the state, and subsequently

redeemed by the owner by virtue of a private act of the legislature, the continuity of the adverse possession was broken in point of law, and that such possession, though it might have been in fact continuous was neither restored upon the redemption so far as to be continuous in law, nor was it so affected as that the person holding adversely could tack the adverse possession prior to the forfeiture to the possession subsequent to the redemption, and so make out a term of adverse possession. The necessity of the continuity of the adverse possession is emphasized in this case. An adverse claimant who was driven from the premises by Indians, and resumed possession as soon as it was safe to do so, was not permitted to compute the period of his absence under a plea of the statute of limitations. *Atch v. Boyer*, 51 Tex. 386. A possession vacated in obedience to a military order compelling all citizens who adhered to the Mexican cause to leave the country, was thereby interrupted. *Holliday v. Cromwell*, 87 Tex. 487. The correct rule, we think, to be deduced from the law on the subject is that the adverse possessor, the inceptor of whose title is founded in wrongdoing, must not yield or surrender his possession under the pressure of any legal methods used to oust him, if he can legally prevent it, and if he does, and an entry adverse to him is made, the continuity of his possession will be broken. Vanderpool's judgment against Hill was rendered on the 25th day of October, 1871, and it appears that two notices of appeal were served, one on the 1st day of November, 1871, and the other on the 21st day of March, 1873, and the judgment was reversed in this court at the January term, 1875. The presumption is that the appeal under the first notice was abandoned, and prosecuted under the second. No supersedeas was obtained, and no effort made to avoid or resist the writ of possession issued to put Vanderpool in possession, yet there were legal remedies provided to prevent such a result. So far as we know Hill took no steps to avoid the serious consequence to him of leaving possession, except of prosecuting the appeal, and we think he should have been prompt to use all legal means to retain the possession of the premises. Furthermore it will be observed that the statute requires that the premises shall be held adversely to the legal title, and if we were to hold that as between Vanderpool and Hill, the latter must be regarded as continuing in possession from October, 1871, in analogy to the doctrine already referred to of not allowing a party to take advantage of a wrong done by himself, still the legal title to the lot, so far as concerned Hill, was in Gould. The view expressed in the West Virginia case referred to is that the adverse claimant must so continue in possession during the statutory period, that the owner may sue him for the recovery of the land. The consequences to the owner would be serious if an occupant who had been ousted by a stranger, but afterwards restored to possession, could claim the bar of the statute, when as a matter of fact he was not in possession and could not be sued. The statute cannot admit of such a construc-

tion. It may be said that while Gould's deed to Vanderpool was void as to Hill, and as between Gould and Hill the title was in the former, still it was held beneficially for Vanderpool. If Hill had remained in possession the opportunity of Gould to sue existed, notwithstanding Vanderpool's suit, and by relinquishing possession this opportunity was taken away. Vanderpool may have discovered his mistake in suing, and have urged a suit on the part of Gould if Hill had remained in possession.

The next objection is that the suit could not be revived in the name of the heirs of James M. Gould. Suit was commenced by Gould in January, 1876, against Henry and Wiley Jenkins, and about two years after pleas filed the plaintiff died. In February, 1889, notice was given of an application to revive the suit in the names of the heirs of Gould, and an order was made by the circuit judge reviving the suit in their names as plaintiffs. No objection was made to such proceedings, but by consent the executors of Delphi Emmerly appeared, and the case was tried upon the issues presented by the pleas of not guilty filed by Henry and Wiley Jenkins and said executors. As no objection was made in the trial court to the proceedings to revive the suit in the names of Gould's heirs, so long a time after his death, we cannot review such action of the court, provided such revivor could be made. On the record presented the only question is whether the suit could legally be so revived. Our conclusion is that it could. At common law the death of a sole plaintiff in real actions before judgment, abated the suit. *Green v. Watkins*, 19 U. S. 6 Wheat. 260, 5 L. ed. 256; *Macker v. Thomas*, 20 U. S. 7 Wheat. 530, 5 L. ed. 515; *Cutts v. Haskins*, 11 Mass. 56; 2 Tidd, Pr. *1117; 1 Comyns' Dig. 120 (H. 32).

Upon the death of the ancestor the legal title under the common-law rule descends to the heir-at-law, and thereupon a new cause of action arises in his favor to recover real estate withheld from him. If the suit of an ancestor can be revived upon his death in the name of the heir, it must be done under legislative authority. The provision in the Act of February, 1861, section 74, page 829, McClellan's Digest, that "in case of the death of a sole plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, the action shall thereupon proceed," may contemplate a revivor in the name of an executor or administrator alone as contended for by counsel (*Price v. Strange*, 6 Hadd. 159), and the 35th rule of practice for circuit courts, framed under the statute mentioned, seems to add force to such contention. If this be true it does not follow that the revivor in the names of the heirs-at-law of Gould was not properly made. The Act of November 28d, 1828, while it declares what actions shall die with the person, and what shall survive, provides that those that do survive may be maintained in the names of the representatives of the deceased. McClellan's Dig. § 77, p. 880. The action here is one

that does not die with the plaintiff. Rule 94 provides that "in all cases where the rules as to making parties in other actions cannot be made applicable to actions in ejectment, and there is no rule in ejectment, or statute controlling the subject, then the persons may be made parties upon motion and notice, in such manner and upon such terms as the judge may direct." The 95th rule reads as follows: "If in any case there should be a person in interest or possession, other than the executor or administrator of the deceased plaintiff or defendant, who should be made a party plaintiff or defendant to the suit, he may be made a party, after such notice and such manner, and upon such terms as to pleading as the court or judge may direct. Such order may be made in vacation as well as in term."

These rules were made by the court under the statute specially for actions of ejectment, which are real actions, and as such actions do not die with the plaintiff, but may be maintained in the name of the representative, and as the heir is the real representative of the ancestor, it is contemplated by the rule that such heir, being a person in interest, may be made a party and maintain the suit. The action to be maintained, as contemplated by the rule, is the one commenced by or against the deceased plaintiff or defendant. This being the case, it will be seen that the action before us was commenced about six months after Hill was restored to the possession of the land in 1875, the date when his adverse possession began after its former interruption. He cannot tack his last adverse possession to his former holding, and this left him without the requisite statutory bar. The fact that the heir may not be entitled to recover mesne profits for the time the land was held in the lifetime of the ancestor, if such be the case, is no reason why the land itself may not be recovered. The suit was commenced against Henry and Wiley Jenkins in January, A. D. 1876. Pending the suit against them, who were in possession under Hill, the latter conveyed the lot in 1881 to his daughter, whose executors voluntarily appeared and defended the suit in 1889. The commencement of the suit under such circumstances must of course date from the time of the institution of the action against Henry and Wiley Jenkins.

For the reasons given the judgment must be reversed and a new trial awarded, and it will be so ordered.

Isaac MILLER, *Appt.*,

v.

Jennie MILLER.

(33 Fla. 453.)

*1. Where alimony is sought, without divorce, solely under the provisions of section

*Headnotes by TAYLOR, J.

NOTE.—As to use of *ne exeat*, see *Moore v. Valda* (Mass.) 7 L. R. A. 390.

As to domicil of wife for purpose of divorce, see *Loker v. Gerald* (Mass.) 18 L. R. A. 497, and *note*, 24 L. R. A.

1485, Rev. Stat., upon the ground of the existence in favor of the wife of some one or more of the legal causes for divorce, then the applicant must allege and prove that she has legally been a bona fide resident and citizen of this state for two years continuously next prior to the filing of her application. The prerequisite two years' residence here is jurisdictional, and no "cause for divorce," such as our courts could recognize, can properly be said to exist in this state in favor of any application until she has bona fide resided here the requisite period of two years.

2. Where the application for alimony without seeking divorce is predicated under the provisions of section 1485, Rev. Stat., upon the ability of the husband to maintain the wife and his failure so to do, then it is not necessary for the wife to allege or prove that she has resided here for two years; but in such case, in so far as the question of the jurisdiction of the court to entertain the cause is concerned, it is only necessary for her to show that either she or her husband has, in a proper and legitimate manner, become, at the time of the application, a bona fide resident and citizen of this state. It is immaterial in the latter cases how long such residence and citizenship shall have continued here prior to the application. But it is not within the spirit or intent of either of these provisions of the statute to confer upon our courts the power to interfere in any respect with the marital status of citizens of other states who may be here only on a temporary visit, either to pass upon such status or to enforce any of the rights and duties that depend thereon.

3. Where an issue is raised by the pleadings, in a proceeding for alimony without divorce, as to the jurisdiction of the court, on the ground that neither the applicant wife nor the defendant husband is a resident or citizen of this state, such jurisdictional question is no bar to the granting of temporary alimony and suit money *pendente lite*, but in such case it is within the sound judicial discretion of the court to award temporary alimony, *pendente lite*, until such jurisdictional issue, with others material to the proper determination of the controversy between the parties, can be finally heard and disposed of upon the proofs.

(April 11, 1894.)

APPEAL by defendant from an order of the Circuit Court for Volusia County directing the defendant to pay alimony to the plaintiff and forbidding him to leave the state pending proceedings. *Affirmed*.

The facts are stated in the opinion.

Mr. John W. Price for appellant.

Messrs. Scott & Broome, for appellee:

If a prima facie case is made by the wife's pleadings a plea to the jurisdiction does not take from the court the power to make the allowance to the wife.

Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; 2 Bishop, Mar. & Div. 394-396, 403, 421, 423.

In matters where a circuit court has the sound discretion the supreme court will not control that discretion except in cases where there is a refusal to exercise the same, or a flagrant abuse of it.

Moody v. Fleming, 4 Ga. 115, 48 Am. Dec. 210; *Delmas v. Margo*, 25 Tex. 1, 78 Am. Dec. 519.

And where error does not appear on the res-

ord, the appellate court will affirm the judgment of the court below.

Davis v. Shaver, 61 N. C. 18, 91 Am. Dec. 92. Alimony *pendente lite* is made up of a sum to support the wife, to pay her counsel fees and legal expenses of her suit.

1 Am. & Eng. Encyclop. Law, p. 474, citing *Collins v. Collins*, 29 Ga. 517; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Call v. Call*, 65 Me. 407; *Moe v. Moe*, 89 Wis. 308; *Waldron v. Waldron*, 55 Pa. 230, and others.

The court will grant this upon having the necessary facts before them, almost as matter of course despite even a plea to the jurisdiction. *Ex parte King*, 27 Ala. 387; *Brinkley v. Brinkley*, *supra*; *Coles v. Coles*, 2 Md. Ch. 341.

Or if a plea is put into the merits of the cause.

McGee v. McGee, 10 Ga. 478; *Story v. Story*, Walk. Ch. 421.

The granting of temporary alimony is in the sound discretion of the court.

3 Am. & Eng. Encyclop. Law, pp. 329, 338; 6 Am. & Eng. Encyclop. Law, p. 372; *Coles v. Coles*, 2 Md. Ch. 335; *Wilson v. Wilson*, 1 Desaus. 219.

Can it be objected here that the sum allowed is unreasonable? The amount to be allowed is determined by no fixed rule being in the discretion of the court, in view of the circumstances of the necessities of the wife and the facilities of the husband, and the standing of the parties in life.

1 Am. & Eng. Encyclop. Law, p. 478.

The just proportion awarded to the wife has been for instance set forth, at various accounts, viz.,—one third, one fourth and one half, it always being in the discretion of the court.

1 Am. & Eng. Encyclop. Law, p. 477, with citations.

A court of equity on a bill by the wife for divorce or separate maintenance will direct the husband to pay over to the wife sufficient funds to prosecute the suit to a final hearing.

Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Methvin v. Methvin*, 15 Ga. 97, 60 Am. Dec. 684, *notes*.

The power given by the revised statutes to the court to allow temporary alimony and counsel fees has particular reference to this class of cases.

Doggett v. Walter, 15 Fla. 355; *Bryan v. Dennis*, 4 Fla. 445.

Where proceedings depend on the discretion of the court and are guided by the circumstances in the case, and not on any certain and known rule of law, the supreme court will not control this discretion unless greatly abused.

Carpenter v. Gookin, 2 Vt. 495, 21 Am. Dec. 566; *Riddle v. Gage*, 87 N. H. 519, 75 Am. Dec. 151; *Moody v. Fleming*, 4 Ga. 115, 48 Am. Dec. 210; *Winslow v. Minnesota & Pac. R. Co.*, 4 Minn. 313, 77 Am. Dec. 519; *Russ v. Gilbert*, 19 Fla. 54; *Williams v. Hilton*, 25 Fla. 608.

As to the granting of temporary alimony, the mere pendency of the suit where the wife has no separate means of her own adequate to her support, and the husband has the means, entitled the wife to alimony, whether she is plaintiff or defendant, as long as the litigation continues.

1 Am. & Eng. Encyclop. Law, p. 272; 2 24 L. R. A.

Bishop, Mar. & Div. 381; *Jones v. Jones*, 2 Barb. Ch. 146, 5 L. ed. 591.

The court may grant temporary alimony at any time before the final hearing.

1 Am. & Eng. Encyclop. Law, p. 475.

The issue between the parties is to be tried, and in the meantime the wife must have the means of living and the benefit of counsel. To deny her this right would practically deny her the right to sue at all.

Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 665; *Pinckard v. Pinckard*, 22 Ga. 21, 63 Am. Dec. 481; *Marsh v. Marsh*, 14 N. J. Eq. 315, 82 Am. Dec. 251; *Lockridge v. Lockridge*, 3 Dana, 28, 28 Am. Dec. 52.

Taylor, J., delivered the opinion of the court:

The appellee, Jennie Miller, filed her bill in the circuit court of Volusia county on the 18th day of December, 1893, against her husband, Isaac Miller, the appellant, praying therein, not for divorce, but for alimony, and the custody of their infant son of the age of twelve years, and for an allowance for the maintenance of said child; and for a writ *ne exeat* to prevent the defendant from departing the state and to furnish security for his compliance with the order for alimony.

The bill alleges, in substance, that the complainant, Jennie Miller, is a resident and citizen of the state of Florida. That she and the defendant, Isaac Miller, are husband and wife. That they were married in the state of New York in 1879, and that afterwards they removed to the town of Franklyn, in the state of New Jersey, at which place they resided until July, 1892, when the defendant kissed her and bade her good-bye, promising to return in three weeks time, telling her that the object of his trip was to establish a syndicate of some kind somewhere in Texas. That the defendant continued to write to her until some time in November, 1892, when he ceased his letters, and she has never heard directly from him since. That defendant left her without a cause and has from the said July, 1892, willfully, obstinately, and continuously deserted her, leaving her in the meantime entirely unprovided for and without means of support other than what she was able to earn by her own labor and industry. That she has borne one child for the defendant, a boy now about the age of twelve years, named Isaac Harry Miller, who is now with her, and who has been supported and maintained by her since the desertion of her by the defendant. That she has been informed and believes, and upon such information and belief charges, that the defendant has avowed his purpose and intention to procure possession of this child, even at the cost of blood if necessary. That since his desertion of her the defendant has resided in the state of Texas. That she has inherited, by the death of a sister, Elizabeth C. Bodine, late of Volusia county, Florida, who died intestate in said county in 1893, the one-fifth interest in certain real and personal property belonging to her said deceased sister's estate. That by the consent and at the request of three of the heirs of the said estate she has applied for and obtained a grant of letters of ad-

ministration upon said estate, and that Charles Delamater, a son of a deceased sister of the said Elizabeth C. Bodine, deceased, has been appointed as her co-administrator upon said estate. That the defendant, having ascertained that she has inherited, in the manner aforesaid, the one-fifth interest in the estate aforesaid, and desiring and intending to harass and wrong her, by attempting to exercise the right of a husband over the estate of his wife given to the husband by the laws of Florida, has left his home and business in Texas and has come to Florida recently, with the purpose and intention of taking possession of her property and of the said child Harry Miller, with the intent to carry beyond the limits of the state of Florida all of her personal property that he can lay his hands upon, and also to take from her and carry out of the state of Florida her said child. That she is advised she has good cause of divorce against her said husband upon the ground of his willful, obstinate, and continued desertion of her for one year, and that she has the legal right, under the laws of Florida, to obtain alimony without seeking a divorce. That the defendant has ample means and is fully able to maintain and contribute to her maintenance and that of his said child, and has without any fault of hers, and wholly without excuse of any kind, utterly failed to do so. That the said estate in which she has a one-fifth interest aforesaid is still unsettled, the debts have not yet all been paid, nor has the said estate as yet been divided, and she is, therefore, still dependent upon her own industry for the means of maintenance for herself and her said child. That the defendant will very soon, and may at any time, remove himself beyond the limits of the state of Florida and beyond the reach of process of this court.

Personal service of the subpoena in chancery was made upon the defendant in Volusia county, Florida.

The defendant interposed a demurrer to the bill upon the grounds: That there was no equity in the bill; that it was not legally sworn to in order to obtain an injunction; that it was multifarious in seeking relief of several kinds; and that the court of chancery was without jurisdiction to adjudicate the subject-matter of said bill. This demurrer the court overruled, and such ruling is claimed to be error. The defendant then answered the bill, in substance, as follows: He admits his marriage to the complainant as alleged. He admits that he left Franklyn, New Jersey, about the 20th of July, 1892, but says that complainant knew where he was going, and the business upon which he was going; that the matter had been talked over between them before leaving for Texas, she having examined all his correspondence. He admits that he remained in Texas, but says that it was for the purpose of saving and securing a large sum of money, to wit: about \$105,000. That he kept up a correspondence with the complainant and sent her money as often as she needed it until November following, when she suddenly and without any cause known to him stopped answering his letters, and for reasons hereafter stated, to

wit: that previous to his going to Texas the said Jennie Miller received from him about \$1,700, with the request from him to deposit the same in bank to her own credit, she thereafter took a portion of that money and went to California without his consent or any knowledge on his part where she was going, and remained away for a long time; that she came back and acknowledged her error and begged forgiveness. That previous to his going to Texas she had left her home where every comfort was provided for her and went away leaving him without any cause or excuse whatever, and came back and her crime was condoned by him. That when she stopped writing to him he naturally supposed that she had left her home and refused to correspond with him. That failing to hear from her, he did not write to her, but tried to ascertain from others where she and his child had gone, but failed to find out for a long time, and when he did ascertain where she was he found that she was in Albion, Michigan, where she now lives. That she took and carried with her to Michigan all the furniture belonging to him of about \$7,000 in value which is still in her possession, and used by her, as he is informed and believes, in keeping a boarding house. He emphatically denies that he has ever failed or refused to provide for, support, and maintain her in a comfortable manner, having plenty of means himself. That he has now and always had a good and comfortable home for her as long as she remains with him and still has so long as she behaves herself as a wife should do towards her husband. That it is no fault of his that she did not come to him at his present temporary home in Texas, but of her own will she has remained away. He admits her inheritance of property in Florida from her sister and her administration on her sister's estate, but which administration was without his knowledge or consent, and which, he is advised, is illegal and void, and to which he will not give his consent. He emphatically denies that he came to Florida for the purpose of obtaining possession of the property that she inherits from her said sister's estate, but that he came here to collect a bill due him by said estate, and which he proposes to collect. He denies that he came to Florida to take possession of his child, Isaac Harry Miller, but to see him and to provide for him as a parent would for a child; and says that he does propose to take said child whenever he is large enough to go to a proper school. He emphatically denies that he ever deserted her, or left her to her own resources, except when produced by her own acts, she always having a home whenever she thought proper to remain there, which she has failed and refused to do. That he is informed and believes that she went to California and remained there with objectionable persons as long as she saw proper, and returned to him, and that for the sake of her peace and happiness he condoned and forgave her bad conduct.

Upon the filing of the defendant's answer the court made an order for an injunction to restrain the defendant from interfering with the property inherited by the complainant,

and for the issuance of a writ *ne exeat* against the defendant, the defendant to be released from custody thereunder upon his giving a bond with surety to be approved by the sheriff in the sum of one thousand dollars. The order for and issuance of this writ is also assigned as error.

Under the writ *ne exeat* the defendant was arrested and gave the required bond.

The complainant then presented her petition for alimony *pendente lite*, and for attorneys' fees, and for suit money. Upon which the court made an order requiring the defendant to pay to the complainant until the further order of the court the sum of twenty-five dollars per week, the first payment to be made on the 3d day of January, 1894, and weekly thereafter, and also the sum of one hundred dollars, solicitors' fees and suit money, to be paid on January 8d, 1894. From this order the defendant appeals.

It is contended for the appellant here that the court had no jurisdiction to entertain the cause because neither of the parties were residents or citizens of Florida, but were here only temporarily. Our statute (Rev. Stat. §§ 1485, 1486), provides that "if any of the causes of divorce set forth in section 1480 (except in the ninth paragraph) shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce, upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife." Section 1486 provides: "If any husband having ability to maintain or to contribute to the maintenance of his wife or minor children, shall fail to do so, the wife, living with them, or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes, and the court shall make such orders as may be necessary to secure to her such maintenance or contribution." Section 1487 provides that "a decree of alimony granted under sections 1484 and 1485 shall release the wife from the control of her husband, and she may use her alimony, and acquire, use, and dispose of other property, uncontrolled by her husband, and when the husband is about to remove himself or his property out of the state, or fraudulently convey or conceal it, the court may award a *ne exeat* or injunction against him or his property, and make such order or decree as will secure the wife's alimony to her." While we do not think that it is within the spirit and intent of these statutes to confer upon our courts the power to interfere in any respect with the marital status of citizens of other states who may be here only on a temporary visit, either to pass upon such status or to enforce any of the rights and duties that depend thereon, yet where either of the parties, in a proper and legitimate manner, becomes a bona fide resident and citizen of this state, then our courts become clothed with power to enforce and protect all of the rights of such citizen, and to compel,

to the extent of their jurisdictional powers, the performance of all duties due to or from such citizen, including those that grow out of the marital status; except, that when a total dissolution or severance of such status, by divorce, is sought, then our statute requires that the residence here must have continued for two years before the application therefor can be made. Where one of the parties, however, is actually, legally and bona fide domiciled in this state, as a citizen thereof, then, we think, that under section 1486 of this statute our chancery courts have jurisdiction to enforce the duty of maintenance and support due from the husband to the wife by awarding alimony, particularly where personal service is made upon the husband within this jurisdiction as has been done here. *Keerl v. Keerl*, 34 Md. 21. It is contended for the appellant that the provision of our divorce statute requiring two years residence in the state before an application for divorce can be entertained, applies to the granting of alimony under all of the provisions of the statutes quoted. Where the application for alimony is predicated solely and entirely upon "the existence of a cause for divorce," as provided for in section 1485, first quoted above, then we think that the bill therefor should allege, and it should also be proved, that the complainant wife has in fact resided in this state continuously for two years next prior to the exhibition of her bill, because under our statute, requiring two years' residence on the part of the applicant for divorce before the doors of our courts are open to his or her complaint, no "cause for divorce" can properly be said to exist in this state in favor of such applicant, at least none such as our courts could recognize, until he or she shall have completed the requisite two years' residence here. The reason for the requirement of the two years' residence before a divorce can be applied for is to prevent citizens of other states from committing a fraud upon the law by taking up a temporary residence here solely for the purpose of obtaining divorces that they could not secure in the jurisdiction to which they belong. But where the application for alimony, as in the case before us, can be rested upon the provisions of section 1486 above, that is a general provision of law to enforce the marital duty due from the husband, having the ability so to do, of maintaining and supporting his wife, regardless of the existence of any cause for divorce, then the reason for the requisite two years' residence does not apply, and in such case it becomes necessary, in so far as the jurisdiction of the court to entertain the cause is concerned, only to show that the applicant wife or the defendant husband is in fact properly and bona fide domiciled here as a citizen of this state. Because of the fact that the bill can be rested upon the provisions of the latter section of the statute, we think it was within the power and discretion of the court to grant alimony thereon. The bill alleges expressly that the complainant wife here is a resident and citizen of Volusia county, Florida. The answer denies this to be true, and asserts that she is a resident and citizen of Michigan, and that she is

here only temporarily for the purpose of securing an interest inherited by her in the estate of a deceased sister. Whether she is in truth a bona fide resident and citizen of Florida, or of the state of Michigan, then, is one of the material questions at issue between the parties to be ultimately settled from the proofs to be furnished at the final hearing. The order appealed from grants temporary alimony only until all of the material issues between the parties can be finally determined by further orders and decrees of the court. And even though the answer raises the issue as to the jurisdiction of the court on the ground that both parties are residents and citizens of other states, still it is within the sound judicial discretion of the court below to award temporary alimony to the wife until that issue with others material to the proper determination of the controversy between the parties can be finally heard and determined. 2 Bishop, Mar. & Div.

§ 934; *Bradstreet v. Bradstreet*, 6 Mackey, 502. Indeed it may be said to be well settled that where the fact of marriage, the wife's necessities and the husband's faculties are shown by adequate pleadings, temporary alimony will be allowed, in accordance with the facts of each case, within the sound discretion of the court. *Methvin v. Methvin*, 15 Ga. 97, 60 Am. Rep. 664; 2 Bishop, Mar. & Div. § 929 *et seq.*, and authorities cited. We do not see that the discretion of the court below has been abused either in ordering the payment of temporary alimony and suit money here, or in the amount required to be paid, in view of the admission from the defendant husband of the possession of abundant means.

It is also urged here as error that the granting of the writ *no azeat* was improper. As there is no appeal from this order we cannot consider same.

The order appealed from is affirmed.

ILLINOIS SUPREME COURT.

CHICAGO, BURLINGTON & QUINCY R.
CO., *Appt.*,

Charles L. JONES.

(149 Ill. 351.)

1. A statute prohibiting more than fair and reasonable rates by a railroad corporation, being merely declaratory of a common-law rule, although penal, does not deprive the company of its property without due process of law, because the statute does not fix any limit of the rates,—especially where a provision is made in the same statute for the fixing of rates by commissioners.
2. There is no unconstitutional delegation of power to railroad commissioners by a statute authorizing them to fix reasonable maximum rates of charges for freight and passenger traffic, where their schedule is not final but is made merely prima facie evidence of the reasonableness of the rates established.
3. Making a schedule compiled by commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates of charges for railroad carriage does not infringe upon the right of trial by jury.
4. Provisions in a statute as to unlawful discrimination in rates will, even if unconstitutional, not make invalid other provisions as to reasonableness of rates.
5. Only transportation within the state, and that which is not a part of any continuous transportation without the state, is within the provisions of sections 1, 7, 8, and 11 of the Act of May 2, 1873, and these do not therefore affect interstate commerce.
6. The power of railroad commissioners to make a schedule of reasonable maximum rates does not impair the obliga-

tion of the contract of a railroad company, under the Act of 1852, which authorized its board of directors to establish rates of toll from time to time, but also provides that the company's by-laws shall not be repugnant to the constitution and laws of the state.

7. A schedule of rates cannot be excluded from evidence under the Illinois statutes when accompanied by a regular certificate of the commissioners as to its publication on the ground that it never took effect because never published as required by statute, since the statutes make the schedule and accompanying certificate prima facie evidence that the schedule offered is a schedule of the commissioners.
8. A statute changing a rule of evidence is applicable to a pending action.
9. An amendment to a declaration charging a common-law liability or implied contract obligation to repay money obtained by wrongful overcharges, states a new cause of action within the rule as to the statute of limitations, where the original counts sought to recover treble damages as a statutory penalty.

(April 2, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Knox County in favor of plaintiff in an action brought to recover back overcharges of freight which had been exacted of plaintiff by defendant for the carriage of livestock. *Affirmed.*

Statement by Magruder, J.:

This was an action in debt, brought by appellee, Charles L. Jones, against appellant, the Chicago, Burlington & Quincy Railroad Company, under the Act of 1873, to recover penalties for alleged overcharges on shipments of livestock from points on ap-

NOTE.—The above case very fully presents the authorities on the subject of state regulation of carrier's rates. See on the same subject, *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 1 L. R. A. 24 L. R. A.

744; *Pensacola & A. R. Co. v. State* (Fla.) 3 L. R. A. 661; *St. Louis & S. F. R. Co. v. Gill* (Ark.) 11 L. R. A. 452, and *note*; *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 12 L. R. A. 436.

pellant's road in this state to the Union Stock Yards, Chicago. The suit was brought in the circuit court of Knox county on October 17, 1882. On May 25, 1883, appellee filed a declaration consisting of two special counts. The first count alleged that the railroad and warehouse commissioners made and published prior to October 2, 1873, as required by law, a schedule of reasonable maximum rates for appellant; that appellee shipped over appellant's road, subsequent to that date, certain cars of livestock from certain points on its road to Chicago; that appellant charged and received from appellee certain rates of freight, which were in excess of the rates fixed in the commissioners' schedule, whereby, by force of the statute, an action accrued to appellee, to recover three times the amount of the overcharge, and a reasonable attorney's fee. The second count was the same in form, except that it alleged a second schedule made and published by the commissioners prior to December 2, 1881, and certain shipments made, and freights charged and received, in excess of the commissioners' rates, subsequent to that date. On June 9, 1883, appellant filed four pleas to the declaration. The first two pleas set out at length the corporate organization of appellant, and the several special charters of the different companies forming it, by consolidation; that, by these charters, appellant was given power by the legislature to fix its own rates of freight and fare; and that the statute under which the suit was brought was in violation of the obligation of the contract between it and the state. The third plea was *nil debet*; and the fourth, that the cause of action did not accrue within two years. On June 11, 1883, the cause was removed to the circuit court of the United States, but on September 8, 1890, was remanded, and redocketed in the state court. In February, 1891, appellee filed an amended declaration, which consisted of 191 special counts. All of these counts, except the last, declared on single shipments on different dates, and were the same in form. Each of the first 124 counts averred the making and publication by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for appellant prior to October 2, 1873,—the rate fixed by the schedule,—the rate charged, and the excess, and that thereby, by force of the statute, a cause of action accrued to the plaintiff for three times the alleged overcharge, and an attorney's fee. The remaining counts, except the last, were the same in form, except that they averred the making of a second schedule prior to December 2, 1881, and shipments subsequent to that date. The last count did not count on the statute, but averred certain shipments, and that the rates charged and received were unreasonable, and that thereby the defendant became indebted to appellee for the alleged overcharge above a reasonable rate. To this declaration, appellant filed seven pleas. The first and second, to all the counts except the last, set up appellant's charters, and the right claimed by it to fix its own rates, and that the statute sued on was a violation of the obligation of its contract with the state, substantially as in the

first and second pleas to the original declaration. The third plea was *nil debet*. The fourth and seventh pleas, to all the counts except the last, averred that the causes of action alleged did not accrue within two years before the commencement of the suit. The sixth plea averred that the cause of action set out in the last count did not accrue to the appellee within five years before the filing, or obtaining leave to file, that count. Appellee joined issue on the third, fourth, and seventh pleas, and filed a demurrer to the first, second, and sixth pleas, the fifth having been withdrawn. The demurrer raised two questions: (1) Whether appellant's first and second pleas, setting up its charter provisions, constituted a defense; and (2) whether the cause of action set up by the last additional count was a different cause of action from that declared on in the original declaration. The court sustained appellee's demurrer to the first and second pleas, and overruled his demurrer to the sixth. Issues were subsequently joined, and a trial was had by a jury. On the trial, appellee gave evidence showing the various shipments made by him for two years prior to the commencement of the suit, and the amount of freight paid on each, and to establish that the rate charged was more than a reasonable rate, and the alleged overcharges, and gave in evidence (1) a schedule of maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated September 1, 1873, consisting of a classification of freight, and a tabulation of rates referring to this classification, with a certificate of the railroad and warehouse commissioners attached, as to the dates of publication; (2) a like schedule of reasonable maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated December 1, 1881, and also having a certificate of the railroad and warehouse commissioners attached, as to the dates of publication. To the admission of these schedules in evidence, appellant objected, on the grounds, among others, (1) that the statute on which the suit was brought was unconstitutional and void; (2) that the provision of the statute making the commissioners' schedule prima facie evidence of reasonable maximum rates was unconstitutional and void; (3) that the schedule was not published as required by the statute, and therefore never went into effect as a schedule. Among the instructions asked by appellant, and refused by the court, were (1) an instruction that, under the pleadings and evidence, the plaintiff was not entitled to recover; (2) an instruction that in arriving at their verdict the jury should disregard the schedule of September, 1873; (3) an instruction that in arriving at their verdict the jury should disregard the schedule of December, 1881. The jury rendered a verdict in favor of appellee for \$2868.60, and the court subsequently assessed appellee's attorney's fee at \$1200. A motion for a new trial was entered, and overruled, and judgment was rendered in favor of appellee for the amount of the verdict and costs. From this judgment, appellant has appealed to this court.

Messrs. Herrick & Allen for appellant.
Messrs. J. B. Cessna and Willoughby & Barnes for appellee.

Magruder, J., delivered the opinion of the court:

The questions presented by this record concern the validity of the system under which for twenty years or more, the rates of railroad charges for the transportation of passengers and freight have been controlled and regulated by this state, through the medium of a board of railroad and warehouse commissioners. The principal points raised by the demurrers to the pleas, by the objections to the introduction of evidence, and by the refusal of instructions, relate to the constitutionality of the act of the legislature of this state, approved May 2, 1873, in force July 1, 1873, entitled "An Act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An Act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freights on said roads,' approved April 7, A. D. 1871." 2 Starr & C. Anno. Stat. p. 1961; Rev. Stat. 1885, chap. 114, p. 951, §§ 124-138. Section 1 provides: "If any railroad corporation," etc., "shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight, . . . the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided." Section 6 provides: "If any railroad corporation shall, in violation of any of the provisions of this act, ask, demand, charge, or receive of any person or corporation any extortionate charge or charges for the transportation of any passengers, goods, merchandise, or property, . . . the person or corporation so offended against may, for each offense, recover from such railroad corporation, in any form of action, three times the amount of the damages sustained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court," etc. Section 8 is as follows: "The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freights, and cars on each of said railroads; and such schedule shall, in all suits brought against such railroad corporations wherein is in any way involved the charges of any such railroad corporation for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, to be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freight, and cars upon the railroads for which said schedules may have been respectively pre-

pared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks in some public newspaper published in the city of Springfield in this state. All such schedules heretofore or hereafter made purported to be printed or published as aforesaid, shall be received and held in all such suits as prima facie evidence of the schedules of said commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named, and that the same has been published as required by law, stating the name of the paper in which the same was published, together with the date of such publication."

1. The first ground upon which counsel for appellant attack the act is that it is void for uncertainty, in not defining the offenses for which the penalties provided for are imposed. The basis of this attack is found in the words: "If any railroad corporation," etc., "shall charge," etc., "more than a fair and reasonable rate," etc. It is said that it is uncertain what a fair and reasonable rate is as the determination of that question will depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability, as affected by the value of the article as carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.; that the offense of charging more than a fair and reasonable rate can only be defined when the jury, in each particular case, shall decide from the evidence before them what is a fair and reasonable rate; that the statute, being penal in its character, should describe the offense in terms which are free from ambiguity; and that the enforcement of a statute whose meaning is thus doubtful violates that provision in the Federal and state constitutions which declares that no person shall be deprived "of life, liberty, or property without due process of law." The difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. If the legislature, in the act passed by it, fixes particular rates or charges, strict compliance therewith may work hardship, in view of the impossibility of always providing in advance for the effect of varying circumstances and conditions. The first section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation, upon receiving a reasonable hire (*Messenger v. Pennsylvania R. Co.* 86 N. J. L. 407, 18 Am. Rep. 457; *New England Exp. Co. v. Maine Cent. R. Co.*

§7 Me. 188, 2 Am. Rep. 81); and the court was to judge of the reasonableness of the freight charges. *Gard v. Callard*, 6 Maule & S. 70; *Louden v. Hierons*, 2 Moore, 102; *Bazendale v. Great Western R. Co.* 5 C. B. N. S. 330. As common carriers must carry all freight offered to them and can only make a reasonable charge for so doing, it follows that the statute is only an expression of what was the law without the statute. Undoubtedly, the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges. *Dow v. Beidelman*, 135 U. S. 680, 81 L. ed. 841. But in the absence of statutory regulation upon the subject, the courts must decide what is reasonable. *Dow v. Beidelman*, *supra*; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 99 U. S. 155, 24 L. ed. 94; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45. This being so, we are unable to see how the statute here deprives the appellant of its property without due process of law. If the legislature has failed to fix a reasonable rate, then the courts must decide for the railroad companies, when controversies arise, what is a reasonable rate. *Chicago, B. & Q. R. Co. v. Iowa*, *supra*.

But we held in *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 448, that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making, by the railroad and warehouse commissioners, of a schedule of reasonable maximum rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: "When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed. . . . It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates is not the exact form of statutory offense, and the taking of such higher rates might not subject to the penalties of the statute, upon the making of proof that they were fair and reasonable. Still, as we view it, to constitute the offense really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates." This construction of the two sections, as related to each other, is not forbidden by the character of the act as a penal statute. Although penal laws are to be construed strictly, yet "the object in construing penal as well as other statutes is to ascertain the legislative intent." *United States v. Hartwell*, 73 U. S. 6 Wall. 395, 18 L. ed. 832. The statutory counts of the declaration in the case at bar contain an averment that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates. It thus avoids the defect for which the declaration in *Chicago, B. & Q. R. Co. v. People*, *supra*, was condemned. Upon this branch of the case, counsel for appellant rely upon the case of *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679, decided by the circuit court 24 L. R. A.

of the United States, sitting in Tennessee; but a comparison of the statute of Tennessee which was under consideration in that case with the Illinois statute under which the present suit is brought will show that they differ from each other in many respects. In *Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, the Supreme Court of the United States passed upon the validity of a statute of Mississippi passed in 1884, and entitled "An Act to provide for the regulation of freight and passenger rates in this [that] state, and to create a commission to supervise the same and for other purposes," which is similar, in many of the essential features, to the Illinois Act of 1873. It was objected to the Mississippi act that it was void for want of sufficient certainty, and the case of *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, *supra*, was referred to in support of the objection. But *Chief Justice Waite*, in delivering the opinion of the court in the *Stone Case*, says of the Mississippi statute: "It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. . . . We find nothing in it to show that the statute, as it now stands, is altogether void and inoperative." See also *Stone v. Yacoo & M. V. R. Co.* 62 Miss. 607, 52 Am. Rep. 193. We are not convinced that it is our duty to hold said Act of 1873 void for uncertainty in defining the offense for the commission of which it imposes the penalties therein mentioned.

2. It is claimed that the provision contained in said section 8 which authorizes the commissioners to fix for each of the railroads in the state a schedule of reasonable maximum rates is unconstitutional, as being an attempted delegation of legislative power. The constitutional provisions on this subject are as follows: "And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." Const. art. 11, § 12, 1 Starr & C. Anno. Stat. p. 163. "The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Const. art. 11, § 15, 1 Starr & C. Anno. Stat. p. 164. The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies; and the charges for services of other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of Congress to regulate foreign and interstate commerce. *Munn v. Illinois*, 94 U. S. 113,

24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45. This doctrine is not here controverted. It is admitted that if, in the Act of 1873, the legislature had prescribed, in definite and specific figures, reasonable maximum rates of charges, the law would have been valid. By an Act approved April 15, 1871, the legislature of Illinois classified the railroads in the state into four classes, and provided that those in the first class should be limited to 2½ cents per mile, those in the second class to 3 cents per mile, those in the third to 4 cents per mile, and those in the fourth class to 5½ cents per mile, as compensation for the transportation of any person with a certain amount of ordinary baggage. Ill. Laws 1871, p. 640. We held this law to be valid. *Ruggles v. People*, 91 Ill. 256. The Supreme Court of the United States affirmed the decision. *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812.

The objection made to the Act of 1873 is that it is not such an act as was the Act of 1871, which was repealed on March 31, 1874. 3 Starr & C. Anno. Stat. p. 2868. The Act of 1873 is said to be invalid because, instead of establishing reasonable maximum rates of charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held, in a number of cases, that statutes which create boards of commissioners, and authorize them to make schedules of rates for railroad companies, are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative, rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end; and that, as the reasonableness of rates changes with circumstances, and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the legislature from the use of the agencies necessary to perform the duty imposed upon it by the constitution; in short, that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. *State v. Chicago, M. & St. P. R. Co.* 38 Minn. 281; *Georgia R. Co. v. Smith*, 70 Ga. 694; *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 641; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866; *State v. Fremont & E. M. Valley R. Co.* 23 Neb. 818, 23 Neb. 117; *People v. Harper*, 91 Ill. 857; 8 Am. & Eng. Enc. Law, p. 911.

In *State v. Chicago, M. & St. P. R. Co.* *supra*, the eighth section of the Minnesota statute, which was there held to be constitutional, provided that the railroad and warehouse commissioners should have the power, in case the tariffs of rates, fares, charges, or classifications filed and published by the railroad companies should be unreasonable, to change them, and make them reasonable, and compel the carriers to adopt them as thus changed, and, upon refusal, to enforce com-

pliance by mandamus; and said section also declared that it should be unlawful for any common carrier to charge a higher or lower rate than that fixed and published by the commission. In that case the supreme court of Minnesota interpreted the eighth section to mean that the rates recommended and published by the commission in the manner required by the act, were not simply advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what were lawful or equal and reasonable rates, and that, in proceedings to compel compliance, no issue could be made, or inquiry had, as to the equality and reasonableness of the rates in fact. It was there conceded by counsel that the legislature could declare the schedule of rates fixed by the commission to be prima facie evidence of what was equal and reasonable, but the court held that the legislature had the power to create a commission whose judgment or determination as to what was reasonable should be final and conclusive. The Minnesota case was taken to the Supreme Court of the United States, and the judgment therein rendered was reversed upon the ground that the Minnesota statute, as construed by the supreme court of that state, conflicted with the constitutional provision forbidding the states to deprive persons of their property without due process of law. *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 33 L. ed. 970. In the latter case, Mr. Justice Blatchford, in delivering the opinion of the court, said of the statute: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." From this decision, *Justices Bradley, Gray, and Lamar* dissented, and held, in their dissenting opinion, that there was no good reason why the legislature might not delegate the duty of regulating and fixing the charges, so as to make them equal and reasonable, to such a board of commissioners as was provided for in the Minnesota statute.

Subsequently, in the case of *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, the case of *Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*, was reviewed and explained. The doctrine of *Munn v. Illinois*, *supra*, and of the other cases known as the "*Granger Cases*," in 94 U. S. 155-181, 24 L. ed. 94, 102, was adhered to; and it was held that the Minnesota law had been declared invalid because it had been construed by the supreme court of that state "as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates."

We understand the doctrine of *Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*, and of *Budd v. New York*, *supra*, to be as follows: The legislature has the power to directly fix the rates of charges. It has the right to declare what is reasonable. When it does so, its declaration is conclusive as to the reasonableness of the rates, and a charge beyond the maximum fixed by it must be regarded as unreasonable. But, where the legislature creates a commission to regulate the rates of charges, such commission has no power to make a schedule of rates which shall be final and conclusive evidence as to the reasonableness of the charges because judicial inquiry is thereby cut off. We do not, however, understand the Federal cases to hold that an act of a state legislature may not be valid, if, while omitting to itself fix the maximum rates, it creates a commission with authority to make schedules which shall be prima facie evidence of the reasonableness of the rates. Where the schedule is only made prima facie evidence, the court, in a suit against the carrier, can inquire and determine what is a reasonable rate; and the defect which was found to exist in the Minnesota law is thus obviated. Such is the character of the Illinois Act of 1873, which provides, in section 8, that the schedule made, published, and certified by the commissioners shall, in all suits brought against the railroad corporations, involving their freight and passenger charges, etc., be "deemed and taken, in all courts of this state, as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges," etc. One of the criticisms made upon the construction given by the supreme court of Minnesota to the statute in that state is expressed in *Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*, in the following words: "The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely prima facie equal and reasonable." The Mississippi statute, which was held to be a valid law in *Stone v. Farmers Loan & T. Co.* *supra*, contained a provision that the determination of the commissioners should be received in the courts as prima facie evidence that such determination was right and proper. So, also, the Iowa statute, which was held not to be unconstitutional as a delegation of legislative power in *Chicago & N. W. R. Co. v. Dey*, *supra*, provided that the schedule made by the commissioners should be prima facie evidence of the reasonableness of the rates therein charged, in all suits brought against the railroad corporations.

Under the constitutional provisions above quoted, the legislature of this state has the right, and it is its prerogative, if it chooses to exercise it, to pass a law establishing or fixing reasonable maximum rates of charges. When it passed the Act of 1873, it did not choose to exercise the power thus conferred upon it. That act does not establish reasonable maximum rates, nor does it delegate to the board of railroad and warehouse com-

missioners the power to establish such rates. When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of prima facie evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But "when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts, to inquire judicially whether the charges are reasonable." *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 462, 33 L. ed. 988. The decision in *Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*, does not base the invalidity of the Minnesota statute upon the ground that the provision making the schedule of the commission final and conclusive as to the reasonableness of the rates was a delegation of legislative power to the commission. Nor do we deem it necessary to decide whether such a provision would amount to a delegation of legislative power, or not. But, if it be conceded that making the schedule of the commission final and conclusive as to the rates is a delegation of legislative power, it is sufficient to say, in the present case, that the Act of 1873 does not give to the schedule any such final and conclusive effect. We are therefore of the opinion that the act is not unconstitutional for the second reason urged upon our attention by counsel.

3. It is argued that the provision of the statute making the schedule of the commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. 2 Rice, Ev. pp. 806, 807; *Com. v. Williams*, 6 Gray, 1; *State v. Hurley*, 54 Me. 563. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. *Pittsburg, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443; *St. Louis F. & T. H. R. Co. v. Funk*, 85 Ill. 460;

Toledo, W. & W. R. Co. v. Larmen, 67 Ill. 68; *Rockford, R. I. & St. L. R. Co. v. Rogers*, 62 Ill. 346; *Chicago & A. R. Co. v. Clamplit*, 63 Ill. 95; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 889. Acts making tax deeds prima facie evidence of the regularity of the proceedings antecedent to the deed have been held to be valid. 2 Rice, Ev. p. 607; *Hand v. Ballou*, 12 N. Y. 541; *Delaplaine v. Cook*, 7 Wis. 54; *Allen v. Armstrong*, 18 Iowa, 508; *Wright v. Dunham*, 18 Mich. 414; *Gage v. Caraher*, 125 Ill. 451. See also *Williams v. German Mut. F. Ins. Co.* 68 Ill. 887. Cases referred to by counsel, which involve the validity of acts providing for references to auditors or referees, and making the findings of facts by them in their reports prima facie evidence of the facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The supreme court of Iowa has decided that a provision making the schedule of the commission prima facie evidence of the reasonableness of the rates of charges, as contained in a statute of that state similar to the said Act of 1878, was not obnoxious to the objections here urged against it, saying: "The provision of the statute that the rates fixed by the commissioners shall be regarded as prima facie reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceedings under the laws of the state. The law presumes the acts of officers of the state to be rightfully done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff." *Burlington, O. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436. See also *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599.

4. It is contended that the statute has been held to be unconstitutional as to interstate shipments, and that, therefore, it is void as a whole. This contention is based upon the decisions of this court in *People v. Wabash, St. L. & P. R. Co.* 104 Ill. 476, and *Wabash, St. L. & P. R. Co. v. People*, 105 Ill. 236, and of the Supreme Court of the United States in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244. In the Illinois cases the action was to recover for unjust discrimination in carrying the same class of freight from Peoria to New York city for a less sum of money than similar freight was carried from Gilman to New York city; Peoria being a greater distance from New York than Gilman, and being 86 miles further west in Illinois upon the defendant company's road from a station near the eastern boundary of Illinois, than Gilman. The judgments in the Illinois cases were reversed by the United States Supreme Court in the *Wabash, St. L. & P. R. Co. case*, *supra*, because of the interpretation placed by this court upon those sections of the Act of 1878 which relate to unjust discrimination, and not because the United States Supreme Court considered the Act of 1878 invalid, as amounting to an attempted regulation of commerce. The latter court, in the *Wabash, St. L. & P. R. Co. case*, *supra*, said: "It might admit of question whether the statute of Illinois

now under consideration was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state." The question whether the Illinois statute was or was not so designed by its framers was not as carefully considered in the above cases as it would have been, had it not been for the construction therein placed upon the previous decisions of the Federal Supreme Court. The latter decisions were then understood as holding that a state law prohibiting unjust discrimination in the rates of charges for the transportation of property between points wholly within the state, whether it was a part of a continuous carriage to a point out of the state, or not, was not invalid, in the absence of congressional action upon the subject, and when construed as the Act of 1878 was construed in the Illinois cases. With such understanding of the Federal rulings, this court held that, while the provisions of the Act of 1878 relating to unjust discrimination were inoperative upon that part of the contract of shipment which had reference to the transportation outside of the state, they were binding and effectual as to so much of the transportation as was within the limits of the state. In the opinion of the majority of the court (*Chief Justice Waite and Justices Bradley and Gray dissenting*) in *Wabash, St. L. & P. R. Co. v. Illinois*, *supra*, *Mr. Justice Miller* said: "It cannot be denied that the general language of the court in these cases, upon the power of Congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it." In the same opinion the same learned justice, in speaking for the majority, while stating that they were bound by the construction given by this court to the Illinois statute, and that this court had so construed the statute as to make it apply to commerce among the states, also said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." Looking, however, at the provisions of the Act of 1878 which have reference to unjust discrimination, in the light of the construction given to them in the Illinois cases above referred to, the Federal Supreme Court held those decisions invalid, as applied to unjust discrimination in the rates of charges for the transportation of property within the state, when such transportation was part of a continuous carriage from a point within to a point without the state, upon the ground that such construction made the provisions conflict with the constitutional grant to Congress of power to regulate interstate commerce. This court might be inclined to consider the question whether the construction announced in said cases and accepted by the United States Supreme Court, may not have been incorrect, and unauthorized by the language of the act, if the present suit had arisen under those sections of the act which have reference to unjust discrimination. But the case at bar arises under the provisions which prohibit

the charge of more than fair and reasonable rates. This action is brought for damages growing out of alleged charges of unreasonable rates for the transportation of property between points lying wholly within the state, and not being part of a continuous transportation to any point outside of the state. It is within the power of the legislature to so amend the act as clearly to limit the provisions concerning unjust discrimination to commerce carried on within the state.

Counsel claim that the provisions relating to interstate commerce are so intimately connected with those relating to commerce carried on wholly within the limits of the state as not to be separable, the one from the other, and that, as the act has been declared invalid when applied to interstate commerce, it must also be invalid as applied to state commerce. Upon this point, reference is made to cases holding that words of limitation cannot be introduced into a penal statute, so as to make it specific, when, as expressed, it is general only. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 568; *Trade-Mark Cases*, 100 U. S. 83, 25 L. ed. 550; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766. If the doctrine of these cases is applicable to the case at bar, it is only applicable to the sections of the Act of 1873 relating to unjust discrimination; and the effect of its application would be to hold those sections void, as affecting transportation within the state, because they had been held void as affecting interstate transportation, but the effect would not be to invalidate the act, so far as it relates to charges of fair and reasonable rates alone. Where a part of a statute is unconstitutional, the remainder will not be declared unconstitutional also, if the two are distinct and separable, so that the latter may stand, though the former becomes of no effect. The constitutional and unconstitutional provisions may sometimes be contained in the same section, but do not necessarily fall together, unless they "are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. . . . If a statute attempts to accomplish two or more objects, and is void as to one, it may still be, in every respect, complete and valid as to the other. . . . A legislative act may be entirely valid as to some classes of cases, and clearly void as to others." *Cooley*, Const. Lim. 6th ed. pp. 211, 213; *Dupe v. Swigert*, 127 Ill. 494. An examination of the Act of 1873 in the light of these principles of construction will show that parts of the act relate to the prevention of unjust discrimination between persons and places in the rates of charges for transportation, while other parts relate to the prevention of charges that exceed fair and reasonable rates. Sections 2 and 8 of the Act relate more particularly to unjust discrimination, and their aim is "against favoritism,—against charging one shipper more than another for the like service under like con-

ditions." *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250; *Illinois Cent. R. Co. v. People*, 121 Ill. 804. Section 1, in connection with sections 7 and 8, concerns the question whether the rate charged a passenger or shipper is reasonable or not, irrespective of the charge that may be made against another passenger or shipper, or at another point. It is easy to see that there is a difference between extortion and discrimination. Hence, we think that the provisions of the act upon the two subjects can be separated and disconnected from each other so that those portions relating to reasonable charges may stand, even if those portions relating to unjust discrimination fall. Whether the latter do or must fall, or not, we do not decide. It is to be noted, however, that in *Indianapolis, D. & S. R. Co. v. Ervin*, and *Illinois Cent. R. Co. v. People*, *supra*, this court treated the whole of the Act of 1873 as valid, as applied to commerce wholly within the state. The *Wabash, St. L. & P. R. Co. cases*, 104 Ill. 476, 105 Ill. 236, arose under the sections relating to unjust discrimination; and it was those sections which were therein construed as being "broad enough to include unjust discrimination in the rates of charges for the transportation of property from a point within to a point without the state." The provisions of the act relating to fair and reasonable rates were not construed as being broad enough to prohibit charges of more than reasonable rates for transportation outside of the state, or within it, as part of a carriage beyond the state. Therefore, the question whether these provisions were intended to apply only to transportation between points lying wholly within the state, and disconnected from a continuous carriage to a point outside of the state, is not a question which is settled in the decisions of the *Wabash, St. L. & P. R. Co. cases*. After a careful study of the terms of the act, we are of the opinion that the first section, read in connection with the title, and sections 7, 8, and 11, applies only to charges of reasonable rates for such transportation within the state as is not a part of a continuous transportation without the state, and therefore does not infringe upon the power of Congress to regulate interstate commerce. The title of the act is "An act to prevent extortion . . . in the rates charged for the transportation of passengers and freights on railroads in this state," and not on railroads outside of this state. The railroad corporations forbidden by section 1 to charge more than reasonable rates are thus therein described: "Any railroad corporation organized or doing business in this state under any act of incorporation, or general law of this state, now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other state, and doing business in this state." Section 11 provides that the term "railroad corporation," contained in the act, shall be taken to mean all corporations, etc., now or hereafter owning or operating "any railroad, in whole or in part, in this state," and to apply to all persons, whether incorporated or not, "that shall do business as common

carriers upon any of the lines of railway in this state," etc. Section 1 forbids the charging of more than reasonable rate for the transportation of passengers or freight or cars "upon any railroad within the state." Section 8 directs the railroad and warehouse commissioners to make "for each of the railroad corporations doing business in this state" a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars "on each of said railroads." It is quite manifest that the schedule thus required to be made is of more importance in determining what are reasonable rates of charges than in determining whether there has been unjust discrimination. In section 3 the discriminating rates, charges, etc., therein referred to, are made prima facie evidence of unjust discrimination, without mention of the schedule. If the greater distance (from Peoria to New York) and the shorter distance (from Gilman to New York) are given, and the fact is ascertained that the charge for transportation over such greater distance is less than the charge therefor over such shorter distance, a discrimination is at once established, whether the whole of the distances be regarded, or the proportional parts thereof in this state. Given the facts of the distances, whether without or within the state, and of the actual charges, and the question of discrimination is determined, though reference to the schedule may be made as to the injustice of the discrimination to the individual. But it could not have been the intention of the legislature that this schedule should be prima facie evidence of what were reasonable maximum rates of charges for transportation outside of the state, or for such transportation within it as might be a part of a continuous transportation from within to without. Other states would have their own laws and commissioners, and methods of ascertaining rates. The railroad and warehouse commissioners named in schedule 8 are Illinois officials, appointed by the governor, with jurisdiction limited to this state, and without power or opportunity to gather the data for fixing reasonable rates of transportation outside of the state, or within the state, as connected with a continuous carriage to a point beyond its limits. The act establishing the board of railroad and warehouse commissioners provides that only railroads incorporated or doing business in this state shall make sworn statements of their affairs to said commissioners. 2 Starr & C. Anno. Stat. pp. 1956-1958. Section 7 of the Act of 1873 requires the commissioners to ascertain whether the provisions of the act have been violated by "any railroad corporation in this state," and for that purpose "to visit the various stations upon the line of each railroad." We construe these features of the act to indicate that, so far as the provisions relating to the charges of reasonable rates are concerned, it was not the intention of the legislature to make them apply to any other kind of transportation than that which should occur wholly within the boundaries of this state, or to any other kind of contracts than those for a carriage which begins and ends within the state, disconnected from a con-

tinuous transportation through or into other states. Consequently, we hold the provisions relating to charges of reasonable rates to be valid.

5. The statute granting power to the railroad commissioners to make a schedule of reasonable maximum rates for appellant is alleged to be a violation of appellant's charter, so as to impair the obligation of its contract with the state, and therefore the act is said to be void as to appellant. This point is settled adversely to appellant by the cases of *Ruggles v. People*, 91 Ill. 256, and *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812. In the former case, one of the questions submitted by the stipulation was whether a law establishing a reasonable maximum rate of charges for the transportation of passengers on railroads in this state was such a constitutional law as appellant "was bound to obey," notwithstanding the provisions of its charter; and it was there held that the law was valid, and that the legislature has the power to fix a maximum rate of charges for corporations exercising a business public in its character, and that such regulation does not impair the obligation of the contract in their charters. In *Ruggles v. Illinois*, *supra*, the provisions of appellant's charter are fully set out. It is not denied that, by consolidation and statutory provisions, appellant acquired the powers and franchises granted to the Central Military Tract Company by an act to incorporate the latter company passed on February 15, 1851, and by an act to amend said act passed on June 19, 1852. By section 3 of said Act of 1851, said company was thereby "created and incorporated for the purpose of organizing under an act entitled 'An Act to Provide for a General System of Railroad Incorporations,' in force November 5, 1849," and was "entitled to have and exercise the powers and privileges, and be subject to the liabilities therein enumerated." The General Law of 1849, in clause 10 of section 21 thereof, conferred upon railroad companies organized thereunder the right "to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided." It also provides, in section 32, that "the legislature may, when any such railroad shall be opened, for use, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such roads; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company from all sources from the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in." The sixth section of the Act of 1852 is as follows: "The said company shall

have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: provided, that the same be not repugnant to the Constitution and laws of the United States or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time, by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine." It is now claimed by the appellant that it still has the right, under its original charter of 1851, of fixing rates, subject only to a limit of three cents a mile on passengers, and that the state has no power to interfere, except to keep the annual profits down to 15 per cent per annum on the paid up capital, and that the Act of 1878, giving the commissioners power to make a schedule of maximum reasonable rates for appellant, ignores these limitations upon the power of the state to regulate its charges. Although the Act of 1852 is entitled "An Act to Amend the Charter of 1851," it is a complete charter in itself. It contains provisions not found in the General Railroad Law of 1849. The plea alleges that it was accepted by appellant, and it was evidently intended and accepted as a substitute for the charter of 1851. In *Ruggles v. Illinois*, *supra*, it was contended by appellant that the Act of 1852 repealed sections 21 and 32 of the old charter, with the limitations therein contained as above set forth, and that under section 6 of the Amending Act of 1852, as above set forth, appellant could establish its own rates of fare and freight, free from legislative interference. In that case the Supreme Court of the United States declined to decide whether section 6 of the Amending Act repealed clause 10 of section 21 and section 32 of the original charter or not. But they held that, under said section 6, no by-law could be established by the directors that did not conform to the laws of the state, whether such laws were in force when the amended charter was granted, or came into operation afterwards; that the power of the company for the regulation of its own affairs was, in express terms, subjected to the legislative control of the state; that the by-laws fixed the rates, and no by-law could be made that was at all repugnant to the laws of the state; that only such charges could be collected by appellant as were allowed by the laws of the state; that, in the absence of legislation, the power of the directors over the rates is subject only to the common law limitation of reasonableness, but that the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property; that when a maximum is so

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established the rates fixed by the directors must conform to its requirements,—otherwise, the by-laws would be repugnant to the laws. Adopting the views thus expressed by the Federal Supreme Court, we are of the opinion that there is nothing in appellant's charter which relieves it from the obligation to submit to the provisions of the Act of 1878 upon the subject of reasonable rates, and that the act does not impair the obligation of any contract alleged to be contained in appellant's charter.

6. It is claimed that the schedule of 1878, which was admitted in evidence, was not published as required by statute, and that for that reason it did not go into effect. The copy of the schedule of September 1, 1878, introduced by the plaintiff, was accompanied by the following certificate, which was attached to it: "Office of the Railroad and Warehouse Commission, Springfield, Illinois. State of Illinois, Sangamon County—ss.: We, the undersigned, railroad and warehouse commissioners in and for the state of Illinois, do hereby certify that the foregoing is a true copy of 'A Schedule of Reasonable Maximum Rates of Charges for the Transportation of Passengers and Freight and Cars,' together with a classification of freight, explanatory, and forming a part, of said schedule, revised and prepared by the railroad and warehouse commission for the Chicago, Burlington & Quincy Company; that said 'Classification of Freight' and schedule has been published as required by law in the Illinois State Journal, a weekly newspaper published in the city of Springfield, in said state, in the issues of said paper dated, respectively, September 3, 10, 17, and 24, and October 1, A. D. 1878, as revised, and was in force from and after September 1, A. D. 1878, and remained in force until December 1, A. D. 1881. Witness our hands this 7th day of February, A. D. 1891. John R. Wheeler, Isaac N. Phillips, W. R. Crim, Railroad and Warehouse Commissioners. Attest: J. H. Paddock, Secretary."

This certificate shows that publication of both the classification and the schedule was made, not only for three successive weeks, but for five successive weeks, and that, consequently, the provision in section 8 as to publication was fully complied with. The trial court was authorized to admit it, and, when admitted, it was "prima facie evidence of the schedules of said commissioners." At the close of plaintiff's evidence the defendant introduced another certificate of the commissioners, dated December 1, 1891, and other evidence, for the purpose of showing that the classification of freights, which recited on its face that it formed a part of each schedule, was published on September 3, 10, and 17, and that the schedule for appellant, which refers to the classification as forming a part of it, was published on September 17 and 24, and October 1. The classification was published three successive weeks, and the schedule was published three successive weeks; but the point is made that, as the schedule referred to the classification, the latter was a part of the former, and that when the schedule was published, on Septem-

ber 17, 24, and October 1, the classification should have been published, as a part of it, and in the same issues of the newspaper with it. As the classification was for all the railroads, and a schedule was made for each, it is a question whether it was necessary to republish the classification with each schedule, it having already been published for the time required by law. The classification was on file in the office of the commissioners, and the schedules referred to it, and the roads could have access to it. The certificate, however, as above set forth, was merely prima facie evidence that the schedule introduced was that of the commissioners. Other evidence might be introduced to show that it was their schedule. This evidence was furnished by the defendant itself. Its own proof showed that the copy introduced was a copy of the schedule prepared and adopted for it by the commissioners. It is not contended that the defendant did not have notice of the schedule of September, 1878, irrespective of any publication of it.

But even if it be true that the schedule could not go into effect until it was published in the manner required by the law, and that the separate publication of the classification and the schedule was not in compliance with section 8, we still think that the certificate above set forth was sufficient. The case below was not tried until November 80, 1891. By act approved June 30, 1885, the legislature amended said section 8, and in the amended section provided as follows: "All such schedules heretofore or hereafter made shall be received and held in all such suits as prima facie the schedules of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad and warehouse commissioners, that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named." 8 Starr & C. Anno. Stat. p. 1029. The certificate of February 7, 1891, conforms to the requirement of section 8, as thus amended. No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights, or rights subsequently acquired. Changes in them may be made applicable to existing causes of action. Cooley, Const. Lim. 6th ed. p. 451; *Gage v. Caraher*, 125 Ill. 447.

7. Appellee assigns as a cross-error the overruling of his demurrer to the sixth plea of the defendant. This plea was to the last additional count of the amended declaration, and averred that the causes of action therein set out did not accrue to the plaintiff within five years next before the filing, or the obtaining of leave to file, said last additional count, or the substitute therefor. The question is whether the amendment, or the last count of the amended declaration, sets up a new cause of action. If it does, the demurrer to the plea was properly overruled. If it does not, the amendment takes effect from the commencement of the suit. Where an amendment sets up no new matter or claim,

but merely restates in a different form the cause of action set out in the original declaration, it relates to the commencement of the suits, and the statute of limitations is arrested, at that point; but, where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date. *Baker v. Missouri Pac. R. Co.* 34 Mo. App. 98. In this case the two counts of the original declaration, and all the additional counts of the amended declaration, except the last, sought to recover the treble damages allowed by the statute for a violation of its provisions; and to these counts the two years statute of limitations was properly pleaded, as, in this state, actions for a statutory penalty must be brought within two years next after the cause of action accrued. The last amended count, filed more than seven years after the filing of the original declaration, sought to recover damages for the violation of defendant's common law liability as a carrier for charging more than reasonable rates. To this count the five years statute of limitations was applicable. It is conceded by appellees that he cannot recover treble damages for unreasonable charges, except for those paid by him during the two years prior to the beginning of the suit, and that the object of the amended count is to recover single damages for the three years immediately preceding the two years for which treble damages are claimed. We think that the amended count introduced a new cause of action. The original declaration declares specially on the statute for the recovery of a statutory penalty; alleges, on the ground of action, the charge of rates in excess of those fixed by the schedule of the commissioner; and concludes: "Whereby, and by force of the statute, . . . an action hath accrued . . . to demand and recover of the defendant three times the amount of said sum of money," etc., "with reasonable attorney's fee, in a sum to be fixed by the court." The amended count is based on an alleged common law liability, or on an implied contract to repay money obtained by wrongful overcharges. Before it was filed the cause of action set forth in it had been barred by the five years statute of limitations. If a new suit had been begun for the same cause of action at the time of the amendment, it could not have been maintained, and there is no more reason why the cause of action should be enforced when embodied in an amended declaration than when forming the subject-matter of a new suit. Although an amendment may properly be allowed, it does not necessarily, when allowed, have the effect of relating back to the date of bringing the suit, for the purpose of determining questions of limitation. An amendment which introduces a cause of action barred by limitation is ineffectual to avoid the statutory bar. *Gibbons v. The Steamboat "Fanny Barker"*, 40 Mo. 258; *Baker v. Missouri Pac. R. Co. supra*; *People v. Judge of Newaygo Circuit Ct.* 27 Mich. 188; *Melvin v. Smith*, 19 N. H. 463; *Illinois & St. L. R. & Coal Co. v. People*, 19 Ill. App. 141. Where the original declaration sets up overcharges upon certain ship-

ments, and the amended declaration sets up overcharges on other and different shipments, the causes of action are not the same. *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 140; *Phelps v. Illinois Cent. R. Co.* 94 Ill. 548; *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 840. Here the original declaration seeks to recover penalties for overcharges on shipments made subsequent to November 2, 1880, while the last additional count of the amended declaration declares for damages on account of overcharges on shipments made prior to October 17, 1880. We are of the opinion that there was no error in overruling the demurrer to the sixth plea.

One or two other minor objections are urged, but, after a careful consideration of them, we are satisfied that they are not well taken.

The judgment of the Circuit Court is affirmed.

George BURDICK, *Plff. in Err.*,

v.

PEOPLE of the State of Illinois.

(149 Ill. 600.)

1. A statute making it unlawful for any person to sell a railroad or steamboat ticket, or any part thereof, without a certificate from the carrier, except in case of the sale of part of a ticket by a person who has bought it with the bona fide intention of traveling upon it, does not violate the constitutional provision against deprivation of life, liberty, or property without due process of law.
2. The obligation of contracts is not impaired as to tickets thereafter issued by a statute restricting the sale thereof without a certificate of authority from the carrier.
3. The regulation of the sale of tickets on railroads and steamboats, which makes such sale unlawful without a certificate of authority from the carrier, is not a regulation of commerce beyond the power of a state legis-

lature, but is a mere police regulation of a public employment.

4. The privileges or immunities of citizens under the Federal Constitution or under the constitution of Illinois, which provides that the general assembly shall not pass special laws granting any special or exclusive privilege, immunity, or franchise, are not infringed by a statute prohibiting the sale of railroad or steamboat tickets without a certificate of authority from the carrier, except when one who has bought a ticket from such agent with the bona fide intention of traveling upon it makes the sale.

(April 2, 1894.)

ERROR to the Circuit Court for Jackson County to review a judgment convicting defendant upon an indictment for selling railroad tickets contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hill & Martin, for plaintiff in error:

If it is true that railroad companies may legally sell to any person any number of tickets or other certificates entitling any holder to travel over their roads, then certainly unless these tickets are limited to the use of the purchaser, he, the purchaser, owns said tickets—they are his property. And it will not do to say that they are only evidence of the holder's right to travel, and not the right itself, for the same may be said of a promissory note, it is only evidence of indebtedness, and yet all the courts have held that the legal holder of such promissory note has a property therein. Why should the legal holder of a railroad ticket occupy a different position?

If a railroad ticket is property, then the general assembly has no authority under the constitution or the common law to pass an act depriving the holder of such property from selling it to whom he pleases.

Every citizen shall hold his property and immunities under the general rules which

NOTE.—*Statutes against ticket brokerage or "scalping."*

While it was held in *State v. Ray* (N. C.) 14 L. R. A. 529, that the sale of a single ticket by the owner because he was unable to use it did not constitute an offense under statute making it unlawful for any person "to sell or deal in tickets," the language of the Illinois statute construed in the above case is too plain to permit its construction so as to exempt the sale of a single ticket therefrom.

An Indiana statute similar to that of Illinois, considered in the main case of *BURDICK v. PEOPLE*, was assailed in *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 288. This was, we believe, the first statute of the kind. It provided that none but authorized agents should sell tickets and that no purchaser should sell an unused ticket or portion of it to any one except a bona fide traveler. Also that the carrier must redeem such unused tickets. The statute was attacked as unconstitutional as a denial of equal privileges and immunities and also as a restriction of commerce an impairment of the obligation of contracts, but the court held it constitutional at least as to subsequent contracts against all these objections and declared it to be an exercise of police power.

A recent Minnesota statute of the same kind is 24 L. R. A.

upheld against similar objections in *State v. Corbett* (Minn.) post, p. 498.

That tickets sold by brokers at rates lower than those charged at regular offices of the carrier constitute an unlawful discrimination under the interstate commerce act of congress was decided by the interstate commerce commission in *Re Passenger Tariffs and Rate War*, 2 Inters. Com. Rep. 340, and the opinion therein by Judge Cooley reviews at length and vigorously the evils of the scalping system.

A recommendation of the commission for legislation to prevent those evils may be found in the annual report of the interstate commerce commission, 3 Inters. Com. Rep. 360, and is also recited in *Ray on Passenger Carriers*, pp. 491-496.

As to the constitutional privileges and immunities of citizens which is one of the grounds of attack on these statutes, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.

The assignability of railroad tickets is considered in *Nichols v. Southern Pac. Co.* (Or.) 18 L. R. A. 55, and in the note to that case, but the effect of a statute like that of Illinois was not considered nor involved in the cases there presented. B. A. R.

govern society. Everything which may pass under the form of an enactment is not the law of the land.

Dorchester College Trustees v. Woodward, 17 U. S. 4 Wheat. 518, 4 L. ed. 629.

The terms "the law of the land" and "due process," as used in the constitution, do not mean a statute passed for the purpose of interfering with property. That construction would, in effect, say to the legislative body, you cannot deprive a man of his property unless you pass a statute for that purpose. In other words, you shall not violate the constitution and deprive a man of his property, unless you choose to do it.

Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; *Ervin's App.* 16 Pa. 256, 55 Am. Dec. 499; *Arrowsmith v. Burlingame*, 4 McLean, 489; *Lane v. Dorman*, 4 Ill. 2-8, 36 Am. Dec. 543; *Hoke v. Henderson*, 15 N.C. 15, 25 Am. Dec. 677.

Defendant in this case had a vested right in the tickets which it is alleged he sold.

The act is also in contravention of the Constitution of the United States, which provides that the state shall pass no law impairing the obligation of a contract.

Fed. Const. art. 1, § 10.

The railroad company has the right to sell such tickets, and the defendant had the right to buy, but the law purports to prohibit the defendant from selling the same after they are purchased. This act certainly impairs the obligation of such contract.

McCruken v. Hayward, 43 U. S. 2 How. 612, 11 L. ed. 399; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 259, 6 L. ed. 621; *Von Baumbach v. Bade*, 9 Wis. 577, 76 Am. Dec. 283; *Johnson v. Higgins*, 3 Met. (Ky.) 566.

Messrs. Maurice T. Mahoney, J. W. Herbert, W. S. Forrest, and M. Rosenthal, for the people.

Magruder, J., delivered the opinion of the court.

This was an indictment against plaintiff in error for wrongfully and unlawfully selling to one L. H. Myers one certain railroad ticket, entitling the holder thereof to travel upon the Illinois Central Railroad from Cairo, in Illinois, to Chicago, in the same state, in violation of the following statute of Illinois:

"An act to prevent frauds upon travelers and owner or owners of any railroad, steamboat or other conveyance for the transportation of passengers. Approved April 19, 1875. In force July 1, 1875.

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That it shall be the duty of the owner or owners of any railroad or steamboat for the transportation of passengers, to provide each agent who may be authorized to sell tickets or other certificates entitling the holder to travel upon any railroad or steamboat, with a certificate setting forth the authority of such agent to make such sales, which certificate shall be duly attested by the corporate seal of the owner of such railroad or steamboat.

"Sec. 2. That it shall not be lawful for any person not possessed of such authority, so evidenced, to sell, barter, or transfer for any consideration whatever, the whole or any part of any ticket or tickets, passes, or other

evidences of the holder's title to travel on any railroad or steamboat, whether the same be situated, operated or owned, within or without the limits of this state.

"Sec. 3. That any person or persons violating the provisions of the second section of this act shall be deemed guilty of misdemeanor, and shall be liable to be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding one year, or either or both, in the discretion of the court in which such person or persons shall be convicted.

"Sec. 4. That it shall be the duty of every agent who shall be authorized to sell tickets, or parts of tickets, or other evidences of the holder's title to travel, to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request him, the certificate of his authority thus to sell, and to keep said certificate posted in a conspicuous place in his office for the information of travelers.

"Sec. 5. That it shall be the duty of the owner or owners of railroad or steamboat, by their agents or managers, to provide for the redemption of the whole, or any parts or coupons of any ticket or tickets, as they may have sold, as the purchaser, for any reason, has not used, and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used; and the sale by any person of the unused portion of any ticket, otherwise than by the presentation of the same for redemption, as provided for in this section, shall be deemed to be a violation of the provisions of this act, and shall be punished as is hereinbefore provided; provided, that this act shall not prohibit any person who has purchased a ticket from any agent authorized by this act, with the bona fide intention of traveling upon the same, from selling any part of the same to any other person.

"Sec. 6. Any railroad or steamboat company that shall, by any of its ticket agents in this state, refuse to redeem any of its tickets or parts of tickets as prescribed in section 5 of this Act, shall pay a fine of five hundred dollars for each offense, to the people of the state of Illinois, and it shall be unlawful for said company, subsequent to such refusal, to sell any ticket or tickets in this state until such fine is paid." 2 Starr & C. Stat. p. 1951.

The defendant, before pleading to the indictment, moved to quash it, upon the alleged ground that said act was in contravention of the constitutions of the United States and of the state of Illinois; but said motion was overruled, and exception taken. The court refused to give for the defendant an instruction to the effect that said act was in contravention of said constitutions, and therefore, void, to which refusal defendant excepted. The jury found the defendant guilty. Motions for new trial and in arrest of judgment were overruled, to which exception was taken; and judgment was entered upon the verdict, fining defendant \$500, to which, also, exception was taken. The subject presented for consideration is the consti-

tutality of the above act, and we will consider the objections to its validity in the order in which they are presented by the counsel for the plaintiff in error in their brief.

1. It is contended that the act violates section 2 of article 2 of the Constitution of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and that it also violates the provisions of a similar character in the Federal Constitution. U. S. Const. arts. 5, 14, Amend., 1 Starr & C. Stat. pp. 36, 88, 89. The position of counsel is that, when a man purchases tickets or other certificates entitling the holder to travel upon any railroad, etc., as stated in the act, such tickets are his property, and that the legislature has no authority to pass an act depriving the holder of such property of the right to sell it to whom he pleases. The constitution does not say that the disposition of property may not be limited or regulated when the interests of the public so require, but that no person shall be "deprived" of his property without due process of law. The phrase "due process of law" is the equivalent of the words "law of the land," as used in Magna Charta, and means "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." *Board of Education of the State v. Bakewell*, 122 Ill. 339; *Rhinehart v. Schuyler*, 7 Ill. 478; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Cooley*, Const. Lim. 5th ed.* 356, top p. 435. An act of the legislature is not necessarily the "law of the land." A state cannot make anything "due process of law" which, by its own legislation, it declares to be such. An act of the legislature which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power, because, if effectual, it operates to deprive a man of his property without "due process of law." *Davidson v. New Orleans*, *supra*; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Rohn v. Harris*, 130 Ill. 525; *Ervine's App.* 16 Pa. 256, 55 Am. Dec. 499; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677.

If, therefore, the above Act of 1875 operates to deprive the holder of a legally purchased ticket of his property rights therein, it must be declared to be void. But, upon turning to section 5 of the Act, we find that it authorizes the original purchaser of a ticket from an authorized agent to resell the whole or any unused part of such ticket to the owner of the railroad or steamboat who sold it to him, or to sell any part of it to any other person, if the original purchase of it from the agent was with the bona fide intention of traveling upon it. The purchaser is entitled to have his ticket redeemed by the railroad or steamboat owner at a rate fixed by the terms of section 5, but his right of sale is not even limited to such owner, provided, only, his purchase was made in the mode and for the purpose stated in the proviso to the section. In view of the provisions contained in sections 5 and 6, we fail to see how the owner of the ticket is deprived of his property in it. His ticket is not destroyed, nor is there any serious limitation upon his use

of it. The design of the act, as stated in its title, is to prevent frauds upon travelers and owners of railroads, steamboats, and other conveyances for the transportation of passengers. The business of a common carrier is a public employment. The franchisees of railroads acting under charters or acts of incorporation are of a public nature, so far as the safety, convenience, and comfort of passengers are concerned. Reasonable regulations affecting the conduct of such public employments are fit subjects for legislative action. The lawmaking power may provide means for remedying such evils as, in its opinion, may exist in the management of these public agencies of transportation; and in doing so it may sometimes impose restrictions, which are deemed to be necessary, upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him, so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property whose use and enjoyment are so limited is invested in a business affected with a public use, or is used as an accessory in carrying on such business. *Munn v. People*, 69 Ill. 80; *Com. v. Wilson*, 14, Phila. 384. We are therefore of the opinion that the act under consideration does not violate section 2 of the Bill of Rights.

2. The act is alleged to contravene the provisions of the federal and state constitutions which forbid the passage of laws impairing the obligation of contracts. U. S. Const. art. 1, § 10; Ill. Const. art. 2, § 14, 1 Starr & C. Stat. pp. 81, 105. The tickets proven to have been sold by the plaintiff in error contain only the name of the railroad company, the words "Calro to Chicago," the signature of the general ticket agent, and certain figures or numbers. It has been held that such a ticket is not a contract, but merely the evidence of a contract, or a mere receipt taken or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another. *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 663; 2 Redf. Railways, 6th ed. p. 803; *Ray* Negligence of Imposed Duties, p. 495; *Com. v. Wilson*, *supra*. But, if it be admitted that the ticket is a contract, the statute would only be inoperative and of no effect as to contracts existing at the time of its passage. It would be valid and constitutional as to future contracts. It cannot be said that the Act of 1875 impaired the obligation of any contract connected with the tickets upon the sale of which the present indictment is predicated. The tickets sold by plaintiff in error were issued by the railroad company in 1893,—eighteen years after the passage of the act. The plaintiff in error must be presumed to have known that the sales of the tickets by him were criminal acts. *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Com. v. Wilson*, *supra*.

3. The act is charged with contravening the third clause of section 8 of article 1 of the Federal Constitution, which confers upon congress the power to regulate commerce among the several states. 1 Starr & C. Stat. p. 80. In the present case the tickets sold

only entitled the holder to travel between points located wholly within the state of Illinois. But the portion of the act upon which the present objection is founded is the prohibition contained in the second section, against the sale of tickets entitling the holder to travel on any railroad or steamboat, "whether the same be situated, operated, or owned within or without the limits of this state." It is held by the Supreme Court of the United States that interstate commerce, the regulation of which is within the exclusive power of congress, includes interstate transportation of passengers. But the deposit in congress of the power to regulate commerce between the states was not intended to deprive the states of their police power. Under its police power, a state may legislate to promote domestic order, morals, and safety; to protect the lives, limbs, quiet, and property of all persons within the state; to secure the general comfort, health, and property of the state; to prevent crime, pauperism, disturbance of the peace, and all forms of social evils. The state cannot invade the domain of the national government, or assume powers properly belonging to congress. In relation to the subject of commerce, including interstate passenger travel, the state cannot place any obstacle in the way of such travel, or impose any burden upon it. But many acts of a state may affect or influence commerce without amounting to a regulation of it. State legislation, which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional, as infringing upon the powers of congress. The Act of 1875 is, we think, such a species of state legislation. The duties which it imposes upon the carriers therein named, and their agents, cannot interfere with the freedom of interstate travel. Such travel is not impeded because tickets are required to be purchased from agents of the carrier who are provided with certificates of their authority. The limitation of the sale of tickets to such agents may be a restraint upon the business of scalpers and ticket brokers, but cannot be regarded as a burden upon interstate commerce. If the body of the Act of 1875 be read in connection with its title, it must have been the opinion of the legislature that the restriction of sales of tickets to authorized agents was necessary to prevent frauds upon travelers and carriers, and to remedy the evils growing out of the practices of scalpers and ticket brokers, as described by Mr. Ray in his work on Negligence of Imposed Duties, Passenger Carriers, at pages from 491 to 498, inclusive. Viewed in this light, the act in question amounts to nothing more than the regulation of a public employment under the police power of the state. The business of the carrier being a proper subject for the exercise of the police power, its necessary incidents and adjuncts are also subject thereto. As the issuing and use of tickets are required in such business, their sale is an incident thereof, and may be regulated by legislative action. It is the province of the legislature to determine the nature and character of such regulations, and

the judiciary is not called upon to consider whether they are wise or unwise. The views herein expressed are sustained by the following authorities: *Fry v. State*, and *Com. v. Wilson*, *supra*; *People v. Walser*, 11 *Chicago Legal News*, 12; *Hannibal & St. J. R. Co. v. Huss*, 95 U. S. 465, 24 L. ed. 527; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Cooley*, Const. Lim. 5th ed. * 574, 597. We do not think that the act violates the constitutional provision conferring upon congress the power to regulate interstate commerce.

4. It is claimed that the act violates that part of section 22 of article 4 of the Constitution of Illinois which provides that the general assembly shall not pass special laws granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever." 1 Starr & C. Stat. pp. 119, 120. Counsel contend that by the terms of the act a certain class of persons, namely, railroad ticket agents, are permitted to sell tickets, and are thereby granted a special privilege. We do not think that there is any force in this contention. It is disposed of by what has already been said in regard to the validity of the act as an exercise of the police power of the state. The requirement that tickets shall only be sold by agents authorized so to do is merely a police regulation as to the manner in which the business of the carrier shall be conducted. From the nature of things, only common carriers can, in the first instance, issue or sell tickets for passage in their own conveyances, or over their own lines. They have no more a monopoly of the ticket business than a manufacturer has of the articles which he manufactures. The authority to the agent is not an authority to sell tickets generally for all other carriers, but only to sell them for the particular carrier providing the certificate of authority. The act would seem to impose upon the carrier a burden, and not to grant a privilege or immunity, as the repurchase of unused tickets is required; and, in order to prevent frauds, the sale of tickets can only be made through agents authorized to sell in the particular mode designated by the statute. Substantially the same phraseology contained in section 1 of the present Act, to which counsel object as amounting to special legislation, is to be found in an act passed by the legislature of Indiana, which was upheld by the supreme court of that state, as being consistent with a constitutional requirement forbidding the legislative grant of exclusive privileges or immunities to any citizen or class of citizens. *Fry v. State*, *supra*. We see no good reason for adopting a different conclusion. Nor can it be said that the law abridges "the privileges or immunities of citizens of the United States." U. S. Const. art. 14, § 1, Amend., 1 Starr & C. Stat. p. 38. The privileges or immunities referred to in the Fourteenth Amendment of the Federal Constitution are those which are fundamental, such as "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, never-

theless, to such restraints as the government may justly prescribe for the general good of the whole." No privilege or immunity of the plaintiff in error has been abridged by the Act of 1875. The right of conducting the business of selling railroad and steamboat tickets is curtailed and hedged about by certain restrictions, which the legislature deemed necessary to prevent frauds upon travelers and public carriers. But these restrictions amount only to "such restraints as the government may justly prescribe for the general good of the whole." *Coryfield v. Coryell*, 4 Wash. C. C. 871, Fed. Cas. No. 3,280; *Slaughter-House Cases*, 88 U. S. 16 Wall. 36, 21 L. ed. 894. In the case at bar, our conclusion is that the statute of this state, above quoted, is not in conflict with the Federal Constitution, or with the constitution of the state, but was a legitimate exercise by the legislature of the police powers of the state. Accordingly, we hold that no error was committed by the court below in its rulings above indicated.

The judgment of the Circuit Court is affirmed.

PITTSBURGH, FT. WAYNE & CHICAGO
R. CO. *et al.*, Appts.,
v.

John CHEEVERS *et al.*

(149 Ill. 420.)

The congregation of solicitors, hotel runners, and drivers of vehicles on the street in front of a railroad station, though constituting a nuisance to the public, if it does not interfere with the railroad company in the discharge of its duties, is not a nuisance to the company, for which it can obtain an injunction, although it may remotely affect the company's business by causing annoyance to its passengers.

(March 31, 1894.)

A PPEAL by complainants from a decree of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County in favor of defendants in a proceeding brought to enjoin defendants from encroaching upon the complainants' rights in the street in front of their premises. *Affirmed.*

The facts are stated in the opinion.

Mr. George Willard, for appellants:

The carrier owes to his passenger not only the duty of carrying him safely, but the duty of protecting him from annoyance and vexation during the existence of the relation.

Protection to Passengers, Act May 14, 1877.

Full power and authority is given by statute

to regulate the manner in which passengers and property shall be transported.

General Act Incorporation Railroads, § 19, p. 9.

Station buildings must not only be provided but they must be kept well lighted and warmed for the comfort of the patron.

Fencing and Operating Railroads, § 22, Act March 31, 1874.

Railway companies have the right to exact observance of all reasonable rules calculated to insure comfort, convenience, and safety of its passengers.

Illinois Cent. R. Co. v. Whittemore, 48 Ill. 420, 12 Am. Dec. 138; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Toledo, W. & W. R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Toledo, W. & W. R. Co. v. Williams*, 77 Ill. 354; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill. 126; *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114; *Chicago & A. B. Co. v. Pillsbury*, 123 Ill. 9; *Jencks v. Coleman*, 2 Sumn. 221; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *Hass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 Am. Rep. 495; *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 465; *Harris v. Stevens*, 81 Vt. 79, 78 Am. Dec. 337; *Vinton v. Middlesex R. Co.* 11 Allen, 301, 87 Am. Dec. 714; *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637; *Barker v. Midland R. Co.* 18 C. B. 46; *Wyllie v. Ethwood*, 9 L. R. A. 726, 134 Ill. 281.

The action of the runners and drivers and the effect thereof constitutes in law an invasion of complainants' rights and entitles them to the relief prayed.

Carter v. Chicago, 57 Ill. 288; *Pekin v. Winkel*, 77 Ill. 56; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155; *St. Louis, A. & T. H. R. Co. v. Belleville*, 20 Ill. App. 580; *Branahan v. Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457; *Barker v. Com.* 19 Pa. 412; *People v. New York*, 59 How. Pr. 277; *Callanan v. Gilman*, 107 N. Y. 360; *Elias v. Sutherland*, 18 Abb. N. C. 126; *Sherry v. Perkins*, 147 Mass. 212; *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361; *Wilder v. DeCou*, 26 Minn. 10; *Flynn v. Taylor*, 14 L. R. A. 556, 127 N. Y. 596.

It is not necessary to prove any particular extent of damage or interruption. If the interruption is substantial and tends to injure the complainants, they are entitled to the relief prayed.

Seneca Road Co. v. Auburn & R. R. Co. 5 Hill, 170; *Callanan v. Gilman*, *supra*; *Adams v. Rivers*, 11 Barb. 890; *Pickard v. Collins*, 23 Barb. 444; *Fisher v. Clark*, 41 Barb. 329; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Broom*, Legal Maxims, * 142, and cases

NOTE.—For private remedies in case of common nuisance generally, see *note* to South Carolina S. B. Co. v. South Carolina R. Co. (S. C.) 4 L. R. A. 202.

For denial of private remedy on account of a defective condition of a street, see *Megarage v. Philadelphia (Pa.)* 19 L. R. A. 221, while for instances of private remedies allowed in respect to obstructions in street or on sidewalk, see *Bradley v. Pharr (La.)* 19 L. R. A. 647, and *Flynn v. Taylor (N. Y.)* 14 L. R. A. 556, the latter of which was a case of habit-

ual obstruction of a sidewalk in which an action for damages was sustained. See *note* to that case as to obstruction of street or sidewalk for business or building purposes.

For rights of hackmen and similar solicitors of patronage at depots, wharves, etc., considered especially with reference to the carriers' own premises, see *Cole v. Rowen (Mich.)* 13 L. R. A. 642, and *note*.

there cited; 1 High, Inj. § 848; Wood, Nuisance, §§ 653, 772-773.

Mr. J. L. High, also for appellants:

An interference with the passenger, as such, is an interference with the business of the carrier.

The abutting owner has a special interest in the street.

Ross v. Thompson, 78 Ind. 90; *Branahan v. Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457; *Carter v. Chicago*, 57 Ill. 233; *Spencer v. London & B. R. Co.* 8 Sim. 194; *Callanan v. Gilman*, 107 N. Y. 360; *Jaques v. National Exhibit Co.* 15 Abb. N. C. 250; *Elias v. Sutherland*, 13 Abb. N. C. 126; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Knox v. New York*, 55 Barb. 404; *Schulte v. North Pacific Transp. Co.* 50 Cal. 592; *Green v. Oakes*, 17 Ill. 249; *Snell v. Buresh*, 123 Ill. 151; *Corning v. Loverre*, 6 Johns. Ch. 439, 2 L. ed. 178; *Pratt v. Lewis*, 39 Mich. 7; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Charleston & S. R. Co. v. Johnson*, 73 Ga. 806; *Turner v. Hoitman*, 54 Md. 148, 39 Am. Rep. 361; *Wilder v. De Cou*, 26 Minn. 10.

Injunctions have been freely granted to restrain the unauthorized obstruction of or building upon public parks and squares at the suit of private property owners abutting upon public streets adjacent to such squares.

Williams v. Smith, 22 Wis. 594; *LeClereq v. Gallipolis Trustees*, 7 Ohio, 217, 23 Am. Rep. 441; *Watertown Trustees v. Cowen*, 4 Paige, 510, 3 L. ed. 533, 27 Am. Dec. 80; *Platt v. Chicago, B. & Q. R. Co.* 74 Iowa, 127.

Sanction of the city officials is no justification of the nuisance.

McCaffrey v. Smith, 41 Hun, 117; *Glaesner v. Anheuser-Busch Brew. Assn.* 100 Mo. 508; *McDonald v. Newark*, 42 N. Y. Eq. 136; *Branahan v. Hotel Co.* 39 Ohio St. 333, 48 Am. Rep. 457.

Messrs. Black & Fitzgerald, for appellees:

For any obstructions to streets not resulting in special injury to the individual, the public only can complain.

McDonald v. English, 85 Ill. 233; *Wood, Nuisance*, § 829; *Angell, Highways*, § 235; *Francis v. Schoellkopf*, 53 N. Y. 155; *Pierce v. Dart*, 7 Cow. 609; *Higbes v. Camden & A. R. Co.* 19 N. J. Eq. 278; *Brown v. DeGroot*, 50 N. J. L. 409; *Talbott v. King*, 32 W. Va. 6; *Hyland v. Short-Route R. Transfer Co.* 10 Ky. L. Rep. 900; *Hogan v. Central Pac. R. Co.* 71 Cal. 83; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Winnelka v. Prouty*, 107 Ill. 225; *Hering v. Scott*, 107 Ill. 605; *Mathiasen & H. Zins Co. v. La Salle*, 117 Ill. 418.

A court will not enjoin, at a private suit, on the ground of public nuisance, that which is sanctioned by competent legislation and is done in an authorized manner, in an authorized place.

Stoudinger v. Newark, 28 N. J. Eq. 187; *Atty-Gen. v. New York & L. E. R. Co.* 24 N. J. Eq. 49; 4 Wait, Act. & Def. 784; *McDonald v. English*, 85 Ill. 233.

Phillips, J., delivered the opinion of the court:

This is an appeal from a judgment of the 24 I. R. A.

appellate court of the first district affirming a decree of the circuit court of Cook county. The facts on which the decree dismissing the bill was based are sufficiently stated in the opinion of the appellate court, by Morn, J., which is as follows: "The bill in this case was filed to restrain and prevent encroachment upon appellants' rights, as abutting owners and occupiers of the Union Passenger Station and grounds, situated on the east side of South Canal street in Chicago. The bill claims that at common law, and under the ordinances of the city, complainants are entitled to have the space in front of said station grounds, from the east line of the street west to the center line thereof, kept free, and unobstructed by, and clear of, solicitors, hotel runners, and drivers of all vehicles, and persons not in the employ of complainants, and engaged in the prosecution and management of the business of said stations. Alleges that the mayor, chief of police, etc., have assumed, in their official capacity, and against the will of complainants, to give express drivers and hotel runners the right and privilege of standing in front of said passenger station, and east of the center line of said Canal street, and soliciting employment, and have assumed to direct policemen on duty at said station not to interfere with or arrest such persons for so doing; that, by reason thereof, persons, in large numbers, gather in front of said station, and near the east line of said street, and, in loud tones of voice, solicit business for hotels, express wagons, and other vehicles, thereby obstructing the street and sidewalks in front of said stations, and annoying the occupants of said building, and the throng of passengers going to and from said station; that defendant Cheevers and Geary are among the persons so acting, and that they combine with others, and threaten to continue to violate complainants' rights. The prayer is that the mayor, chief of police, etc., be restrained from giving, against complainants' will, permission to any persons to stand, or to stand any vehicle, in front of complainants' station, east of the center line of said Canal street, there to solicit or wait for employment, and that said Cheevers and Geary be enjoined from acting under any permission granted by any official to stand in front of said station, and there wait for or solicit employment, and that said injunction be made perpetual, etc. The bill was answered by the defendants, a temporary injunction denied, and the matter referred to the master, to take proofs and report his conclusions. The master reported against granting the relief prayed, and, on a hearing of exceptions to his report, the same was confirmed, and the bill ordered by the court to be dismissed for want of equity. The master has stated in his report, which we find in the record, the conclusions as to law and fact reached by him, with clearness and force; and an examination of the record, and consideration of the arguments presented in the briefs of counsel, has led us to the conviction that the result reached by him, and, as to the substantial questions in the case, approved by the court, is correct. The master states that he finds

and concludes that the manner in which said business of soliciting passengers for their patronage, for hotels and express wagons, is conducted, is a nuisance as to such passengers, and to the public, but that such conduct on the part of said expressmen and hotel runners does not interfere with the railroad company in discharge of its duties, and as a common carrier of freight and passengers, and does not deprive it of free access to the street in front of its depot, and does not interrupt or hinder its business, and that such nuisance is not a nuisance to the railroad company in such a manner that it is specially and peculiarly injured thereby, aside from annoyance suffered by the traveling public patronizing its depot and road. The whole effect of the testimony is that the only detriment to the railroad company, from the manner of conducting their business by the hotel runners and expressmen, is through annoyance caused to passengers entering and departing from said depot; and it is argued that from such annoyance the business of the company is injuriously affected, in that passengers will avoid patronizing a depot or railroad, in order to patronize which they have to expose themselves to such annoyance. I conclude, as a matter of law, that such annoyance and indirect injury does not constitute such a nuisance as a court of equity will enjoin, but that, in order to lay the basis for equitable relief, it is necessary to show that the complainant is injured in its property rights by the obstruction or interference with its easement and right to an uninterrupted use of the public street in front of its prem-

ises; and such detriment and annoyance as it suffers in common with the public, and which is only indirect, must be left to the public authorities to regulate and control, and cannot be remedied by a court of equity on the application of one, as a member of the public, even though he may suffer more than the majority of others from the existence. It is needless to discuss the numerous authorities cited by the learned counsel for appellants, which it is claimed establish a rule for this case contrary to that stated by the master. Each one will be found to depend for its decision upon special and peculiar circumstances and conditions, which do not exist in this case. Such occupation or obstruction of a public street as will entitle an owner of land abutting thereon to the aid of a court of equity to abate must be shown to be such as works an injury to him, not merely greater in degree than that sustained by others of the general public, but such as is special and peculiar in its effects upon him in relation to the use and enjoyment of his property. Such a case is not made out by this record, and the decree dismissing the bill for want of equity must therefore be affirmed."

We have examined the argument of counsel for appellants in support of the errors assigned on the record here, and are of opinion that the decree dismissing the bill was properly entered. We are satisfied that the reasons for affirmance of that decree are sufficiently stated in the foregoing opinion.

The judgment of the Appellate Court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

George McALISTER *et al.*

v.

Benjamin F. BURGESS, Executor, etc., of
Jane D. Royce, Deceased.

(..... Mass.)

1. A gift for the benefit of poor churches of a city and vicinity is charitable within the exception to the rule of law against perpetuities.
2. It is a matter of common knowledge that the attendants of any particular church are not limited to its members, but are an indefinite and varied number.
3. There is no uncertainty which will defeat a gift for the benefit of poor churches of a city and vicinity.

(May 15, 1894.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the consideration of the full court of a bill filed to nullify the residuary clause of the will of Jane D. Royce, deceased, as being void for creating a perpetuity. *Bill dismissed.*

The facts are stated in the opinion.

NOTE.—For uncertainty and indefiniteness as to beneficiaries of charity as affecting validity of gift, see *Johnson v. Johnson* (Tenn.) 22 L. R. A. 179, and cases referred to in footnote.

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Messrs. Robert M. Morse and Charles E. Hellier, for complainants:

The words "for the benefit of" may be sufficient to create a trust.

Going v. Emery, 16 Pick. 107, 26 Am. Dec. 645; *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445.

No question is made that "in this commonwealth trusts for the support of public worship and religious instruction, or the spreading of religion at home or abroad, have always been deemed charitable uses."

Jackson v. Phillips, 14 Allen, 539, citing *Bartlett v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Going v. Emery*, *supra*; *Schier v. St. Paul's Church*, 12 Met. 250.

But it is equally well settled that a church or religious society in this commonwealth is a voluntary association, formed for the use of its members or pewholders, and of such persons as may become members or pewholders; that it does not differ essentially from other voluntary associations organized for other good purposes, and that a gift for its benefit cannot be upheld as a public charity.

Atty-Gen. v. Federal Street Meeting-House in Boston *Proprs.* 3 Gray, 1; *Atty-Gen. v. Trinity Church*, 9 Allen, 422; *Atty-Gen. v. Old South Soc.* 13 Allen, 474; *Old South Soc. v. Crocker*, 119 Mass. 1, 20 Am. Rep. 299.

Assuming, then, that a gift for the benefit of a particular church cannot be supported as a public charity, it must follow that a gift for the benefit of all the churches in a particular place is open to the same objection.

The case falls within the principle laid down in *Kent v. Dunham*, 143 Mass. 216, 56 Am. Rep. 667, where it was held that a devise for the benefit of the destitute descendants of the testator was invalid as a public charity.

Such a gift is too vague to be capable of execution.

Nichols v. Allen, supra; Chamberlain v. Stearns, 111 Mass. 287.

Mr. D. C. Linscott for defendants.

Barker, J., delivered the opinion of the court:

By the residuary clause of her will, the testatrix gives property, which is said to be about \$20,000 in value, "to the Evangelical Baptist Benevolent and Missionary Society, for the benefit of poor churches of the city of Boston and vicinity." The respondent corporation of that name was chartered by Stat. 1857, chap. 154, "for the purpose of securing the constant maintenance in said Boston of evangelical preaching for the young and the destitute, with free seats; for the employment of colporteur and missionary laborers in Boston and elsewhere; for the purpose of providing suitable central apartments to other and kindred benevolent and missionary societies, and for the general purpose of ministering to the spiritual wants of the needy and destitute." The bill is brought by the next of kin of the testatrix, who contend that the residuary clause is void because creating a trust contrary to the rule against perpetuities, and because the clause is so indefinite and uncertain that its provisions cannot be carried out; and they ask that the executor be directed to pay the residuary fund to the next of kin of the testatrix, in accordance with the laws of distribution. The attorney-general has been made a party, and, by his answer, claims that a valid public charity was created by the clause quoted. The Evangelical Baptist Benevolent & Missionary Society contends that the clause gives it the residue of the estate as an absolute gift, adding that if it shall be decided that the gift was not absolute, but in trust for the benefit of poor churches in Boston and vicinity, it will accept and administer the trust, and contends that on either construction of the clause the bequest is valid. The executor takes no position upon the question whether the gift is absolute or in trust, but demurs on the ground that the bequest is a valid one, and that the next of kin have no right to claim the fund as undevised property.

A gift of property, to be lawfully applied for the benefit of an indefinite number of persons, by bringing their minds or hearts under the influence of religion, is a charity in the legal sense, within the terms of the definition given in *Jackson v. Phillips*, 14 Allen, 539, 556. As held in *Baker v. Fales*, 16 Mass. 488, 495: "The very term 'church' imports an organization for religious purposes, and property given to it *eo nomine* in the absence of all declaration of trust or use, must,

by necessary implication, be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God." It follows that the legitimate use by a church of property so given must result in its application for the benefit of those who attend upon, or are within the sphere of the influence of, the services of the church, by bringing them under the influence of religion. It is a matter of common knowledge that the individuals who attend the services of any particular church are not limited to the members of that church, but are an indefinite and varying number of persons; and there can be no question that an indefinite number of persons is constantly benefited by having their minds and hearts brought under the influence of religion by poor churches of the city of Boston and vicinity. Grants and donations both of real and personal estate may, consistently with existing laws, be made to churches, and provision is made by the statute law for the manner in which such grants and donations shall be held. Pub. Stat. chap. 89, §§ 1-8. There seems to be no reason, therefore, why a gift of property to one or more churches should not be held a charitable gift, and none why, if it is given in trust, the trust should not be held a trust for a public charity, and not subject to the rule of law against perpetuities.

The plaintiffs contend, however, that it is settled by a course of decisions that in this commonwealth a church is a voluntary association, of such a nature that a gift for its benefit cannot be upheld as public charity, and they cite as authority for this contention the cases of *Atty-Gen. v. Federal Street Meeting-House in Boston Proprs.* 3 Gray, 1; *Atty-Gen. v. Trinity Church*, 9 Allen, 423; *Atty-Gen. v. Old South Soc.* 18 Allen, 474; and *Old South Soc. v. Crocker*, 119 Mass. 1, 20 Am. Rep. 299. In none of these cases, however, was it contended that the gifts or devises were void. In the first of these cases the property which the attorney-general contended was held as a public charity was not the property of a church, but of the proprietors of a meeting-house; nor was it the proceeds of a gift, but of a purchase for full consideration. In the second case there was a gift by devise of land to the Rector and church wardens of King's Chapel, and their successors in office, upon several distinct trusts, one of which was to pay a stated yearly sum forever to the church; another, to pay a yearly sum for the support of a course of sermons to be preached in the church building during every Lent; and another, to pay a fixed sum yearly at the door of the church building, on certain days in Lent, for the use of the poor, by way of a contribution. The two latter gifts were held to be clearly of the nature of public charities; but the first was not held void, and the reason why the information or bill was dismissed was because there had been no failure in the due execution of the trusts, and no occasion existed for the intervention of the court. The practical result of the decision was that a church held for its own use a large surplus coming from the devised property, and not needed to execute the specific public

charitable trusts created by the will. The case is therefore an authority in favor of the validity of gifts for a church, as well those for its private use as those which are clearly public charities. In *Atty-Gen. v. Old South Soc. supra*, no question of the validity of a gift to a church, or in trust for the benefit of a church, was raised or considered; and the only doctrine there held which may be considered as at all bearing upon the present case was that the sacramental contributions of the society, which was not a church, but a religious corporation, were not impressed with the character of a public charity. In *Old South Soc. v. Crocker, supra*, the two conveyances by Madame Norton were not to a church, but to certain persons named, and their associates; and the purpose of the conveyance was not for general church purposes, but for the erection of a meeting-house and of a dwelling for the minister, while her devise, although to the "Third Church of Christ in Boston," was not for the general purposes of the church, but "for the use of the ministry in the said church, successively, forever." While it was held that no public charity was created by the deeds or the devise, it was also held that a trust not obnoxious to the rule of law against perpetuities was created by them. The case is certainly not an authority for the position that a gift for the benefit of a church, simpliciter, is not a public charity, and is an authority that a devise to a church for the use of the ministry in the church, forever, is a good devise. In our opinion, a gift to a church, without restrictions as to the use to be made of the property, is a gift to be applied for the promotion of public worship and of religious instruction, which must necessarily influence other than church members, and has all the elements of a public charity.

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If, as contended by the Evangelical Baptist Benevolent & Missionary Society, the gift is not in trust, but is an absolute one to that corporation, there can be, of course, no question of its validity on the ground that it is obnoxious to the rule against perpetuities. It is not now necessary to decide whether the gift is absolute, or in trust. That question depends upon whether the testatrix used the words, "for the benefit of poor churches of Boston and vicinity," as a further description to identify the legatee, or a direction to the legatee to use in a particular branch of its work a fund which she gave to it absolutely, or meant that the bequest was to be used only for the benefit of the churches indicated. Nor, in our opinion, is the gift, whether absolute or conditional, void for uncertainty. It is not contended by the plaintiffs that there are no poor churches in Boston and vicinity, and we see no more practical difficulty in ascertaining the beneficiaries, if the bequest is a trust, than in the case of poor persons, or of deserving charitable institutions, while the territorial designation is sufficiently exact. See *Jackson v. Phillips*, 14 Allen, 539, 597; *Seres v. Chapman*, 158 Mass. 400.

It is not necessary now to decide whether, if the bequest is in trust for poor churches of Boston and vicinity, it is a permanent trust, or one which could properly be executed by an immediate distribution of the whole fund. All that we now decide is that the bequest, however it may be construed, is a valid one, and that the next of kin of the testatrix have no right to have the residuary fund, of which it disposes, distributed to them as intestate property.

Demurrers sustained, and bill dismissed with costs.

MARYLAND COURT OF APPEALS.

POSTAL TELEGRAPH CABLE CO.,

Appt.,

v.

Mayor, etc., of BALTIMORE.

(.....Md.)

An ordinance imposing a tax of \$2 on each telegraph, telephone, electric light, or other pole except trolley poles used exclusively for wires of street railways does not violate the right of a telegraph company, which has accepted the provisions of the Act of Congress of July, 1866, giving it the privilege of operating a line over post-roads.

(June 19, 1894.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Baltimore County in favor of plaintiff in an action brought to recover a tax which had been assessed by the plaintiff city upon the poles used by the defendant in its business. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*Power of states to control or impose burdens upon interstate telegraph and telephone companies.*

The conclusion to be drawn from all the decisions of the Supreme Court of the United States bearing upon the subject seems to be clear that a state cannot impose burdens of any kind whatever upon interstate messages by telegraph or telephone; but that business of such companies, so far as it consists of messages of private individuals between points in the state, is subject to state regulation and taxation. This doctrine runs through the decisions touching the various kinds of state interference and burdens on such business.

In *American U. Teleg. Co. v. Western U. Teleg. Co.* 67 Ala. 26, 43 Am. Rep. 90, a state constitutional provision requiring a foreign corporation to have a known place of business and an authorized agent in the state was held to be a valid police regulation and not an unconstitutional interference with interstate commerce in respect to a foreign telegraph company. But in that case the company had acquired no property nor attempted to construct any line in the state and no interstate business of the United States officers or agents was involved. It would seem under the federal decisions cited below that the company would have the right to engage in interstate business or do business for the government without any interference by the state.

Licenses for doing business.

Where the business of a telegraph company is largely interstate and the company has complied with the Act of Congress of July 24, 1866, so as to be entitled to the use of post-roads, a municipal license tax, as a condition precedent to the doing of any business within a municipality, is unconstitutional. *Bradford v. Postal Teleg. Co. (Pa.)* 11 Ry. & Corp. L. J. 54.

This doctrine was fully established in the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811, reversing *Port of Mobile v. Leloup*, 76 Ala. 401. The decision of the United States Supreme Court, the source of ultimate authority on the question, was that no municipal license tax could be authorized by a state on a foreign telegraph company acting under the act of congress, where it was engaged in interstate business, if the tax was imposed on the whole business of the company, although a portion

Messrs. R. S. Guernsey and George H. Bates, for appellant:

Is it shown that there is any legislative authority or permission to impose this tax?

A city ordinance for police regulation is void if it is made a means of revenue.

Vansant v. Harlem Stage Co. of Baltimore, 59 Md. 380; *State v. Rowe*, 72 Md. 548; *Easton Comrs. v. Corey*, 74 Md. 263.

A regulation is not a tax.

Western Union Teleg. Co. v. Pendleton, 122 U. S. 359, 30 L. ed. 1187.

A tax is a regulation when applied to means of interstate commerce and is within the prohibition of United States Constitution that prevents any regulation of interstate or foreign commerce without authority of congress.

Henderson v. Wickham, 92 U. S. 259, 28 L. ed. 543.

An ordinance may regulate but not restrain trade.

Northern Liberties Comrs. v. Northern Liberties Gas Co. 12 Pa. 321; *Warren v. Geer*, 117 Pa. 207; *Kneidler v. Norristown*, 100 Pa. 373, 45 Am. Rep. 384; *Millertown v. Bell*, 123 Pa.

of such business was entirely within the state. This case establishes clearly the proposition that telegraph business between states is interstate commerce within the constitutional protection against interference.

But a license tax of \$500 imposed by a city ordinance as a condition of carrying on business within the city by sending messages between points in the same state, other than messages sent for the United States government, its officers or agents, is not unconstitutional, although the company is also engaged in interstate business. While the interstate business of the company, or that which is done by it for the United States government, cannot be prohibited, or in any respect interfered with by municipal or state authorities, such part of the business of the company as consists of messages for private individuals between points in the same state is subject to state regulation and burdens, although they are not between points within the city, but between that city and other places within the state, so that a license tax or other burden may be imposed in two cities for the same message. *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 602, 38 L. ed. 871.

That a city cannot tax the government business of a telegraph company acting under the act of congress is declared in *Charleston v. Postal Teleg. Cable Co.* (S. C.) 9 Ry. & Corp. L. J. 129, in which it is also held that the authority of a city to impose a license tax on business of a telegraph company wholly or partly within the state does not authorize a tax on all the business of the company within the state.

This subject of licenses appears also under different headings below, in respect to various forms of taxation.

Tax on messages.

Telephone messages sent to other states constitute interstate commerce, which are not subject to state taxation. *Re Pennsylvania Teleph. Co. (N. J.)* 9 Ry. & Corp. L. J. 112.

A tax on each telegraph message under state authority is unconstitutional, so far as it touches messages between states, or those sent by United States officers or agents, where the company has accepted the Act of Congress of July 24, 1866 (Rev.

155; *Sayre v. Phillips*, 16 L. R. A. 49, 148 Pa. 493.

The state legislature never intended and did not in fact surrender the state control of the streets in Baltimore to the mayor and city council of Baltimore.

Koch v. North Avenue R. Co. 15 L. R. A. 877, 75 Md. 222; *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 247.

The police power cannot be alienated, surrendered, or abridged by the legislature.

People v. Squire, 107 N. Y. 606.

The legislature of a state cannot constitutionally transfer to municipal corporations the power of determining upon what property, taxes and assessments shall and what shall not be imposed.

Cooley, Const. Lim. p. 187, 6th ed. 632; *State v. Hudson County Avenue Comrs.* 37 N. J. L. 19; *Brewer Brick Co. v. Brewer*, 63 Me. 62, 16 Am. Rep. 395; *Wilson v. Sutter County Supr.* 47 Cal. 91.

This tax is unequal and not according to the value of the class of property upon which it is imposed.

State v. Cumberland & P. R. Co. 40 Md. 51; *Daly v. Morgan*, 1 L. R. A. 757, 69 Md. 460;

Wells v. Hyattsville Comrs. 20 L. R. A. 89, 77 Md. 125.

Constitutional provisions for the purpose of insuring equality in the levy and collection of taxes apply equally to all kinds of taxation, whether state, county, or municipal.

Cooley, Taxn. 2d ed. p. 184; *Burroughs*, Taxn. chap. 19, § 180, p. 380; *Knoutton v. Rock County Supr.* 9 Wis. 410; *Weeks v. Milwaukee*, 10 Wis. 243; *Zanesville v. Richards*, 5 Ohio St. 589; *Daly v. Morgan*, *supra*; *Hale v. Kenosha*, 29 Wis. 599; *Hunsaker v. Wright*, 30 Ill. 146; *Glasgow v. Rouse*, 43 Mo. 479.

The terms "equal and uniform" and "according to value" preclude a discrimination as between those carrying on the same business.

New Orleans v. Home Mut. Ins. Co. 23 La. Ann. 449.

It also precludes a specific tax on any species of property in any manner, the value of which is not uniform.

Bright v. McCullough, 27 Ind. 223; *Sims v. Jackson Parish*, 22 La. Ann. 440; *State v. Endom*, 23 La. Ann. 663; *Livingston v. Albany*, 41 Ga. 21.

A charge of \$1 per mile laid upon each rail-

Stat. §§ 5263, 5269). *Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 28 L. ed. 1087, reversing 55 Tex. 314.

But a municipal license tax on messages "to and from points within the state" is not an interference with interstate commerce, although the company is engaged in business over post-roads. *Moore v. Bufaula*, 97 Ala. 670.

Tax on gross receipts.

A tax by state authority on the gross receipts of a telegraph company, including those from interstate business, was upheld by several state courts which declared that this did not constitute a regulation of commerce. *Western U. Telegr. Co. v. Mayer*, 28 Ohio St. 521; *Western U. Telegr. Co. v. Com.* 110 Pa. 405; *Western U. Telegr. Co. v. State Board of Assessment*, 86 Ala. 273.

The same was held in respect to a municipal tax on such receipts. *Western U. Telegr. Co. v. Richmond*, 28 Gratt. 1, in which it was also held that the fact that the company had accepted the Act of Congress of 1866 did not exempt it from such tax as a government agency.

But these state decisions were overruled or reversed by decisions of the United States Supreme Court, which fully establish the doctrine that a state tax on gross receipts of a telegraph company, where a part of its business is interstate, is an unconstitutional interference with interstate commerce. *Ratterman v. Western U. Telegr. Co.* 127 U. S. 411, 32 L. ed. 229; *Western U. Telegr. Co. v. Pennsylvania*, 128 U. S. 39, 32 L. ed. 845, reversing 110 Pa. 405; *Western U. Telegr. Co. v. Seay*, 132 U. S. 472, 33 L. ed. 409, reversing *Western U. Telegr. Co. v. State Board of Assessment*, *supra*.

In such a case an injunction against that portion only of the tax which is based on interstate commerce may be granted if such portion can be separated from the remainder. *Ratterman v. Western U. Telegr. Co.* *supra*.

Tax on franchisees.

A state tax on the franchise of a telegraph company which has accepted the Act of Congress of 1866 is void, as an attempt to tax an instrument of general government. *San Francisco v. Western U. Telegr. Co.* 17 L. R. A. 301, 96 Cal. 140.

It was said in *Atty-Gen. v. Western U. Telegr. Co.* 24 L. R. A.

38 Fed. Rep. 129, that a state tax on the franchise and property of a foreign telegraph company was not a regulation of commerce, although the company had accepted the act of congress; but the tax involved in this case was regarded by the Supreme Court of the United States, which upheld it (*Western U. Telegr. Co. v. Atty-Gen.* 125 U. S. 530, 31 L. ed. 790), as a tax on the property of the corporation, although nominally on such portion of its capital stock as corresponded with the portion of its whole line which was within the state.

It is said in *Western U. Telegr. Co. v. Lieb*, 76 Ill. 174, that a foreign telegraph company is taxable on the exercise of its franchises and privileges in the state, but in that case the tax was in fact on capital stock and was held not to be authorized by a statute which in terms applied only to domestic corporations.

Tax on property or capital stock.

That a tax by each town or ward on telegraph lines within such district, including the easement of the company in the land occupied by its poles and apparatus, is not an unconstitutional regulation of commerce, is decided in *People v. Dolan*, 12 L. R. A. 251, 126 N. Y. 166, modifying on other grounds *People v. Tierney*, 57 Hun. 357. Although the telegraph company was in this case a domestic corporation, it was engaged in interstate business, and the decision would undoubtedly have been the same if the company had been a foreign corporation. It was held also in that case that the value of such property could not be estimated with reference to its use as part of a telegraph line in operation, but must be based on the value without regard to such use.

A telegraph company operating its lines under authority of the act of congress is not exempt from the ordinary burdens of taxation in a state where its line runs. *Atty-Gen. v. Western U. Telegr. Co.* 141 U. S. 40, 35 L. ed. 623.

A state tax nominally based on the shares of stock of a foreign telegraph company doing business within the state in proportion to the part of the whole line operated by the company which is within the state was held to be in effect a tax on the property of the corporation within the state, and

road track in the state is in violation of a constitutional provision requiring uniformity.

Pittsburgh, C. & St. L. R. Co. v. State, 16 L. R. A. 380, 49 Ohio St. 189.

This tax cannot be imposed under the authority to levy taxes for the support of the city government.

Burroughs, Taxn. 418; *Daly v. Morgan, supra*; *St. Mary's Industrial School v. Brown*, 45 Md. 311; *Cooley, Const. Lim.* 231, ed. of 1890. 227.

This ordinance by imposing this specific tax in effect determines the value of the property—that is it assumes that all of this class of property is of the same value.

This renders it void in any event.

People v. Hastings, 29 Cal. 449; *Burroughs, Taxn.* chap. 12, p. 283.

A legislative enactment making or determining the value of property for taxation would be the blending of the legislative and judicial functions and also would deprive the property owners of due process of law and give them no opportunity to be heard in the matter.

Uman v. Baltimore, 11 L. R. A. 224, 72 Md. 587; *State v. Rowe*, 72 Md. 548; *Easton Comrs. v. Covey*, 74 Md. 263.

not an invalid burden on interstate commerce. *Ibid.*; *Western U. Teleg. Co. v. Atty-Gen. supra*.

A question under the Ohio state constitution, which requires property to be taxed according to its true value in money, and that all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, shall be taxed by a uniform rule, has arisen with reference to the so-called Nichols law, which provides that the value of the property within the state of telegraph, telephone, and express companies shall be determined for taxation in proportion to the value of the entire property of such companies and that the board shall, "be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money."

The supreme court of the state in *State v. Jones*, 33 Ohio L. J. 54, holds that this law does not violate the constitutional rule of uniformity, since that rule does not preclude placing such corporations in a class by themselves, and that the statute did not bind the board to find the value of the entire property of the company equal to that of the entire capital stock, but only to be guided thereby in ascertaining the true value in money of the property in the state.

On the other hand, the circuit court of the United States, expressing regret that it could not wait for a decision of the state supreme court before passing on the question, has held the statute unconstitutional on the ground that the market value of the shares of capital stock had no legitimate effect in increasing the value of the tangible and visible property in Ohio of the Western Union Telegraph Company, because the good-will and other intangible factors of the value of the capital stock were not taxable as property themselves, under the Ohio laws and constitution, nor as an increment to the value of such tangible property, and therefore, that a statute requiring the value of the capital stock to be a guide in determining the value of the tangible property of a small class of business corporations violates the constitutional rule of uniformity. *Western U. Teleg. Co. v. Poe*, 61 Fed. Rep. 449.

A telephone company incorporated in another state is not taxable on its gross earnings or capital stock merely because it has leased apparatus to a

domestic corporation, with the reservation of the right to take and operate the line in case of a certain breach of contract. *People v. American Bell Teleph. Co.* 117 N. Y. 241; *Com. v. American Bell Teleph. Co.* 129 Pa. 217.

A franchise tax on the capital of an interstate telegraph company employed within the state is not an unconstitutional interference with interstate commerce. *People v. Campbell*, 70 Hun. 507.

An injunction against operating a telegraph line of a foreign corporation engaged in interstate business until the payment of a lawful tax cannot be allowed as a remedy to compel the payment of the tax, as this would interfere with interstate business. *Western U. Teleg. Co. v. Atty-Gen. supra*, reversing on this point. *Atty-Gen. v. Western U. Teleg. Co.* 33 Fed. Rep. 129.

These ordinances discriminate against the property of defendant in imposing the taxes. This poll tax is in addition to the amount of taxes imposed upon the property of other citizens and corporations.

Charlotte, C. & A. R. Co. v. Gibbs, 142 U. S. 391, 35 L. ed. 1053.

These ordinances are in violation of the Con-

domestic corporation, with the reservation of the right to take and operate the line in case of a certain breach of contract. *People v. American Bell Teleph. Co.* 117 N. Y. 241; *Com. v. American Bell Teleph. Co.* 129 Pa. 217.

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Charge for poles and wires.

The main case is clearly supported by the authorities.

It is established that a municipal corporation being chargeable with the duty of supervising the construction and maintenance of electric lines within its streets and public places in order to prevent danger to the people from their defective condition, may impose upon such electric lines a reasonable charge to pay for such supervision.

A charge of one dollar per annum for each pole and two dollars and fifty cents per annum for each mile of wire was held reasonable. *Western U. Teleg. Co. v. Philadelphia (Pa.)* Jan. 23. 1888.

In *Philadelphia v. Postal Teleg. Cable Co.*, 67 Hun. 21, the reasonableness of a charge for each pole and each mile of wire under the Philadelphia ordinance was involved. The amount of such charge is not stated in the opinion, but it would appear to be the same as that in the preceding case.

The New York court declared that it could not say this charge for police regulation and supervision was unreasonable, and held that it did not constitute a restraint upon interstate commerce. *Philadelphia v. Postal Teleg. Cable Co. supra*.

But the circuit court of the United States refused to uphold the Philadelphia ordinance in *Philadelphia v. Western U. Teleg. Co.*, 2 Inters. Com. Rep. 728, 40 Fed. Rep. 615, declaring that Philadelphia was not authorized to tax a telegraph company occu-

stitution of the United States and the laws of congress relating to the regulation of interstate commerce and the protection of property.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 11, 24 L. ed. 711; *Western U. Teleg. Co. v. Texas*, 105 U. S. 464, 26 L. ed. 1068.

The property of a telegraph company situated within a state may be taxed by the state, as all other property is taxed; but its business of an interstate character cannot be thus taxed.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311; *Charleston v. Postal Teleg. Cable Co.* (S. C.) 9 Ry. & Corp. L. J. 129; *Bradford v. Postal Teleg. Co. (Pa.)* 11 Ry. & Corp. L. J. 54.

This tax or claim is a restriction upon the use of the United States post roads.

U. S. Const. art. 1, § 8, subsec. 7; *Western U. Teleg. Co. v. Atty-Gen.* 125 U. S. 580-554, 31 L. ed. 790-795.

This tax or claim is a restriction upon an agent of the national government without authority of congress.

U. S. Const. art. 1, § 8, subsec. 18; *Ward v. Maryland*, 79 U. S. 12 Wall. 427, 20 L. ed. 451; *Western U. Teleg. Co. v. Texas*, *supra*.

This license exaction is an abridgment of

the rights, immunities, and franchises of the Postal Telegraph Cable Company's charter in the free use of the post-roads of the United States.

Pembina Consol. Steer Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181-190, 31 L. ed. 650-654; *Minnesota v. Barber*, 136 U. S. 313, 84 L. ed. 455; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 459, 30 L. ed. 694; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114-118, 84 L. ed. 394-356; *Western U. Teleg. Co. v. Texas*, *supra*; *Crutcher v. Kentucky*, 141 U. S. 47-63, 35 L. ed. 650-654; *Lyng v. Michigan*, 135 U. S. 161-166, 34 L. ed. 151-153.

The specific tax upon telegraph poles, as such, without regard to size, height, or material of which it is composed, and physical condition and extent of business, is unequal.

Pacific Exp. Co. v. Seibert, 142 U. S. 333, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Lickord v. Pullman Southern Car Co.* 117 U. S. 33-51, 29 L. ed. 787-791; *Tennessee v. Pullman Southern Car Co.* 117 U. S. 51, 29 L. ed. 791; also *Harman v. Chicago*, 147 U. S. 896, 37 L. ed. 217; *Minot v. Philadelphia, W. & B. R. Co.* 2 Abb. U. S. 828.

This tax or claim, and the manner of creat-

pying its streets, and further that if it was engaged in interstate commerce, the state could not confer such power. The opinion proceeds, however, to say that the city may charge for supervision of the telegraph lines what is reasonable, but cannot lay away any fund for imaginary future demands, and therefore, that an ordinance which would impose a charge of about \$16,000 per year, while experience shows that \$3,000 or \$3,500 per year was sufficient to pay the expenses, was unreasonable and invalid. Therefore the federal court, while acknowledging that the state courts upheld the ordinance, refused to uphold it.

A charge of one dollar per annum for each pole was held not to be unreasonable in *Chester City v. Western U. Teleg. Co.* 154 Pa. 464; *Allentown v. Western U. Teleg. Co.* 148 Pa. 117.

In *Chester v. Western U. Teleg. Co.*, *supra*, the supreme court of Pennsylvania declared that the reasonableness of the license fee for such a telegraph company may be measured partly by the liability of the city for injuries caused by defective poles and wires, as well as by the amount of actual expense for licenses.

A charge of \$5 per pole for the privilege of using streets, alleys, and public places of the city of St. Louis being graduated by the amount of use is held by the Supreme Court of the United States not to be a privilege or license tax, but to be valid. *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 880, and on denial of rehearing in 149 U. S. 467, 37 L. ed. 812, but the dissenting opinion in this case denies that the charge is reasonable, reciting that it amounts to 44 per cent of the entire value of the property of the company in the city. This case reverses the decision of the circuit court in 39 Fed. Rep. 59.

The city of St. Louis having full control of streets and power to "regulate the use" is held entitled to demand a consideration and the majority of the court holds that \$5 per pole cannot be declared unreasonable on the case as then presented but that this question was open to investigation on another trial.

A tax by the state of one dollar for each mile of the first line of wire within the state and fifty cents per mile for each additional wire, with a penalty of \$500 imposed on any agent of the company for failure to pay the tax, was held unconstitutional 24 L. R. A.

as an attempted regulation of commerce on the ground that it was not a tax on the property of the company within the state, but upon its business. *Com. v. Smith*, 92 Ky. 38.

Considering the fact that a state tax, like that in the case last cited, can hardly be claimed to be a charge for police supervision of the poles and wires, it would seem that this decision is not in conflict with that of the Supreme Court of the United States upholding a city charge of \$5 for each pole. If the tax is in fact on the business rather than on the property of the company it is clearly within the scope of the decisions above respecting various forms of license or privilege taxes. A state tax might easily become prohibitory if not restricted.

The St. Louis board of public improvements was held in *State v. Flad*, 23 Mo. App. 185, to have no power to impose upon a telephone company other conditions for the use of streets than those imposed by statutes and ordinances, and that the board must issue a permit for poles in the streets on compliance with these conditions.

State monopolies.

A legislative grant of an exclusive franchise for telegraph business between certain points in the state was held, in a controversy between domestic corporations, to be valid under the state constitution, in *California State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398, but the case was considered only with respect to the provisions of the state constitution.

A Pennsylvania case held that the post-roads, which a telegraph company, accepting the act of congress, is entitled to use cannot include roads which are the property of a state, and the soil of which is generally owned by individuals. *Philadelphia v. Western U. Teleg. Co.* 2 W. N. C. 455.

But this decision is clearly superseded by that of the United States Supreme Court in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 1, 24 L. ed. 708, affirming 2 Woods, C. C. 643, in which it is held that the Act of Congress of July 14, 1866, prohibits state monopolies in telegraph business, and extends the right of a company which has accepted the act to run its line over all post-roads and navigable waters, and that post-roads within this provision are not restricted to roads over the public domain, but include all roads which are properly known as

ing it, or any statute similar to it, is against the public policy of the United States.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Passenger Cases*, 48 U. S. 7 How. 463, 12 L. ed. 777; *Mculloch v. Maryland*, 17 U. S. 4 Wheat. 481, 4 L. ed. 607.

Messrs. Thomas G. Hayes and William Bryan, Jr., for appellee:

The mayor and city council of Baltimore have power, under chapter 370 of the Acts of 1890, to regulate the use of the streets of the city by telegraph, telephone, and other poles.

Under this power, the municipality has been decided to be authorized to permit iron railway tracks to be laid on the streets of the city by street railway companies.

Koch v. North Avenue R. Co. 15 L. R. A. 877, 75 Md. 239; *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 239; *Lake Roland Elec. R. Co. v. Baltimore*, 20 L. R. A. 126, 77 Md. 352.

The city has the right to charge a reasonable rental for the use of its streets.

St. Louis v. Western U. Tele. Co. 148 U. S. 93, 37 L. ed. 390, and 149 U. S. 465, 37 L. ed. 810.

post-roads. It holds also that although the statute does not give a foreign corporation the right to enter on private property without consent of the owner it does prohibit the state from preventing the occupation of post-roads for telegraph purposes.

To the same effect it was held in *Western U. Tele. Co. v. Atlantic & Pacific States Tele. Co.* 5 Nev. 102, that a state cannot by the grant of an exclusive franchise, prevent the use of a post-road by any telegraph company which has accepted the act of congress. But this decision adds that proof of such acceptance is necessary, and that a letter purporting to be from the postmaster general, which is not authenticated, is not sufficient proof. It says that while the letter, if authentic, may be sufficient, the proper proof would be a certified copy of the acceptance filed under seal of the government.

So in *Southern R. Co. v. Southern & A. Tele. Co.* 46 Ga. 43, it is held that a foreign corporation may be given the right to build a telegraph line across the public domain but not upon private property without compensation.

The authority given to a telegraph company to lease its line was held in *Philadelphia v. Western U. Tele. Co.*, 3 W. N. C. 455, not to include the right to lease its franchise, so as to authorize the lessee to open new lines. But it may be questioned how far this decision remains unimpaired in this respect by the decision of the United States Supreme Court denying the right of the state to give an exclusive franchise.

Revocation of license.

In *State v. Jersey City (N. J.)* Feb. 7, 1897, it was held that the common council could not review the permission of a telegraph company to use a street, after it had incurred the expense of placing poles, etc.

But in *American Rapid Tele. Co. v. Hess*, 13 L. R. A. 484, 125 N. Y. 641, it is held that the license of a telegraph company to use a highway is revocable by the legislature.

Placing wires under ground.

The fact that a telegraph company has accepted the act of congress and obtained the right to use public streets which constitute post-roads does not exempt it from the power of the state to compel

Bryan, J., delivered the opinion of the court:

On the 20th day of April, 1893, the mayor and city council of Baltimore passed an ordinance which imposed a tax \$3 on each telegraph, telephone, electric light or other pole, which should be used in any of the streets, lanes, or alleys of the city.

But the ordinance excepted trolley poles, which were used exclusively for stringing thereon wires for use in the propulsion of street passenger cars by electricity.

The Postal Telegraph Cable Company used and maintained five hundred and nine telegraph poles in the public streets of Baltimore, but refused to pay the tax on them. A suit was brought by the mayor and city council to recover the amount due according to the terms of the ordinance. That telegraph company, instead of pleading to the declaration, filed an answer, composed of twenty-five sections. The plaintiff demurred, and by consent of counsel, a *pro forma* judgment was entered, sustaining the demurrer and determining that the plaintiff should recover the amount of the tax.

the placing of wires under ground. *American Rapid Tele. Co. v. Hess*, 13 L. R. A. 484, 125 N. Y. 641; *Western U. Tele. Co. v. New York*, 3 L. R. A. 449, 2 Inters. Com. Rep. 533, 86 Fed. Rep. 552.

But a telegraph company having the right to use post-roads cannot be prevented by state law from carrying its wires along an elevated railway which constitutes a post-road independent of the street beneath it. *Western U. Tele. Co. v. New York*, *supra*.

State regulation of business.

Many decisions have been made construing and giving effect to state laws respecting Sunday messages and other matters of regulation of telegraph business in which the effect of the statutes upon interstate business or foreign corporations has not been considered or questioned, although such business or corporations were involved. For an illustration in case of a foreign company, see *Western U. Tele. Co. v. Yopet*, 3 L. R. A. 224, 118 Ind. 243.

Statutes providing penalties for default or mistake in transmission of messages have been construed in a number of cases, and with some conflict.

An Indiana statute of this kind was construed by the state courts to be inapplicable to messages sent into the state from other states on the ground that the contracts were made outside the state. *Rogers v. Western U. Tele. Co.* 122 Ind. 396; *Western U. Tele. Co. v. Reed*, 96 Ind. 195; *Carnahan v. Western U. Tele. Co.* 89 Ind. 623, 46 Am. Rep. 175.

On the other hand, in Georgia, a penal statute requiring delivery of a message within a reasonable time was held not a violation of the interstate commerce law, although the message was sent from another state. *Western U. Tele. Co. v. James*, 90 Ga. 254.

And in Indiana the state courts held that such a penal statute did apply to a message sent from that state to a point in another state because the contract was made within the state, even if the default in delivery or mistake of the company was made in another state. *Western U. Tele. Co. v. Hamilton*, 60 Ind. 181; *Western U. Tele. Co. v. Lindley*, 62 Ind. 371; *Western U. Tele. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 608; *Western U. Tele. Co. v. Ferris*, 103 Ind. 91.

These Indiana decisions as to penalties for messages sent out of the state are rendered obsolete by

The answer filed by the defendant seems to be framed on the model of equity proceedings. Both in form and substance, it is in absolute disregard of the practice prevailing in this state, and was necessarily held bad on demurrer. But as the object of this suit is to determine the validity of the ordinance in question, we shall express our opinion upon it without regard to errors in practice and procedure. We shall assume (as is undoubtedly the case) that the defendant is a corporation under the laws of New York; and that it is engaged in operating telegraph lines over the post-roads of several states of the Union, by making telegraphic communications for commercial and other purposes; and that it has accepted the provisions of the Act of Congress of July, 1866 (Title 65 of U. S. Rev. Stat.), relating to the occupancy of post roads; and that it is entitled to the privileges conferred by that Act. It has been decided by the Supreme Court of the United States that telegraphic communication between the different states is a species of interstate commerce, and that it is, therefore, within the control of congress. The telegraphic companies which have accepted the provisions of the Act of 1866 are entitled to use the post-roads of the United States for the operation of their lines.

The streets of the city of Baltimore are post-roads, and in this capacity are subject to this act of congress.

But it cannot be supposed that any power is conferred upon a telegraph company to use the streets without compensation.

The supreme court has decided what the right to use a post-road means. It has said that this act "gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." These (meaning post roads) are within the dominion of the national gov-

ernment to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.

State sovereignty under the constitution is not interfered with.

Only national privileges are granted. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

It is not contended on the part of the plaintiff that any state authority can prevent or hinder interstate commerce, or that it can tax the receipts derived from it, or that it can require a license for carrying on the business, or the payment of a sum of money for such license.

The city ordinance does not exclude the telegraph company from the use of the streets as post-roads; on the contrary, it recognizes such use, and exacts compensation therefor. The question arises whether such compensation can be lawfully demanded.

The power of the mayor and city council of Baltimore over the streets cannot be regarded as within the region of debate.

By legislative enactment, by long continued usage, and by repeated decisions of our courts, it has been determined that it has full and complete control over the streets and highways of the city. The Act of 1890, chapter 370, declared that it should have power to regulate the use of the streets by telegraph, telephone, electric light and other wires and poles; and that it might require the wires to be placed under ground. It may permit the erection of poles, determine where they may be placed, and upon what terms they may be used. The erection of a pole is the appropriation of a portion of a street, and the entire exclusion of the public from the use of it. It is necessarily to some extent

the decision of the United States Supreme Court in *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 358, 30 L. ed. 1187, 1 Inters. Com. Rep. 808, reversing 95 Ind. 12, 48 Am. Rep. 692, which decides that a state statute cannot regulate the transmission of telegrams into other states, and that such messages are not within the provisions of a state statute giving a penalty for a default in delivery which occurs in another state.

It is perhaps open to question how far this decision of the United States Supreme Court affects the Indiana decision in *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1, which holds that the Indiana statute providing for special damages in case of negligence of telegraph company can be recovered, although the message was sent from another state. The question is suggested whether or not the recovery of special damages, as distinguished from a penalty, is a part of the remedy which is within the proper sphere of state regulation, although the action may be based on an interstate transaction.

In *Central U. Teleg. Co. v. State*, 118 Ind. 194, it was held that a telephone company was not exempt from state control in respect to service and rates for persons within the state, although the line ex-
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tended into other states and belonged to a foreign corporation.

So in *Central U. Teleg. Co. v. State*, 106 Ind. 1, and *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201, an Illinois corporation was held subject to the Indiana statutes as to service of process for persons in Indiana, but there was no discussion in those cases as to the interstate character of the business.

That a state statute may require sufficient facilities on the part of a telegraph company to do business both for individuals and for other telegraph lines, and that such business shall be done promptly and impartially, is declared in *Connell v. Western U. Teleg. Co.* 108 Mo. 459, holding that this is not an interference with interstate commerce; but the case also holds that such a statute does not apply to a delivery of the message in another state.

And in *State v. Nebraska Teleg. Co.*, 17 Neb. 128, 52 Am. Rep. 404, an interstate telephone company was held bound to furnish service but there was no discussion of interstate matters.

For note on compulsory service in similar cases see *Rushville v. Rushville Nat. Gas Co.* (Ind.) 15 L. R. A. 321.

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an obstruction, and under some circumstances, it may be a great public inconvenience.

The telegraph company has not the semblance of a right to appropriate any portion of the streets in this way.

It may be suggested that it might acquire such right by condemnation.

We shall not discuss this question.

The assertion of such a pretension would be regarded as offensive in the highest degree, and would call forth great opposition. If the question should ever be presented to the courts, we trust that it may be temperately and dispassionately discussed, and wisely and justly decided.

As the matter now stands, the consent of the mayor and city council must be obtained for the use of the poles.

It would not be right to clog the consent with unjust and unreasonable conditions, such as would manifest a purpose to prevent the transaction of the interstate business of the telegraph company, or to impede, oppress, and embarrass it, or to make a discrimination against it in favor of some rival company. The privilege of using the poles is granted on the payment of the sum of two dollars per annum for each pole. This is less than seventeen cents a month. Baltimore is a large and populous city. In the localities desirable for telegraph offices the sidewalks are frequently thronged by large numbers of people, and the driveways so closely blocked with vehicles that it is a matter of peril and difficulty to cross from one side of the street to the other.

In many other parts of the city the crowding of the streets is sometimes very great. It is a matter of much importance to preserve space for public convenience. If we take as a standard the rental value of ground fronting on public streets, we will see that seventeen cents a month for the space covered by a telegraph pole is a very small fraction of the value of its occupation; and it is a vastly smaller fraction of the compensation due for the inconvenience caused to occupiers of houses in the vicinity, and to persons using the streets in the ordinary methods of travel.

The mayor and city council, however, with a wise and liberal forecast have forbore to place burdens on industries and enterprises, which accompany and increase the growth and prosperity of the city. In our opinion the tax on these poles is reasonable and moderate. We, of course, are conclusively bound by the decision of the supreme court in *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380.

In that case the validity of a tax was in question, which had been imposed by the city of St. Louis on telegraph poles of the Western Union Company. The court overruled the suggestion that the act of congress which granted the use of the post-roads, conferred on telegraph companies the unrestricted right to appropriate public or private property; and affirmed that the franchise

or privilege was to be exercised in subordination to public and private rights. It held that the tax was valid; and said in speaking of the public streets: "While for purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation."

It matters not for what that exclusive appropriation is taken; whether for steam railroads, telegraphs, or telephones; the state may, if it chooses, exact from the party or corporation given such exclusive use, pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated. The tax was five dollars per annum for each pole, and it was maintained by the telegraph company that it was unreasonable, unjust, and excessive. As the judgment in favor of the telegraph company was reversed on other grounds, the court said that the question might be passed for further investigation on the new trial. It also said "prima facie," an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. On a motion for reargument, the court reaffirms the validity of the tax.

In speaking of the power to regulate the use of the streets, which was vested in the city of St. Louis under its charter, it said: "If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to, in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the state."

The judgment below must be affirmed.

Affirmed 150 U. S. 210, 39 L. ed. 399.

Frederick William SCHWANEBECK *et al.*,
Appts.,
v.

Louis C. SMITH *et al.*

(77 Md. 314.)

A contract between abutters on a street about to be closed that certain parts of the bed of the street shall be awarded to each without specifying any instrument of title, and that then one shall sell and the other buy "at the market price" a strip fronting seven feet on a designated street to a ten-foot alley not located, is too indefinite to be specifically enforced.

(March 15, 1898.)

APPEAL by plaintiffs from a decree of the Circuit Court of Baltimore City in favor of defendants in an action brought to compel specific performance of a contract to convey real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Emil Budnitz and C. D. McFarland for appellants.

Mr. James McColgan for appellees.

Alvey, Ch. J., delivered the opinion of the court:

This is an application for specific performance of what is alleged to be a contract between the parties, plaintiffs and defendants in this case, for the partition or division of certain portions of the bed of Birkhead street, condemned and closed by the authority of the city of Baltimore, between Charles and Patapsco streets. It appears that each of the parties, complainants and defendants, had some interest in the soil, by previous lease or conveyances, in the bed of Birkhead street, between Charles and Patapsco streets, and there was an ordinance pending, or about to be introduced, in the city council, for the condemnation and closure of Birkhead street between Charles and Patapsco streets; and in this state of affairs the parties to this case entered into an agreement; the parties of the second part to the agreement being the complainants in this case, and the parties of the first part thereto being the defendants. The agreement is as follows: "That the parties hereto do mutually agree and covenant to do no act that shall hinder the passage by the mayor and city council of Baltimore of an ordinance providing for the reversion of the city's interest in certain portions of ground binding upon lots of ground held by the parties hereto, and which portions of ground were dedicated to the city for the use of a street to be known as 'Birkhead Street,' and which said dedication was not accepted by the city; and they do further agree that, in the event of the passage of said ordinance, they will divide the ground forming the bed of said street, in the manner following, that is to say: The parties of the second part shall be awarded the ground beginning at

the southwest corner of the lot now owned by them at the N. E. cor. of Charles and said Birkhead streets; running thence southerly into the bed of said Birkhead street a distance of 25 feet; thence easterly, a distance of 95 feet, to a ten-foot alley, with the use in common; thence northerly to the southeasterly boundary of the lot now owned by them; thence westerly 95 feet to the place of beginning. The parties of the first part hereto [that is to say, the defendants] shall be awarded the ground of said proposed street which shall remain after the award to the parties of the second part, as above set forth. The parties of the second part [the plaintiffs] further agree to sell to the parties of the first part, after said division shall be made, a piece or parcel of said ground which shall be furthest south in the proposed division, which said piece or parcel shall front 7 feet on Charles street to a 10-foot alley, charging therefor the market price for said ground, as it shall appear on the date of said sale. The parties of the first part agree to purchase, on the above terms, the piece or parcel of ground above described." It is quite apparent that this agreement was unskillfully drawn, and it is open to doubtful construction in regard to several questions. It is alleged in the bill, and admitted by the answer, that the ordinance referred to, for condemning and closing Birkhead street from the east side of Charles street to the west side of Patapsco street was passed in October, 1888, and that the city authorities proceeded to condemn and close the street between said points, and that the defendants were assessed for benefits the sum of \$432.14, which amount constitutes a lien on the ground of the defendants embraced within the bed of Birkhead street, fronting on Charles street, but which assessment the defendants have refused to pay, and the city officials threaten to sell the ground of the defendants so embraced in the bed of Birkhead street, for payment of the assessment. The plaintiffs allege that the defendants have refused to execute to them a deed for the lot to which they are entitled under the agreement, although they (the plaintiffs) are ready and willing to sell and convey the lot, 7 by 95 feet, to the defendants, at the market price, as provided in the agreement.

The bill prays—First, that the defendants may be decreed to pay the \$432.14, the assessment against them as for benefits for closing the street, and all costs on the assessment, and thus relieve the ground of the lien or incumbrance; second, that the defendants be decreed to grant and convey to the plaintiffs, by a good and sufficient deed, the lot of ground forming a part of the bed of Birkhead street, condemned and closed as aforesaid, having a front of 25 feet on Charles street, with a depth of 95 feet, being the lot agreed to be awarded to the plaintiffs by the agreement exhibited with the bill; and for general relief. The defendants, by their answer, deny *in toto* the rights claimed by the plaintiffs; they deny the correctness of the construction of the agreement as contended for by the plaintiffs; and they insist that they are under no obligation whatever

NOTE.—As to definiteness of contract, see *Wells v. Alexandre* (N. Y.) 15 L. R. A. 218, with note on validity of contract for purchase of indefinite quantity.

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to the plaintiffs to pay off the assessment made upon them by the city for benefits for closing the street, nor are they bound, as they contend, to make a deed to the plaintiffs for any part of the bed of the street; and they further insist that the contract is greatly wanting in certainty and mutuality; and that it is not such as a court of equity should specifically enforce. The city of Baltimore, by its answer, insists upon its right to enforce the assessment, and to the benefits of the lien upon the ground.

The contract provides for a division of the bed of the street between the parties, upon its being condemned and closed by the city, and it refers to the parts to be awarded to each; but how or by whom the award is to be made, or by what instrument effected, the contract is entirely silent. Whether this award was intended or was supposed to be necessary to be made by the city commissioner in condemning and closing the street, or that it was necessary to have the sanction of the city authority to any division that might be agreed upon by the parties themselves, would seem to be matter of doubt. The parties have not stipulated for mutual conveyances for the parts to be awarded. They have simply said that certain parts of the bed of the street shall be awarded, but without fixing any valuation or specifying any instrument of title whatever. But it is stipulated by the plaintiffs that they will sell to the defendants, after said division shall be made, a certain piece or parcel of said ground fronting 7 feet on Charles street to a 10-foot alley (without saying whether the alley is the boundary of the width or the depth of the lot), "charging therefor the market price for said ground as it shall appear on the date of said sale," and the defendants agreed to purchase the same on those terms. This is, in part, of the substance of the consideration for the contract. But how is this price to be ascertained? It was not designed that this particular piece or parcel of ground should be put up at public sale, in order to ascertain the market price, and the opinions or judgments of witnesses as to values are too proverbially variant and conflicting to be appealed to for the purpose of fixing with certainty the market value of the property at a particular date. The court has no means by which to ascertain, with any proper degree of certainty, the market price of this piece of ground at the date of its sale. There would therefore seem to be such uncertainty and vagueness in the terms of the contract as to render it improper for the court to undertake to decree its specific performance. It is a settled prin-

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ciple in this court that "every agreement, to merit the interposition of a court of equity to enforce it, must be fair, just, reasonable, bona fide, certain in all its parts, mutual, etc., and, if any of these ingredients be wanting, courts of equity will not decree a specific performance. *Gelston v. Sigmund*, 27 Md. 334, 343, and the cases there cited. In the case just cited the agreement was to let B. retain possession of certain property from the 1st of July, 1866, to the 1st of July, 1867, upon his giving the same rent that A. "might be able to obtain from other parties;" and it was held that the agreement was uncertain, and was not such as a court of equity would enforce; that it could not be certainly ascertained how much any other person would pay, and it was therefore too uncertain to be specifically enforced. In that case the case of *Bromley v. Jefferies*, 2 Vern. 415, was cited and relied on by the court, in which there was a covenant by A. that B. should have a certain estate for £1,500 less than any other purchaser would give for it, and afterwards the covenantor devised this estate to his grandson for life, with remainder over, and died. The court refused to decree specific performance of the agreement, by reason of the uncertainty of it, because, as said by the court, "if the estate was not to be sold, but the plaintiff was to have it, it was not practicable to know what a purchaser would give for it." And so, here, the market price of property being what it will bring in fair, open market at public sale, it is not practicable to ascertain that price unless the property be subjected to the test of such sale, and that is clearly not what was contemplated by the parties; and to determine the matter upon the mere opinions of witnesses that might be produced by the opposing parties would not conform to the terms of the contract, and might work surprise to either or both of the parties. Indeed, to determine the question on such evidence would simply be to make it depend upon the opinions of values, with respect to which opinions the parties might not have been willing to contract; for, as said by Lord Arden, *M. R.*, in the case of *Emery v. Wase*, 5 Ves. Jr. 848, "values differ so much that it is not very wise to agree to sell according to the valuation of any one." The agreement not being of a nature to be specifically enforced by a court of equity, the decree below dismissing the bill will be affirmed, with costs, and the plaintiffs be left to any legal remedy they may have on the contract for breach thereof. *Emery v. Wase*, 5 Ves. Jr. 848, 849; *Colson v. Thompson*, 15 U. S. 2 Wheat. 386, 4 L. ed. 258.

Decree affirmed, with costs to appellees.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

STATE of Tennessee, for the Use of the
UNITED STATES, *Plff. in Err.*,
c.

William J. HILL *et al.*

(60 Fed. Rep. 1005.)

The United States may sue as the party aggrieved upon the bond of a sheriff from whom a federal prisoner, lawfully in his custody, has escaped, where the state statutes authorize suit on the bond by any party aggrieved.

(February 5, 1894.)

ERROR to the District Court of the United States for the Middle District of Tennessee to review a judgment in favor of defendants in an action brought to recover upon a sheriff's bond the amount which the United States claimed to be damaged by reason of the sheriff's permitting one of its prisoners to escape. *Reversed.*

Statement by **Barr**, *District Judge*:

The appellant sued the appellees, Hill and the sureties on his sheriff's bond, and filed this declaration:

"The State of Tennessee, for the use of the United States of America, Plaintiff v. Wm. J. Hill, H. C. Hudson, James W. Johnson, R. G. Fehr, J. G. Sawyer, T. M. Graham, B. H. Beazeley and V. E. Shwab, Defendants. (No. 882.)

"The plaintiff sues the defendants for this: That on the 1st day of January, 1893, and on divers other days before said date, the defendant William J. Hill was the sheriff of Davidson county, Tennessee, within said middle district of Tennessee, duly elected, qualified, and acting as such sheriff. That on the 1st day of September, 1890, he, the said William J. Hill, as required by the law of the state of Tennessee, executed a bond in the penal sum of \$40,000, with the defendants H. C. Hudson, Jas. W. Johnson, R. G. Fehr, J. G. Sawyer, T. M. Graham, B. H. Beazeley, and V. E. Shwab as sureties thereon, and they, the said sureties, executed said bond, and it was approved and delivered; that said bond was conditioned as required by the law of Tennessee, in cases of sheriff's bonds, and was, among other things, conditioned that he, the said William J. Hill, would 'faithfully execute the office of sheriff of Davidson county, and perform its duties and functions during his continuance in office,' etc. A certified copy of said bond as it was delivered to, executed before, and accepted and approved by the judge of the county court of Davidson county, and filed as provided by law, together with a duly certified copy of the oath of office taken by the said William J. Hill as sheriff, is here to the court shown, and made a part hereof. That among the duties of said William J. Hill, as sheriff, as provided by law, is the following, to wit:

"To take charge and custody of the jail of said county, and of the prisoners therein to receive those lawfully committed, and to keep them, himself or by his deputies or jailer, until discharged by law.' That by the statutes of the state of Tennessee, in such cases made and provided: '(1) The county jail is used as a prison for the safe keeping and confinement of all persons committed thereto under the authority of law. (2) The foregoing provisions extend to persons committed by authority of the courts of the United States. (3) The sheriff is liable for failing to receive and keep all persons delivered under the authority of the United States to the like pains and penalties as to similar failures in the case of persons committed under the authority of the state. (4) The sheriff has the custody and charge of the jail of his county, and of all persons committed thereto, and may appoint a jailer, for whose acts he is civilly responsible. (5) It is made the duty of the sheriff to take charge and custody of the jail of his county, and of the prisoners therein, to receive those lawfully committed, and to keep them himself or by his deputies or jailer until discharged by law.'

"And the plaintiff says that the conditions of said bond, executed by the defendants as aforesaid, have been broken in this, that is to say: One Thomas C. Boalen, at the October term, 1891, of the United States circuit court for the middle district of Tennessee, was duly indicted by the grand jury of said court for violation of sections 5440, 5456, 5477, and 5469, of the Revised Statutes of the United States, to wit: 'For stealing, embezzling, and taking out of the street mail box at the corner of Church and Market streets, in the city of Nashville, a letter containing a check, and he unlawfully opening it, and embezzling said check therein contained. For taking from the street mail box another letter, and opening it, and embezzling said check therein contained. For conspiring with Charles Hubbard, *alias* Charles Dymond, and Charles J. K. Stratton, *alias* Harry Armstrong, to commit the offense of breaking open said mail box and taking therefrom said two letters, and opening the letters and embezzling two checks therein contained. For willfully and maliciously destroying mail matter deposited in said letter box. For feloniously having in his possession certain keys suited to locks of the street mail boxes in use by the United States for receiving mail in the city of Nashville, etc. For stealing and taking from an authorized depository for mail matter, to wit, the street mail box in the city of Nashville, two letters deposited in said mail box. For opening and embezzling and destroying two drafts, which he, the said Thomas C. Boalen, took out of a street mail box, in the city of Nashville, one of said letters containing a draft for \$601.05, and another a draft for \$352.50, and embezzling said two letters and drafts.' That, after said indictment was found as aforesaid, the said Thomas C. Boalen was arrested by due process of law on a warrant sworn out before Will. Haight, a United States circuit court commissioner, at Atlanta, Ga., on the — day of November,

NOTE.—The above case seems to be strictly novel as a suit by a state for the use of the United States upon the bond of a sheriff who has suffered the escape of a federal prisoner.

1891, and thereupon, to wit, on the 9th day of November, 1891, an order was made by the circuit court of the United States for the northern district of Georgia that he, the said Thomas C. Boalen, be removed and transferred to the circuit court for the middle district of Tennessee, etc. That thereafter, to wit, on or about the 10th day of November, 1891, the United States marshal for the northern district of Georgia, as he was ordered to do, did transfer the said Boalen to the middle district of Tennessee, and there delivered him to C. B. Harrison, United States marshal for the middle district of Tennessee. That thereupon, under an order of commitment duly made by H. M. Doak, Esq., United States circuit court commissioner for the middle district of Tennessee, being an officer authorized by law to issue said order, to wit, on the 10th day of November, 1891, which was during the time for which said bond aforesaid was executed by the defendants, the said United States marshal did commit the said Thomas C. Boalen to the jail of Davidson county, within said district, and to the custody of him, the said William J. Hill, sheriff for Davidson county, aforesaid, who was then acting as such sheriff. That thereupon, to wit, on the — day of —, 1891, the said William J. Hill, failing to do his duty, and without the leave and license of, and against the will of, the plaintiff, negligently and unlawfully suffered and permitted the said Thomas C. Boalen to escape and go at large wheresoever he would, out of the custody of him, the said William J. Hill, so being such sheriff as aforesaid, and the said Thomas C. Boalen is still at large, and cannot be found. Whereby the said plaintiff has been and is greatly injured, and plaintiff is greatly delayed and prevented from prosecuting the said Thomas C. Boalen for the great crimes and felonies by him committed, contrary to the statutes and against the peace and dignity of the United States; and plaintiff is greatly delayed in and prevented from prosecuting him, the said Thomas C. Boalen, under the said indictment so found as aforesaid against him by the grand jurors for the said United States circuit court for the middle district of Tennessee, in the cause of the United States v. Thomas C. Boalen *et al.*, then and there pending before the said United States circuit court for the middle district of Tennessee; and whereby the said plaintiff aforesaid is delayed in and prevented from causing the said Thomas C. Boalen to be punished with imprisonment for the term and terms of years which is provided by statute as a punishment in such cases, and is delayed in and prevented from recovering from him, the said Thomas C. Boalen, the fines imposed by law for violation of the United States statutes, —\$10,000. And in endeavors to arrest and to cause the arrest and capture of him, the said Thomas C. Boalen, who was notoriously one of a gang of dangerous offenders, plying their vocation in many places in the United States, prior to the time he was found and arrested in Atlanta, Georgia, to wit, on the — day of November, 1891, and leading up to the arrest, and bringing about the arrest, the plaintiff necessarily expended large sums of money, to wit: \$10,000, for traveling and other necessary ex-

penses of officers and employes of the United States postoffice department; and also, \$2,000 for other necessary expenses in that behalf, such as advertisements, printing, etc., etc. And for the arrest and imprisonment and trial of the said Thomas C. Boalen, at Atlanta, Georgia, proceedings for removal, and removal from Atlanta, Georgia, to Nashville, the plaintiff necessarily expended another large sum of money, to wit, \$1,000. And for endeavors to recapture and ferret out the whereabouts of the said Thomas C. Boalen, since he, the said defendant, William J. Hill, negligently, carelessly, etc., as aforesaid, allowed him to escape from his custody, the said plaintiff has necessarily expended another large sum of money, to wit, \$1,000, and other necessary expenses in this behalf, —\$1,000. To the plaintiffs' damage twenty-five thousand dollars (\$25,000). Hence suit.

"John Ruhm,

"U. S. Attorney. M. D. T."

The defendants demurred to this declaration, and alleged several grounds therefor. The principal ones are: "(1) Because the defendants were not liable to a civil action on the bond given to the state of Tennessee at the suit of the United States for damages for the alleged negligence. (2) The said action is one that cannot be maintained in the United States district court. That the liability of the officers of the state of Tennessee upon their official bonds can only be enforced in its own court, and that the state of Tennessee is a necessary party plaintiff, and no suit can be brought by her or in her name against citizens of the state of Tennessee in a United States court sitting in that state. (3) That no recovery can be had for expenses incurred by the officers of the United States for the arrest, imprisonment, and trial of said Boalen, or for his removal from Atlanta, Ga., to Nashville, Tennessee, because the same was not a debt or liability against said Boalen. (4) That no recovery could be had for the fines imposed by law for the offenses charged against said Boalen until conviction and imposition of said fines by a verdict of a jury and judgment of the court against him. (5) That the money expended by plaintiff in an effort to recapture said Boalen after his escape is not recoverable, in this action, for the reason such expense would not be recoverable against Boalen should he be recaptured, convicted, and sentenced. (6) Because the declaration nowhere alleges that said escaped prisoner was guilty of the offenses charged in the indictment." The demurrer was sustained, and the suit dismissed by the district court.

Argued before Jackson and Taft, Circuit Judges, and Barr, District Judge.

Mr. John Ruhm, U. S. Atty., for plaintiff in error:

The district court of the United States shall have jurisdiction of all suits at common law brought by the United States or by any officer thereof, authorized by law to sue.

Rev. Stat. § 563, subsec. 4.

The penalty of the official bond of the sheriff is by the provisions of section 809, Milliken & Vertrees' Code of Tennessee, made payable to

the state. It is therefore proper, if not imperative, that the suit should have been brought in the name of the state for the use of the party agreeing.

Milliken & Vertrees' Code, §§ 3492, 3494.

The United States have the same right as a citizen would have.

The sheriff is liable only to pains and penalties for negligent escape of defendants in error.

The sheriff is neither by the statute of Tennessee nor by those of the United States criminally liable for a mere negligent escape. He is indictable in both jurisdictions where he voluntarily permits the escape.

Milliken & Vertrees' (Tenn.) Code, §§ 5569, 5570; U. S. Rev. Stat. § 5409; *Cotton v. United States*, 52 U. S. 11 How. 231, 18 L. ed. 676.

The novelty of the particular complaint alleged in an action on the case is no objection, provided that the injury be cognizable by law, and that it be shown to have been inflicted on the plaintiff.

Broom, Legal Maxims, *198, citing cases.

The majority of cases cited in the books, where sheriffs have been sued upon their official bond for negligently allowing prisoners to escape—and there are many of them—arise under the old *ca. sa.* law. There are, however, a few cases in which suits have been brought by the state for its own use, where the person who escaped, had been indicted under the criminal laws of the state.

Com. v. Reed, 2 Bush, 618, 8 Bush, 516.

While the liability is everywhere recognized, the rules as to measures of damages are different in escape on mesne and final process.

The state has a right of action for its own use upon the official bond of a sheriff where he negligently allows prisoners indicted under state laws to escape.

Why, then, should there be no liability to the United States, who are by law required to place their prisoners under the custody of the sheriff, and pay him for their keeping.

Com. v. Reed, 2 Bush, 618, 8 Bush, 516; *Shattuck v. State*, 51 Miss. 575.

There can be no distinction whether the escape occurred before or after conviction.

Rivenscroft v. Hyles, 2 Wils. 295; *Love v. M'Alister*, 4 Hayw. 67; *Faulkner v. State*, 6 Ark. 150; *State v. Baden*, 11 Md. 317; *Slocum v. Riley*, 145 Mass. 870.

Even if it affirmatively appears that the plaintiff in an action on the case has sustained no damage, the officer guilty of a technical violation of duty would still be liable to nominal damages.

2 Sedgw. Damages, § 547; *Metener v. Graham*, 66 Mo. 653; *Kidder v. Barker*, 18 Vt. 454; *Alexander v. Macauley*, 4 T. R. 611; *Goodnow v. Willard*, 5 Met. 517. *Per contra*, *Dwyer v. Woulfe*, 40 La. Ann. 46.

Where there is a legal wrong there should always be a legal remedy.

State v. Hammond, 72 Ind. 472; *Murfree, Sheriffs*, § 566; Sedgw. Damages, § 103, citing cases; *Clifton v. Hooper*, 6 Q. B. 468.

A declaration bad for full damages may still be good for nominal damages.

Rox v. Wray, 56 Ind. 423; *Terrell v. State*, 68 Ind. 155, 68 Ind. 570; *State v. Blanch*, 70 Ind. 204.

A right of action should accrue when a 24 L. R. A.

breach of duty is committed; and once existing should not be destroyed by the circumstances that it proves to inflict no pecuniary damages.

2 Sedgw. Damages, § 547, citing *Pelham v. Way*, 82 U. S. 15 Wall. 196, 21 L. ed. 55; *Dow v. Humbert*, 91 U. S. 294, 23 L. ed. 868.

Of "escape" generally, and the distinction between voluntary and negligent escape,—

See 2 Hawk. P. C. 196; 1 Hale, P. C. 696.

A sheriff's duties are ministerial, and the statute imposing them usually inflicts penalties for neglect in their performance, but the imposition of such penalties does not relieve him from his common-law liability, in an action for negligence.

Whittaker's Smith, Neg. 868; *Crane v. Stone*, 15 Kan. 94; *Browning v. Rittenhouse*, 83 N. J. L. 279; *Hopkinson v. Leeds*, 73 Pa. 896; *State v. Mullen*, 50 Ind. 598.

To suffer an escape to occur is a very grave offense in the sheriff, and subjects him to very severe punishment.

Murfree, Sheriffs, § 1156; *Murfree, Official Bonds*, § 693.

The sheriff is liable for the act of the jailer.

10 Vin. Abr. p. 124; *Rez v. Fell*, 1 Snlk. 272; 2 Hawk. P. C. 128-138, chaps. 19, 20; Hale, P. C. 591-606, chaps. 51, 52; *Randolph v. Donaldson*, 18 U. S. 9 Cranch, 76, 3 L. ed. 662. See also *Erwin v. United States*, 37 Fed. Rep. 485; *Serris v. Marsh*, 38 Fed. Rep. 796; *Re Birdsong*, 39 Fed. Rep. 600.

Messrs. Tillman & Tillman and W. D. Covington, for defendants in error:

A civil action for damages against the sheriff for an escape of a prisoner held for a criminal offense does not lie in behalf of the government.

Bouvier, Law Dict. Escape; 3 Bl. Com. 180, 165, 290; *McCracken v. State*, 8 Yerg. 171; *Cotton v. United States*, 52 U. S. 11 How. 230, 13 L. ed. 675; *South v. Maryland*, 59 U. S. 18 How. 396, 15 L. ed. 433.

An action against a sheriff for permitting an escape on mesne process before judgment against the prisoner, can only be sustained by averring and proving that the prisoner was indebted to the plaintiff.

2 Sedgw. Damages, p. 546.

The true measure of damages is the value of the custody at the moment of the escape. The true inquiry is, Has the defendant, by his negligence, deprived the plaintiff of any legal means of securing the payment of his debts?

2 Sedgw. Damages, § 554.

The sheriff's liabilities for the escape of one arrested under criminal process are such only as the criminal law prescribes by way of punishment. He is never in such case liable, at any person's suit, in a civil action.

Smith, Sheriffs, p. 564.

Barr, District Judge, delivered the opinion of the court:

Many errors have been assigned, but we need only consider whether the suit as brought was maintainable. The opinion of the court is very brief, but the learned judge seems to have been of the opinion that no expenses incurred by the United States in causing the indictment, arrest, or removal of the prisoner, nor the expenses of his recapture, could be

recovered against the sheriff and his sureties, unless such expenses could have been recovered against the prisoner had he been convicted, and that the fines which might have been assessed against him, had he been convicted of the offense or offenses charged, could not be considered in estimating the damages unless the prisoner had been previously convicted and fined. It may be conceded that, had said Boalen been tried and convicted, none of the expenses alleged to have been incurred by the United States could have been assessed against him, and judgment rendered therefor on the indictment. But this is not an action at law against a sheriff for an escape in which the measure of damages is confined to the interest which a creditor has or might have in his imprisoned debtor. It is an action on the official bond of a sheriff, in which one of the obligations is that he will faithfully perform his duty as sheriff. Among other duties, the sheriff has the charge and custody of the jail of his county, and the prisoners legally committed therein, until discharged by law. This includes federal as well as state prisoners, and the Tennessee statute makes the sheriff civilly responsible for the acts of the jailer whom he appoints. Tennessee Code, §§ 6233-6242. The sheriff executed his bond to the state, but any party aggrieved can under the statute sue on the bond in the name of the state, and in such cases the suing party is considered the real plaintiff. *Id.* §§ 8492-8494.

The district court has, by the express terms of the act of congress, jurisdiction of all suits at common law brought by the United States; hence there is no difficulty as to the jurisdiction of that court, if there is a cause of action on this bond alleged in favor of the United States. It is insisted that although Boalen was in the legal custody of the sheriff, and his escape is alleged to have been by the negligence of the sheriff, the United States cannot maintain an action for his escape, because the United States, in the arrest and punishment of offenders against its laws acts as sovereign, and not in its corporate capacity, and, therefore, cannot have an action for damages whatever may have been the negligence of a jailer in allowing the escape of the prisoner Boalen; and *Cotton v. United States*, 52 U. S. 11 How. 229, 18 L. ed. 676, and *South v. Maryland*, 59 U. S. 18 How. 896, 15 L. ed. 483, are referred to as sustaining this proposition. *Cotton v. United States*, *supra*, was an action of trespass *quare clausum fregit* brought by the United States against Cotton for cutting and carrying away pine timber from the lands of the United States. The error complained of by Cotton was the refusal of the trial court to instruct: "(1) That the only remedy for the United States for cutting pine timber on public lands was by indictment; (2) that the United States have no common-law remedy for private wrongs." The supreme court sustained this refusal of the lower court, and there is nothing in the opinion sustaining the distinction suggested. Indeed, the court says, in answering the suggestion, that an indictment was the only remedy: that "the punishment of the public offense is no bar to the remedy for the private injury." In *South v. Maryland*, *supra*, the action was against a sheriff

and his sureties for his refusal and neglect in not rescuing one Potile from mob violence, and the court held the action could not be maintained. The court held that the duty of the sheriff to protect Potile from mob violence arose from his being a conservator of the peace, and his neglect was not merely the neglect to perform a ministerial duty. In the opinion the court divided the duties and powers of a sheriff at common law into four distinct classes. In the ministerial class are put the duty of a sheriff as keeper of the county jail, and his liability for the safe keeping of prisoners committed to his custody. The court says, in the course of the opinion:

"It is an undisputed principle of the common law that for a breach of a public duty an officer is punishable by indictment; but where he acts ministerially, and is bound to render certain services to individuals for a compensation in fees or salary, he is liable for acts of misfeasance or nonfeasance to the party who is injured by him."

In this case an individual was suing; hence, the use of that word by the court. But the question of the liability of a ministerial officer in a civil action for misfeasance or nonfeasance to a state or the United States was neither presented nor considered by the court. Neither is there any suggestion of a distinction between the sovereign powers and the corporate capacity of the United States as to the right to institute a civil action. The sovereign power and corporate capacity of the United States are so intermingled that it is often impossible to separate them, or to know when one ceases and the other commences. But, whatever may be the distinction, it can have no relation to the right of the United States to bring a civil action or to defend one, if they so elect. It is argued, however, that as there has not been a trial of Boalen, and it is not alleged he was guilty of the crimes for which he is indicted, and for which he may be fined if guilty, there can be no recovery, because the alleged negligence of the jailer has not caused the United States any pecuniary injury, but rather the contrary, as the escaped prisoner was no longer a charge upon the United States. This argument overlooks the fact that the United States, in arresting and imprisoning Boalen, who was charged with the violation of its criminal laws, acted under an undoubted power, and in the performance of a duty, and that in the exercise of this power and the performance of this duty, it has expended money in causing the arrest, removal to Nashville, and the imprisonment there of Boalen, to secure his trial for indictable crimes, and that the benefit of the money thus expended by the United States has been entirely lost by the negligence of his jailer.

Such actions as this are unusual, but this fact is certainly not conclusive against the right, since criminal proceedings against an officer who has given bond for the faithful discharge of his duties, for misfeasance or nonfeasance in office, may have proven to be the more efficient remedy. No decision has been cited in which the right of action in such a case as this one has been denied, and there are two cases at least in which such right of action has been recognized and sustained. *Com.*

v. Reed 2 Bush, 618. 3 Bush, 516. In *Com. v. Reed*, 2 Bush, 618, the Kentucky court of appeals sustained an action on a sheriff's bond against him and his sureties for the negligence of the sheriff in failing to arrest a person on bench warrants issued on indictments for unlawful gaming, and for willfully taking insufficient surety on bond for the appearance of another person whom he had arrested for the same offense. The court of appeals, by C. J. Robertson, in the opinion said: "Although there may be no precedent for any judicial recognition of such a remedy, yet we perceive no reason why it should not be available; and it seems to us that principle sanctions it, and that it is sustained by both the common and statutory law of Kentucky."

This court, in another part of the opinion, says: "Nor is the undeterminateness of the damages, and the difficulty of ascertaining their precise amount by any certain or fixed standard, a sufficient answer. The same difficulty occurs in many other classes of action undoubtedly maintainable."

In this case the Tennessee statute makes the sheriff civilly responsible for the acts of the jailer whom he appoints, and as we have seen

the United States may sue, and a cause of action is alleged in the declaration, the demurrer should have been overruled. The measure or extent of damages is not now before this court and we do not indicate an opinion thereon.

The judgment of the District Court sustaining the demurrer to the declaration and dismissing the action is reversed, and the District Court is directed to set aside said order, and proceed in conformity with this opinion.

Taft, Circuit Judge, concurring:

I concur in the foregoing opinion, and only wish to add that negligence of the sheriff resulting in the escape of Boalen, which made the duty of the United States as a government to apprehend and punish him more onerous in a pecuniary way, was a breach of the bond, and a pecuniary injury to the United States, for which they may recover damages. The last count in the declaration is for \$1,000 expended in Boalen's recapture after his escape from the sheriff's custody, and that, even if there is no other averment of recoverable damages, as to which no opinion will be expressed, is sufficient to make the declaration good.

ALABAMA SUPREME COURT.

Mattie D. FALLS *et al.*, Appts.,

UNITED STATES SAVINGS, LOAN & BUILDING CO.

(97 Ala. 417.)

1. A statute recognizing as evidence the proceedings of any legislative body "purporting on the face of the book to be printed by authority of the government," applies to a book compiled by an individual under statutes which are printed in full at the beginning of the book and which recognize the compilation as authoritative and make it evidence.
2. One who executes a mortgage to a corporation as such to secure a loan of money cannot deny its corporate character to defeat foreclosure.
3. Charter privileges as to the rate of interest a corporation may receive on its loans are not available to it in a foreign state in contravention of the usury laws.
4. A statute giving special advantages to building and loan associations as to the rate of interest they may receive on loans will, unless a contrary intention appears, be confined in its operation to domestic corporations.
5. The steps taken to become a member of a building and loan association must be regulated by the law of its domicile, and the fees allowed by that law will be held valid everywhere.
6. An attorney's fee for the foreclosure of a mortgage expressly provided for in the instrument is collectible on foreclosure.

7. Persons compelled to take stock in a loan association to secure a loan, but for whom the scheme of the concern provides no dividends or other share in the profits, cannot be regarded as members and their payments as made upon stock calls for the purpose of taking them out of the usury law.

8. An agreement for a loan to be paid in seven equal annual installments, with interest reserved for the whole time at six per cent per annum on the amount of the original loan, is usurious under a statute permitting interest at 8 per cent per annum.

9. The laws of arithmetic are judicially noticed.

10. The borrowing of money from the local agent of a foreign loan association which maintains a place of business within the state and giving the association a mortgage as security through him is a local contract, although the papers are to be approved and the money paid at the domicile of the association, and the papers expressly state the contract is to be governed by the law of the domicile.

(Stone, Ch. J., dissents from proposition 10.)

(November 25, 1892.)

APPEAL by defendants from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to foreclose a mortgage. *Reversed.*

In the complaint the complainant described itself as a body corporate under the laws of Minnesota, doing business in the county of Jefferson, state of Alabama. A demurrer was

NOTE—The subject of usury in payments to building and loan associations, a particular phase of which is here presented in respect to a person 24 L. R. A.

who takes shares as security, is treated at length in a note to *Reeve v. Ladies Bldg. Assn.*, Perpetual (Ark.) 18 L. R. A. 129.

fled to the complaint on the ground that it was not shown therein that complainant had a known place of business in the state of Alabama; that it was not shown that the complainant had a resident agent in the state; that the bill shows the rate of interest was usurious. The demurrer was overruled. The answer alleged that the loan to secure which the mortgage was made was executed by the mortgagor for the benefit of her husband; that the entire transaction took place in the county of Jefferson, Ala., and that the effort to locate the transaction in Minnesota was to avoid the laws of the state of Alabama; and that the mortgage was contrary to the policy of the state of Alabama and void.

Further facts appear in the opinion.

Mr. John Vary, for appellants:

Foreign corporations are permitted to do business in this state by the law of comity. Such corporations have no more rights or privileges than the citizens of this state.

2 Morawetz, Priv. Corp. § 965.

The laws of the state of Minnesota have no binding force, *proprio vigore*, outside of its territorial limits and jurisdiction.

2 Morawetz, Priv. Corp. § 959.

The United States Savings Loan & Building Company is permitted to loan money in this state at the legal rate of interest just as any citizen may do because it has complied with the law in reference to appointing an agent with a known place of business.

Const. art. 14, Act 1886-87, p. 102.

But the said appellee is not permitted to loan money upon the building and loan plan in this state because it has not complied with the law of this state in reference to corporations engaged in similar business.

2 Morawetz, Priv. Corp. §§ 505, 964; Story, Confil. L. 8th ed. § 106, note a; *Hitchcock v. United States Bank*, 7 Ala. 886; *Nelms v. Edinburg American Land Mortg. Co.* 92 Ala. 157; *Martin v. Johnson*, 8 L. R. A. 170, 84 Ga. 481; *American Freehold Land Mortg. Co. v. Sewell*, 18 L. R. A. 299, 92 Ala. 163; *Dolman v. Cook*, 14 N. J. Eq. 56; *Campion v. Kille*, Id. 229; *Andrews v. Torrey*, Id. 355.

This is simply an Alabama contract for the loan of money. In determining whether a contract is infected with usury, its substance and effect, not its form, are material.

Uhlfelder v. Carter, 64 Ala. 527.

The corporate powers, the by-laws, and the contract show the loan to be tainted with usury.

Burlington Mut. Loan Assn. v. Heider, 55 Iowa, 424; *Mechanics & Working Men's Mut. Sav. Bank & Bldg. Assn. of New Haven v. Wilcox*, 24 Conn. 147; *Williar v. Baltimore Butcher's Loan & A. Assn.* 45 Md. 546; *Forest City United Land & Bldg. Assn. v. Gallagher*, 25 Ohio St. 208; *Hawkeye Benefit & L. Assn. v. Blackburn*, 43 Iowa, 885; *Monticello Mut. Bldg. & L. Assn. v. Smythe*, 9 Rep. 714.

Mr. R. H. Pearson also for appellants.

Mr. J. M. McMaster, for appellee:

The admission of the Minnesota statutes was in conformity with statute. Code 1886, § 2790, provides "... or the statutes of any other state or territory of the United States ... and public and private statutes, or the pro-

ceedings of any legislative body, purporting on the face of the book to be printed by authority of the government or state or territory," are evidence without further proof.

Clanson v. Barnes, 50 Ala. 261.

In a bill to foreclose a mortgage, filed by a foreign corporation, it is not necessary to aver or show affirmatively that the corporation has capacity to make the contract, the presumption being in favor of its validity. The *onus* of showing its validity is on the party assailing it.

Boulevard v. Davis, 9 L. R. A. 601, 90 Ala. 207; *Nelms v. Edinburg American Land Mortg. Co.* 92 Ala. 157.

The appellant cannot inquire into the corporate existence of the appellees.

1. Because the corporate existence is self-proving, unless denied by sworn plea or answer.

Acts 1888-89; *Hooper v. Strahan*, 71 Ala. 75; *Bonner v. Young*, 68 Ala. 85.

The note and mortgage being admitted in the pleadings and evidence, it is an established law in this state that a corporation in reference to its corporate power cannot be denied by one who deals with it as such.

3 Brickel, Dig. § 86, p. 161; *Savage v. Russell*, 84 Ala. 103; *Cahall v. Citizens Mut. Bldg. Assn.* 61 Ala. 232; *Lehman v. Warner*, 61 Ala. 455.

When a contract appears on its face that it was to be performed, or was made in reference to the laws of some other place, it will be governed by the laws of the place of performance in reference to which it was made.

3 Am. & Eng. Encyclop. Law, p. 544; 3 Kent, Com. 459, with authorities there cited; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Moore v. Davidson*, 18 Ala. 209; *Evans v. Kittrell*, 33 Ala. 449; *Cubbage v. Napier*, 62 Ala. 518.

Corporations of the character of the appellee are withdrawn and excepted from the operation of statute in reference to interest, and are not usurious.

Montgomery Mut. Bldg. & L. Co. v. Robinson, 69 Ala. 418; *Security Loan Assn. v. Lake*, Id. 456; 7 Wait, Act. & Def. p. 617; *Red Bank Mut. Bldg. & L. Assn. v. Patterson*, 27 N. J. Eq. 223.

On rehearing.

Messrs. J. M. McMaster and F. H. Ewing, for appellee:

Where a contract is made in one state to be executed in another state, the contract can be enforced in reference to the rate of interest charged in either state, provided the terms so express it, without incurring the penalties of usury.

Hunt v. Hall, 37 Ala. 702; *Andrews v. Pond*, 38 U. S. 13 Pet. 77, 10 L. ed. 66; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Cubbage v. Napier*, 62 Ala. 522; *De Wolf v. Johnson*, 28 U. S. 10 Wheat. 387, 6 L. ed. 848; 1 Randolph, Com. Paper, § 46; *Goodrich v. Williams*, 50 Ga. 425; Story, Prom. Notes, 7th ed. § 167; *Tiedeman*, Com. Paper, § 511; *Tyler*, Usury, p. 79; *Scott v. Perlee*, 39 Ohio St. 63, 48 Am. Rep. 421.

This doctrine is limited to bona fide transactions, and will not avail the lender if the same is done to evade the usury laws of the state.

Junction R. Co. v. Bank of Ashland, 79 U. S. 12 Wall. 226, 20 L. ed. 385.

There was no plea of such a character in the case at bar.

The enforcement of this note and mortgage in an Alabama forum involves neither a breach of legal or moral right.

Where a contract appears on its face that it was to be performed or was made in reference to some other place, it will be governed by the laws of the place in reference to which it was made.

8 Am. & Eng. Encyclop. Law, p. 514; *De Wolf v. Johnson*, *supra*; 1 Randolph, Com. Paper, § 46; *Goodrich v. Williams*, *supra*; *Tiedeman*, Com. Paper, § 511; *Tyler*, Usury, p. 79; 2 Kent, Com. p. 459, with authorities; *Moore v. Davidson*, 18 Ala. 209; *Evans v. Kittrell*, 33 Ala. 449; *Cubbedge v. Napier*, 62 Ala. 518; *American Freehold Land Mortg. Co. v. Sewell*, 13 L. R. A. 299, 92 Ala. 168.

Is the legislative incorporation of building and loan companies against the general sentiment or policy of civilized countries? We find them in England, in Canada, and in every state of this Union. The schemes are only different in the minuteness of their details; the general purpose of all is the same, their workings may be slightly different, but they are immaterial incidents, and have nothing to do with their general purport.

In *Vermont Loan & T. Co. v. Whitted*, 2 N. Dak. 82, the court uses the following language: "Endlich, on Building Associations, p. 161, says: 'If we consider the reasons which may be assumed to have guided legislatures in conferring upon building associations the extraordinary privileges and immunities which they enjoy, it will be readily understood (and there can be no other apology for it) that at the bottom of it all is a motive of public policy.'"

Contracts made upon valuable consideration by competent parties are never void as against public policy unless the objects or ends which they have in view "injuriously affect or subvert public interest, or are such as by their terms or contemplated manner of performance must work some mischief affecting the body politic."

7 Wait, Act. & Def. p. 91.

What is there immoral in giving the wage-earner a plan which he can adopt and utilize and become a freeholder of a country, closely identified by residence with his state and community.

The first feature is a necessity going to the very essence of the corporation.

Endlich, Building Associations, p. 401.

As a matter of American history, the city of Philadelphia, known as the home of building and loan companies, has more owners of homes than any other city in the world of its population and it has been directly attributed to companies like the appellants. Can for a moment any system or plan with such beneficent effects be confronted with the charge of invading moral institutions?

Endlich, Building Associations, § 1.

The general assembly have sanctioned transactions of this kind by especially providing that building and loan companies may loan

their funds in that way and to use the words of this court, "that which the legislature authorizes to be done cannot be in violation of law."

Security Loan Asso. v. Lake, 69 Ala. 456.

The transaction entered into by it with the appellant was one which in itself had been declared by the general assembly not to be offensive to the usury laws of the state.

Montgomery Mut. Bldg. & L. Asso. v. Robinson, 69 Ala. 412; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 537, 27 L. ed. 1020.

These contracts are not usurious.

Reeve v. Ladies Bldg. Asso., Perpetual, 18 L. R. A. 129, 56 Ark. 385.

There is in the transaction an element of uncertainty and hazard that seems to exclude the idea of a loan of money at a usurious rate of interest. Where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious.

Spain v. Brent, 68 U. S. 1 Wall. 604, 17 L. ed. 619; *Tyler*, Usury, pp. 89, 175, *et seq.*; *Lloyd v. Scott*, 29 U. S. 4 Pet. 205, 7 L. ed. 883; *Delano v. Wild*, 6 Allen, 1, 88 Am. Dec. 600; *Bowker v. Mill River Loan Fund Asso.* 7 Allen, 100; *Parker v. Fulton Loan & Bldg. Asso.* 46 Ga. 166; *Bibb County Loan Asso. v. Richards*, 21 Ga. 592; *Shannon v. Dunn*, 43 N. H. 194; *Burns v. Metropolitan Bldg. Asso.* 2 Mackey, 7; *Pattison v. Albany Bldg. & L. Asso.* 68 Ga. 878; *Thompson v. Gillison*, 28 S. C. 584.

It cannot be well maintained that there is a corrupt intent to make a usurious contract when as the books everywhere show that judges of learning and ability in courts of last resort have after patient and careful consideration of contracts of this nature expressly held that they do not come under the operation of usury laws.

Reeve v. Ladies Bldg. Asso., Perpetual, 18 L. R. A. 129, 56 Ark. 385; *Vermont Loan & T. Co. v. Whitted*, 2 N. Dak. 82.

A building and loan company which has loaned money to one of its stockholders on a bond and mortgage conditioned for the payment of a specified interest with monthly installments on each share of stock owned by such member, until the principal is paid can recover on foreclosure the amount in arrear without any deduction for the monthly installments paid by the stockholder as he will receive the benefit of such installments in the increased value of the stock.

People's Bldg. & L. Asso. v. Furey, 47 N. J. Eq. 410; *Strohen v. Franklin Sav. Fund & L. Asso.* 115 Pa. 878; *International Bldg. & L. Asso. v. Abbott*, 85 Tex. 220.

There can be no difference as a matter of principle between a member who takes stock for an investment, and a member who takes stock as a borrower from the association. The investor has to pay monthly payments on stock owned by him, and so does the borrower. The only difference is, that the borrower must pay interest, and in the case at bar Mrs. Falls contracted to pay 6 per cent.

Taylor v. Van Buren Bldg. & L. Asso. 56 Ark. 840; *Tyrrell Loan & Bldg. Asso. v. Haley*, 139 Pa. 476.

Stone, *Ch. J.*, delivered the opinion of the court:

In Code 1886, § 2790, is this language: "The proceedings of any legislative body, purporting on the face of the book to be printed by authority of the government, state, or territory, are evidence without further proof." A book published in St. Paul, Minn., in 1879, was offered in evidence to prove the statute law of that state. It was objected to. The title page of the book has these words: "The General Statutes of the State of Minnesota. . . . Prepared by George B. Young." Immediately succeeding the foregoing statement is found the following: "Edited and published under the authority of chapter 67 of the Laws of 1878 and chapter 67 of the Laws of 1879." These statutes are printed in full on the second leaf of the book. Chapter 67 of the Statutes of 1878 declares that "the said statutes shall be compiled and published by a commission consisting of George B. Young and such others as he may associate with him, under the supervision and direction of the governor." Chapter 67 of the Statutes of 1879 provides that "the edition of the General Statutes and other public laws of this state in force at the close of the legislative session of eighteen hundred and seventy-eight (1878) prepared by George B. Young, pursuant to chapter sixty-seven (67) of the General Laws of Eighteen Hundred and Seventy-Eight (1878), shall be competent evidence of the several acts and resolutions therein contained, in all courts of this state, without further proof or authentication." It is difficult to conceive of language which would more clearly express the fact that the laws found in said book were printed by authority of the state than is here shown. Our statute does not require that the state shall be the publisher. That it is done with its authority is enough. *Clanton v. Barnes*, 50 Ala. 260; *Bradley v. Northern Bank of Alabama*, 60 Ala. 252. There is nothing in this exception. There is, if possible, less merit in the objection to the introduction in evidence of the Minnesota Compilation of Statutes, published in 1891, so far as those statutes can be considered in this case. See the certificates in the first of the volume, made by the secretary of state and state librarian, and see section 361 of the book itself.

The real transaction in this case was a loan of money by a Minnesota corporation—the United States Savings, Loan & Building Company—to Mrs. Falls; and the negotiation and agreed contract were conducted and consummated in Alabama. The corporation had a place of business in Birmingham, Ala., and had an agent thereat. It had complied with our constitutional and statutory provisions. Const. art. 14, § 4; Sess. Acts 1886-87, p. 102. This compliance gave it a constitutional and legal right to transact business in Alabama.

An objection was reserved to the action of the city court in receiving in evidence what purports to be a certified copy of the act and proceedings by which appellee was incorporated. The precise objection is that the authentication is not a compliance with legal

requirements. We hold it to be unnecessary to decide this question. That the appellant executed the note and mortgage, the collection of which by foreclosure is the purpose of this suit, is fully shown, and nowhere denied. We hold that the mortgage shows on its face that the United States Savings, Loan & Building Company is a corporation. This is shown in very many of its recitals, and this dispensed with all proof of its incorporation. So whether the transcript was properly authenticated or not was immaterial. Mrs. Falls had admitted complainant's corporate character by the execution of the mortgage. 1 *Morawetz, Priv. Corp.* § 39; 2 *Morawetz, Priv. Corp.* §§ 592, 774. Each separate government or state has its own legislative system and policy; and in determining and enforcing rights which originate out of our jurisdiction, comity requires that we shall admeasure the redress by the yardstick of the place where the right accrued. In entering into contracts, if nothing appear to the contrary, the law of the place silently becomes a part of the contract, and determines the measure of right it secures. This right by comity, however, has limitations. No state will enforce contracts or redress grievances entered into or suffered in another state or foreign country, if the enforcement involve a breach of legal or moral right as maintained in the law of the forum. When a corporation of foreign creation not only attempts to enforce rights before our tribunals, but goes further, and actually performs corporate acts within our jurisdiction, they can claim and exercise no exceptional rights or privileges which may have been conferred by the law of their creation, if such enforcement involves a breach of our own public policy or statutory system. The legislature of one state cannot confer rights and authorize their exercise beyond its own boundaries, unless they be in harmony with the general policy of the state or country in which the exercise is attempted. "The power of a corporation to act in a foreign country depends both upon the law of the country where it was created, and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits." Story, *Conf. Laws*, 8th ed. § 106, *note a*. In 2 *Morawetz, Private Corporations*, § 959, is this language: "It is a fundamental principle that the laws of a state can have no binding force, *proprio vigore*, outside of the territorial limits and jurisdiction of the state enacting them." And in section 964 the same author says: "It has been held that, although a corporation be expressly authorized by its charter to charge a certain rate of interest upon its loans, it will nevertheless not be permitted to charge the same rate in a foreign state, if that would be contrary to the usury laws there in force." And in section 965 this author says: "Foreign corporations have no right by the law of comity to do acts within a state which

are prohibited by the laws of that state to its own citizens or corporations engaged in a similar business." It is not our intention to determine in this case whether a building and loan association, incorporated and doing business in Alabama, can contract for and recover a greater rate of interest than 8 per cent per annum. See our statutory system, commencing with section 1553 of the Code of 1886. What we do decide is that the statutes of Minnesota have no binding force with us; and any provision found in them which authorizes a corporation of their creation to contract for and recover more than 8 per cent for the loan or forbearance of money is obnoxious to our statute enacted for the prevention of usury. We hold, further, that the contract which gave rise to the present suit is an Alabama contract, and can only be enforced to the extent our statutes permit. Any statute of this state which may be supposed to confer on building and loan associations the right to charge more than 8 per cent interest, even if we concede such statutory authority, must be confined in its operation to such corporations as are chartered in Alabama. It cannot be supposed that our legislation had a greater purpose or intent than this. We have made no accurate calculation, and hence cannot declare the precise rate of interest Mrs. Falls would be required to pay, if she were to comply with the letter of her contract. It is greatly in excess of 8 per cent per annum. The plea of usury is very fully sustained. With us, however, usury is only a partial defense. It extends only to a denial of all interest, when the party contracting to receive usury is the complainant. The rule in chancery is different from that which prevails at common law. *Dawson v. Burrus*, 73 Ala. 111; *Uhlfelder v. Carter*, 64 Ala. 527.

Several other defenses were urged in this case which we consider untenable. This was in no sense a loan of money to the husband. The loan was to Mrs. Falls; and we think there is nothing in any of the objections urged, save the single one of usury. That, with us, is only a partial defense. A single feature of the controversy before us, we think, must be governed by the laws of Minnesota. The United States Savings, Loan & Building Company was incorporated under the laws of Minnesota, and has its business domicile in that state. The first step taken by Mrs. Falls was to constitute herself a stockholder in that corporation. This act must be considered as having been performed in Minnesota, and as governed by the laws of that state. Under their system corporations in forming are permitted to charge a graduated membership fee. In the case before us it amounted to \$155. We hold that this fee, together with the agreed attorney's charge of \$200 for foreclosing the mortgage, is collectible. The latter—the attorney's fee of \$200—is expressly provided for in the mortgage. No question is raised upon its reasonableness, and we feel no hesitancy in holding that this item was properly allowed to complainant. Mrs. Falls did not receive the full \$10,000, the amount of the agreed loan. Three monthly installments were re-

tained, amounting to \$510; also the membership fee, \$155, was withheld; the latter rightfully, as we think, and she is entitled to no credit for that. What she actually owes is \$9,490, plus \$200 attorney's fee for foreclosing the mortgage. The decree of the chancellor is reversed, and a decree here rendered that the complainant, instead of the sum of \$12,688, recovered in the court below, have and recover of appellants \$9,490, and other \$200 attorney's fee with a lien, and to be enforced as directed in the decree of the chancellor. Let the costs of appeal be paid by the appellee.

Reversed and remanded.

A rehearing was subsequently asked for and on May 2, 1893, the following additional opinion was filed:

Since the opinion in this case was delivered, November 25, 1892, an elaborate and earnest argument has been submitted by appellee, asking a reconsideration of that decision. One position assumed and pressed with great zeal is that the contract under consideration is not tainted with usury, even assuming it to be governed by the statutes of Alabama. The precise argument used in this connection is that the payments stipulated to be made monthly by Mrs. Falls, other than those which are, in the very terms of the by-laws and contract, called "interest," are not payments on the debt contracted, but calls or installments paid on the shares of stock subscribed for. If this position be sound, the interest actually collected is only one-half of 1 per cent per month, equal to 6 per cent per annum, and hence not usurious. The corporate powers, by-laws, and methods of doing business which pertain to the United States Savings, Loan & Building Company are set forth in the transcript before us. We will briefly sketch what we understand to be the main features of its plan of operations, so far as it is necessary to a proper understanding of this case. The authorized capital of the corporation was and is \$10,000,000. It is divided into shares valued at \$100 each. Unlike most money corporations the capital stock is not required to be paid in at or within a short time after organization, with a view of supplying a fixed security for creditors. On the contrary, the shares are paid for in monthly installments, aggregating 7.20 per cent during the year, or six-tenths of 1 per cent per month. Paid at this rate, and without other resource, the entire capital stock will be paid in a fraction under fourteen years. This is the rate to non-borrowers, called "investors." The business of the corporation is lending its money, and its chief loans are made on real security, appraised and valued at double the amount of the loan. The monthly installments paid in, less 10 per cent thereof reserved to defray the expense of administering the corporation, supplemented with the monthly payments of interest, constitute the operating capital of the corporation, on which it conducts its business of lending money. These loans are made monthly, and consequently the funds are kept employed and interest-bearing. What are denominated "shareholders" are

divided into two classes,—those who borrow from the corporation, and those who do not. To obtain a loan from the corporation, the applicant must first become a shareholder, paying for the privilege a small, graduated membership fee, of \$1.60 per share, down to 75 cents. After paying three monthly installments, he may apply for and obtain a loan on the following terms and conditions: (1) The applicant must first obtain the requisite shares of stock; and for this service he must subscribe for double the number of shares, which would be requisite to make up the sum proposed to be borrowed, rating the shares at their full matured value of \$100 each. So, in borrowing \$10,000,—the sum borrowed in this case,—the borrower must subscribe for 200 shares. That was done in this case. (2) The applicant must also have paid three monthly installments of 60 cents per share, and three months' interest on the sum proposed to be borrowed, at 6 per cent interest. These sums, which were required to be prepaid, in this case amount to \$510; being for installments, \$360, and for interest, \$150. So the borrower actually obtained only \$9,490. (3) The borrower, before obtaining the loan, was required to, and did bid 100 of his subscribed shares, to be surrendered to the company as a bonus for the privilege and personal favor of being allowed to become a borrower; but monthly installments exacted from shareholders of 60 cents per month were still required to be paid by the borrower on the entire number of subscribed shares, including the 100 surrendered as a bonus. So the borrower is required to pay, and did bind himself to pay, in this case, double the sum of the installments required of nonborrowers,—equal to one seventh of the sum borrowed. These payments, unaided, if credited, without discount or diminution, would mature the stock and extinguish the debt in seven years. (4) The borrower was required to mortgage and did mortgage real estate appraised at \$20,000, to secure the payment of the monthly installments and interest until the sum borrowed should be repaid, after deducting from all installments paid a sum to cover the operating expenses. (5) In addition to this mortgage security the borrower was also required to pledge and did pledge for the repayment of the money borrowed her remaining 100 shares of stock which had been made the basis of the loan. (6) Notwithstanding the installments required to be paid monthly, which in the course of the year amounted, in addition to interest paid during the year, to a fraction over 14 per cent of the principal of the money borrowed,—the sum of the year's installments paid on the principal of the debt being one seventh thereof,—this did not diminish the sum of the interest required to be paid each year, so long as any portion of the money borrowed remained unpaid. Thus: The sum borrowed in this case was \$10,000. The agreed interest on this was 6 per cent, equal to \$600 for the first year. But the payment of this same sum of \$600 interest was to be kept up so long as any of the principal debt remained unpaid. Even when the principal of the debt became reduced by installments paid to one seventh

of the original sum borrowed, the rules of the company and the contract in this case required the borrower to pay the same agreed amount of interest—\$600—for the forbearance of the remaining one seventh of the debt for one year.

The borrowers must first become shareholders. In what sense do they become such? They acquire none of the privileges or rights of shareholders, in the ordinary sense of that term. They receive no dividends, and have no share in the profits of the enterprise. When they repay the money borrowed, according to the terms of the loan, they receive no certificate of stock, and when the business of the corporation is wound up, they have neither part nor lot in its profits or accumulations. On the contrary, when the principal debt is extinguished by the payment of the monthly installments demanded, and the fixed, unchanging sum of agreed, so-called "interest," is paid up to and including the time when the installments extinguish the principal debt, then their connection with and interest in the enterprise ceases. Not by the receipt or retention of a certificate of stock. Not by any participation or right to participate in the profits or accumulations of the adventure. It ceases by a cancellation of the so-called "certificates of stock," and a final severance of the borrower's connection with the corporation. By the very terms of the note and mortgage the borrower is required to make the agreed monthly payments of installments and interest, "until said stock becomes fully paid in, and of the value of \$100 per share, . . . and shall then surrender said stock to said company in payment of said note." These are the terms the contract imposes on the borrower; these the conditions on which she can obtain a release of her lands from the mortgage lien. When these terms are complied with (and of course not till then), "this deed [the mortgage] shall be null and void, otherwise to remain in full force and effect." It is nowhere said that the borrower shall share in the profits or assets of the association; the very language of the note and mortgage as copied repels such interpretation. Can it with any propriety be said that persons, filling the relation we have been describing, ever become shareholders in the corporation? They acquire none of the rights which attach to that relation. Are they not simply borrowers of money; and is not all else simply machinery to bring about that end,—useless machinery, save that it may furnish excuse for demanding of the borrower a membership fee, and that he shall contribute to the expense fund of the corporation's administration? The corporation is also empowered to impose and does impose penalties and forfeitures for delays and defaults in the payment of installments and interest. Such imposed penalties are found in the transcript before us. Being practically a loan of money, was the loan in the present case an agreement to demand and pay a greater rate of interest than 8 per cent per annum,—the lawful interest of the state of Alabama? We employ the word "agreement" intentionally; for, to be usurious, the contract itself must stipulate for

interest above the lawful rate. We have been referred to two calculations, with the view of convincing us that the interest stipulated to be paid in this case is not usurious on its face. One of those calculations is shown in the deposition of the witness Douglas, found in the transcript before us. The other is seen in the report of the case of *Thompson v. Gillison*, 28 S. C. 584. In each of those instances the calculator was betrayed into the same oversight or error. Each allowed to the lender the same sum as interest for each of the years the loan was permitted to run, as if the principal or interest bearing fund had remained undiminished during the whole term of the loan. Had that been the case,—in other words, if the borrower had paid only the interest during the intervening years, and had left the principal intact until the final settlement, and then paid the entire principal at one time,—their calculations would stand vindicated. This, because in such case the interest-bearing fund would remain the same during the entire period of the loan. But they were not dealing with such facts. The problem they were handling was like the one we have in hand; the principal, or interest-bearing debt, was being reduced, say, one seventh each year. We have made many calculations, and have, in that way, demonstrated the correctness of the proposition that, by the very terms of the contract Mrs. Falls made with the United States Savings, Loan & Building Company, she bound herself to pay interest, and to pay it monthly, at a rate greatly in excess of 6 per cent per annum, and very materially in excess of 8 per cent per annum.

Let us state the account on the facts of the case we have in hand. Computing the several payments of the principal debt required to be made during each year as aggregating one seventh of the debt, the whole debt will necessarily become extinguished in seven years. In this we do not compute the sums paid as interest, but include only the excess of the several payments over and above interest. Thus, the sum of the amount of the loan being \$10,000, it necessarily follows that for the first year the interest-bearing debt must be \$10,000. But the principal, or interest-bearing debt, being reduced one seventh by payments during the first year, it follows that the sum of the debt left unpaid for the computation of interest for the second year will be only six sevenths of \$10,000. And so the process of reduction of the interest-bearing debt will go on at the rate of one seventh each year. For the seventh year the principal on which interest is to be computed will be only one seventh of \$10,000; a fraction over \$1,428. Six per cent interest paid at the fixed, unchanging sum of \$600 per annum for these seven years will aggregate \$4,200. Calculated on the balances left after the several yearly payments are deducted, the sum of the several payments of interest will amount to \$2,400, or four sevenths of \$4,200. This shows an excess of interest stipulated to be paid during the seven years of \$1,800, if we compute interest at 6 per cent per annum. If the unchanging sum of \$600, stipulated to be paid during each year

—aggregating \$4,200 during the seven years—be in fact paid, the borrower, instead of paying 6 per cent for the forbearance of the money, will in fact have paid at the average rate of 10½ per cent per annum. And this excess of interest Mrs. Falls bound herself to pay by the very terms of the contract she entered into. The contract requires Mrs. Falls to pay \$170 per month, equal to \$2,040 during each year. In the calculations we submit, we treat these payments as if made in gross at the end of each year. Treating them thus, and computing interest only on the balances left after the annual payments, the following results are shown: (1) At 6 per cent interest, the debt of \$10,000 will be entirely extinguished, principal and interest, by these annual payments of \$2,040, in a fraction less than six years; and in so paying, the entire interest paid by the borrower will amount to a fraction less than \$2,200. Paid at the agreed rate of \$600 for each of the six years, it would amount to \$3,600. (2) At 8 per cent interest, the same annual payment of \$2,040 would extinguish the debt, principal and interest, in something less than six and one-half years, while the sum of all the interest paid would be \$3,178. Paid on the basis of the contract at the gross sum of \$800 per year, it would amount to \$5,200. We might give other examples by way of illustration; but we think these sufficient. It will be observed that, in making our calculations, we have assumed that the borrower received the full \$10,000. She actually received only \$9,490. And we have pretermitted all consideration of the membership fee she was required to pay, and her share of the operating expenses of the corporation, which the rules of the association hold her liable for. We have likewise taken no account of the fact that the interest was made payable monthly. These items brought into the account would materially swell the burden the contract imposes on the borrower.

If further proof be required to show the contract we are considering is usurious in its terms, it is furnished in the decree the chancellor rendered in this cause. No one contends that in rendering his decree he went beyond the letter of the contract he was construing. Yet, although the decree was rendered less than two years after the money was borrowed, the \$10,000 had increased to \$12,638; and of this sum only \$440 was for fines assessed for nonpayment of monthly installments and interest. This taken from the \$12,638 leaves about \$2,200 of interest and charges for the use of \$10,000 from the date of the contract—May 10, 1890—to the date of the decree,—March 10, 1892. This accorded to complainant about 1 per cent interest per month, or 12 per cent per annum. The other class of shareholders are nonborrowers, sometimes called "investors." The monthly installments required of these is just one half of the sum required of the borrowers,—being one fourteenth of the value of their stock,—and they pay no interest. They have no shares required to be surrendered as a bonus, or premium; no dead shares. They pay installments only on the shares they own, and acquire all the rights of shareholders or

stockholders in the corporation, to the extent of the stock they subscribe for. They have a voice in the government of the corporation, and share in its dividends and other accumulated assets. They share ratably in all the excess of interest paid by the borrowers, and in this way realize more than lawful interest on their investment. Under all the calculations, the shares of the investors mature in about seven years up to the full \$100 per share. These are shareholders in fact and in law, for they have all the powers and rights of shareholders in corporations. No one will dispute that the investors realize more than lawful interest. Whence comes the fund from which this excess of interest is realized? It must come from the borrowers, for there is no other source from which it can be derived. To secure to one class unlawful interest, while none of the shareholders pay in excess of the lawful rate, is a physical impossibility. The consequence is that their shares will have matured up to their full value of \$100 per share, while they have paid out but little, if any, over half that sum, and have lain out of the use of their money for a time which averages only three and a half years, or four at most. So, the nonborrower realizes a much higher rate of usurious interest than the borrower pays. This, because there are many more borrowers who pay usurious interest than there are investors who divide that usury between them. We have said this was practically a loan of money. Stripped of all mere formal accompaniments, we are not able to discover any material connection Mrs. Falls ever had with the corporation, other than as a borrower of money. She had no voice in its government, no share in its profits or assets. In determining the character of any given transaction, the law regards the substance, not the form it is made to assume. In *Uhlfelder v. Carter*, 64 Ala. 527, this court said: "In determining whether a contract is infected with usury, its substance and effect, not its form, are material. The intent to take or reserve more than lawful interest for the loan of money, or the forbearance of a debt, must exist; and this is deduced from the relations of the parties, their acts contemporaneous with or subsequent to the contract, and all attendant circumstances. When this intent exists, and such is the substance and effect of the contract, no form or covering which may be given to it, no device or shift, can sustain it. A simple loan, or the mere forbearance of an existing debt, which, with the lawful interest, is not put at hazard, but is certainly to be paid, will become usurious, by ingrafting upon it stipulations intended for the additional profit of the creditor, and not as compensation for loss or inconvenience he may bear." Our calculations and argument are based, not on contingent or possible losses the association may suffer in its administration. We have considered the questions on a basis the most favorable and successful that could possibly attend the enterprise, even if every borrower meets his contractual engagements punctually, and every installment is paid on the day it matures. We have allowed to the borrower full credit for the entire sum of the

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installments he is required to pay, without deduction of anything therefrom to meet corporation or other expenses or losses. And we have shown that with these most favorable, possible results,—we may say impossible,—the borrower is bound, by the very letter of the contract, to pay a rate of interest greatly in excess of 8 per cent per annum. And it is of no moment that no witness testifies that the interest is usurious. The corporate powers, the by-laws, and the contract are shown in the transcript, and these furnish the evidence—the indisputable evidence—that the rate of interest required and contracted to be paid is manifestly in excess of 8 per cent. The question is simply one of arithmetical calculation,—and the laws of arithmetic are judicially taken notice of,—and the excess is so obvious that it is impossible to suppose it was not intended. The excess of interest, noted above, is one of the fixed, certain terms of the contract by which the money was lent, and which Mrs. Falls, in obtaining the loan, bound herself to pay. No ingenuity can infuse any element of contingency or uncertainty into her contractual obligation to pay up to this point. Beyond this, however, there is an uncertain liability, namely, it cannot, from anything shown to us, be certainly known how much she may be required to pay beyond the sums shown in our calculations. Enough for us that the contract itself requires the borrower to pay more than lawful interest.

But there was another reason operating upon the writer of this opinion which induced him to request a recall of the certificate of reversal, and a further consideration of the case. He had come to doubt the correctness of the conclusion announced, that in determining the question of usury, we must be governed by the Alabama statutes. The facts shown by the record are as follows: "The United States Savings, Loan & Building Company is a private corporation, incorporated under the laws of Minnesota, located and doing business in the city of St. Paul, of that state. One of its purposes is the loan of money on long time, secured by mortgage on real estate, the accruing interest and partial installments of the principal to be repaid monthly. True, they are not in the books of the corporation, or in the contract of the parties, called installments of the debt, but monthly payments on the capital stock. We think, however, that this is a misnomer; for we cannot perceive that the borrower on subscribed shares ever becomes a stockholder in fact. He acquires none of the rights or powers of a stockholder, as that term is generally understood and applied. The negotiation for a loan was entered upon in Birmingham, Ala. That negotiation was conducted by the husband of Mrs. Falls, representing her, and by a soliciting agent, representing the corporation. As we understand the record, the following comprises substantially what was done in Alabama: The soliciting agent furnished the information and the blanks necessary to be filled out and signed, in order to make the application in proper form to obtain membership and the loan, and probably filled those blanks, and forwarded the

application. It is probable that he also represented the corporation in having the abstract of title prepared, a valuation made of the property offered as security, and the preparation of the note and mortgage, to be executed by the applicant. All these acts, however, were provisory. They were but an offer. It is not only not shown that the soliciting agent entered into any binding contract that the company would accept the offer and lend the money, but the converse of this proposition is established. Not until the proposition was considered at the home office, not until the papers were examined and the offer accepted, was any contract made which would bind the company. Not until then could Mrs. Falls have maintained an action for a breach of contract, if the company had refused to advance the money; for no contract had been concluded. Such is the unmistakable language of the record. *Derrick v. Monette*, 73 Ala. 75; 3 Brickell, Dig. p. 361, § 426; Whart. Conf. L. § 421. When Mrs. Falls' proposition was accepted, a check for the money was issued by the proper officer of the United States Savings, Loan & Building Company, in St. Paul, Minn., payable to the order of Mrs. Falls. That check was drawn on the Minnesota Loan & Trust Company, the building and loan company's trustees, having its business habitation in Minneapolis, Minn. True, that check was cashed at a bank in Birmingham, Ala., but there is nothing unusual in that; and it is not shown that the building and loan company had any agency in procuring that to be done, even if we concede such agency would affect the question. The note given by Mrs. Falls and her husband, although signed in Birmingham, Ala., is made payable "to the order of the United States Savings, Loan and Building Company at the office of the treasurer, St. Paul, or to its trustee in Minneapolis, Minn. . . . This note is understood to be made with reference to and under the laws of the state of Minnesota." The mortgage also stipulates that the money is to be paid "at the office of [the company's] treasurer at St. Paul, Minnesota, or at the office of its trustee, Minneapolis, Minnesota;" and it also contains the clause: "This mortgage is understood to be made with reference to and under the laws of the state of Minnesota." So, we repeat, no binding contract was agreed on or concluded in Alabama. That justly celebrated jurist, *Chancellor Kent* (2 Com. 459), employed this language: "If a contract be made under one government, and 'is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed; and the foreign law is in such cases adopted, and effect given to it." In *Story on Conflict of Laws*, § 280, 24 L. R. A.

it is said: "Where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." In 8 *American & English Encyclopedia of Law*, 543, 544, the principle is thus expressed: "As a general rule, the validity of a contract is to be determined by the law of the place where it is made, unless it appears on its face that it was to be performed, or was made, in reference to the laws of some other place, in which case it will be governed by the laws of the place of the performance." Each of these standard works has an abundant citation of authorities. See also, *Hunt v. Hall*, 37 Ala. 702; *Cubbage v. Napier*, 62 Ala. 518; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 13 L. R. A. 999; *Boone, Mortg.* § 86; *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *De Wolf v. Johnson*, 23 U. S. 10 Wheat. 367, 6 L. ed. 343; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *Peyton v. Heinikin*, 131 U. S. Append. ci. and 20 L. ed. 679; *Dolman v. Cook*, 14 N. J. Eq. 56; *Goodrich v. Williams*, 50 Ga. 425.

I am aware that artifice is sometimes resorted to in the making of contracts, with a view of evading the laws against usury. To this end a false or fictitious place of performance is sometimes inserted in the writing. Whenever such attempt is made to appear, the courts refuse to lend their sanction to it. If such was the intention in this case, it has not been shown. I feel forced by the authorities to hold that, in the matter of collectible interest under this contract, the laws of Minnesota must govern. It is not my intention to disturb our former rulings as to the law which should govern this contract. On that question I think the present case clearly distinguishable from any we have heretofore decided, in two particulars. First, the final agreement of the parties—the closing of the bargain—was consummated in Minnesota, and the money borrowed was promised to be repaid there; second, it is one of the express terms of the contract that it is "made with reference to and under the laws of Minnesota." This provision, standing alone, would not be decisive, for it might be prostituted to improper uses. Taken in connection with the facts of this case, I think it supports the conclusion I have reached. I repeat: It is not my intention to overturn our former rulings. *Farrior v. New England Mortg. Secur. Co.* 88 Ala. 275; *American Freehold Land Mortg. Co. v. Sewell*, *supra*; *Evans v. Kittrell*, 33 Ala. 449.

The foregoing is only my own opinion, formed alone on what is shown in the transcript. My brothers, however differ with me, and adhere to the first opinion. The result is that the application for a reversal of the former ruling is denied.

TEXAS SUPREME COURT.

Frank CARGILL *et al.*, *Plffs. in Err.*,

v.

KOUNTZE BROS.

(88 Tex. 388.)

1. Bills of discovery are not authorized under the Texas practice, in which law and equity are blended into one system, and in which statutory provisions have been made for the discovery of evidence by simple interrogatories in a pending suit and for depositions of the adverse party.
2. Re-enactment of a statute which has been construed by the courts must be presumed to be with the intent to adopt that construction.

(June 24, 1888.)

NOTE.—Right to discovery by bill where the statutes provide for the examination of the party before trial.

The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party, or by the production of deeds, books, and writings in his possession or control.

It does not, however, follow that because the courts of law have had power given to them to grant such relief, courts of equity have therefore been wholly deprived of the right to entertain such bills which formed part of the ancient well-settled jurisdiction of the latter courts. *Colgate v. Compagnie Francaise du Telegraphe de Paris* a New York, 23 Fed. Rep. 82.

The principle that courts of equity will not yield the jurisdiction vested in them, merely because of the extended powers of courts of law, seems to be vigorously asserted. *Ibid.*

Accordingly it is no reason why, merely on account of the enlarged powers of the courts of law, equity should refuse relief. *Ibid.*; *Millsaps v. Pfeiffer*, 44 Miss. 306; *Shotwell v. Smith*, 30 N. J. Eq. 73.

The question how far jurisdiction will now be entertained for the purpose of compelling discovery by bill in equity, in cases where jurisdiction has been conferred upon courts of law by statutes of the different states, is one upon which the practice of the courts in the different states is not uniform.

The right to the bill in equity has been expressly abolished by statute in some states. Thus, relief by way of the old bill of discovery has been abrogated by statute in Arkansas, except in cases mentioned in section 4922 of the digest of the statutes of that state *infra*, and in Connecticut to a certain degree.

So in Dakota and in Iowa, except in cases mentioned in section 3728 of the Code of the latter state. And in Missouri, Montana, New York, when sought in aid of another action, North Carolina, Ohio, South Carolina, Texas, and Wisconsin.

The right, however, would still seem to exist in the following states, even though provision has been made for the examination of the parties pending the action.

Thus in Alabama, Georgia, Illinois, Maryland, Mississippi, New Jersey, Pennsylvania, and West Virginia, although the common law practice has been enlarged in this respect by statute in those states.

In Michigan, the question would seem to be an open one.

Although in New York such bills are abolished 24 L. R. A.

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment reversing a judgment of the Circuit Court for Harris County in favor of defendants in a proceeding brought to compel them to discover assets which might be reached by an execution upon a judgment which had been recovered against them. *Reversed.*

Statement by Gaines, J.:

This suit was brought by Kountze Bros., alleging themselves to be creditors of Cargill & Dennis, to compel the latter to make discovery of their assets. After stating that the plaintiffs had obtained a judgment against the defendants for \$1,054; that they had sued out executions, which had been returned "No property found;" and that they had caused an abstract of the judgment to be filed in the

when in aid of another suit, yet they would seem to exist for other purposes. *Hart v. Albright*, 23 Abb. N. C. 74, *infra*; *Shoe & Leather Reporters Asso. v. Bailey*, *infra*.

Alabama.

In *Cannon v. McNab*, 48 Ala. 99, it was held that the laws of that state allowing the parties to be examined as witnesses, did not take away the right to a bill in equity seeking a discovery.

The same principles are upheld in *Shackelford v. Bankhead*, 72 Ala. 476, wherein it was stated that the well-established jurisdiction of equity in matters of discovery was not ousted or in any wise affected by the statutory changes in the common-law rules of evidence.

And again in *Handley v. Hedlin*, 84 Ala. 600, where the bill was sought as auxiliary to an account.

In *Wood v. Hudson*, 96 Ala. 469, 530, it was held that the well-established jurisdiction of a court of equity to compel a discovery from a party, was not affected by the statutory provisions, which permitted an examination of the parties to a suit as a witness in a court of law, the jurisdiction remaining the same as before the adoption of the statute.

Under sections 3544-3547 of the Alabama Code, as amended by the Act of 1888, 1889, page 96, the remedy of a simple contract creditor is enlarged, and under their provisions he may maintain a bill for discovery and relief in certain cases for which the general principles of courts of equity, without the statutory aid, would be wholly inefficient. *Sweetser v. Buchanan*, 94 Ala. 574.

Under the above sections a creditor's bill upon a simple contract alleging that the defendant had "property, or an interest in property, real or personal, or money or effects, or chose in action, subject to the payment of his debts," but that the kind and description of the property and how held was concealed and unknown to the petitioner, and seeking a discovery thereof, was allowed. *Ibid.*

Arizona.

The right to discovery by means of bill in equity would seem to have been abrogated by the Compiled Laws of this state of 1887, section 2855. But by the Revised Statutes of this state, ed. of 1887, chap. 48, of the Compiled Laws relating to proceedings in civil cases is repealed.

Under the Revised Statutes of the state, ed. of 1887, section 1855, page 329, either party to a suit may make the deposition of the opposing party as a witness, and shall have the same process to obtain his testimony as in the case of any other witness, the

office of the clerk of the county court of Harris county, so as to secure a lien upon the real estate of defendants in that county,—they proceed, in their petition, to make the following allegations: "And your petitioners represent that, shortly before the recovery of said judgment against Cargill & Dennis, they, the said Cargill & Dennis, were, and for several years previous thereto had been, and are now, engaged in divers money-making and speculative enterprises and transactions, and your petitioners are informed and believe that, in the course of such business pursuits of the said Frank Cargill and E. L. Dennis, divers persons became indebted to them to a large amount, and that the defendants, Cargill & Dennis, have, at the time of filing this, your petitioners' bill of complaint, debts due to them, and for which they hold divers securities and evidences to a large amount, and have divers goods, wares, and

merchandise, or other articles of personal property, which belong to them, or in which they are in some way beneficially interested, and that they have equitable interests and things in action, of some kind or nature, which might or ought to be applied to the payment of your petitioners' said judgment against them, the defendants, Cargill & Dennis. And your petitioners further represent that the defendants, Frank Cargill and E. L. Dennis, more especially E. L. Dennis, are owners of, or in some way or manner beneficially interested in some real estate in this or some other state or territory, or some chattels real, of some name or kind, or in some contract or agreement relating to real estate, or rents or issues and profits of some real estate, and also that the defendants are the owners of, or in some way or manner beneficially interested in, the stock of some company, incorporated or unincorporated, or in

examination being conducted in the same manner as in the case of other witnesses.

And under section 1862 of the same statutes, the common law of England as now practiced and understood in its application to evidence has to be followed and practiced so far as not inconsistent with this act or any other law.

Arkansas.

Under the Digest of the Statutes of Arkansas, ed. of 1884, chap. 119, page 970, section 4921, no action to obtain a discovery shall be brought except as provided in the next section, and section 4922 provides where any person or corporation is liable, either jointly or severally with others by the same contract, an action may be brought against any of the parties who are liable to obtain discovery of the names and residences of the others who are also liable.

California.

In *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120, it was held that a creditor might compel his debtor, who refused to apply property to the satisfaction of a judgment upon examination in supplementary proceedings, to deliver such property up in satisfaction, under the Code of Civil Procedure, sections 714, 721, which was intended as a substitute for the creditor's bill as formerly used in chancery.

Connecticut.

A discovery is auxiliary or incidental to the relief, and if the relief is unattainable, the discovery can answer no imaginable purpose. *Welles v. Rhodes*, 59 Conn. 498.

Chapter 22 of the Statute of 1890 provides the plaintiff at any time after entry of action, and the defendant at any time after answer, may file a motion praying for the disclosure of facts or production of papers, books, or documents material to the support or defense of the suit within the knowledge, possession, or power of the adverse party, and such facts, papers, books, or documents being disclosed or produced may be given in evidence by the party filing such motion.

The question was raised whether or not, under the above section, a defendant would have a right to call upon plaintiff in defense of the trial, to disclose the proof proposed to be offered by him for the express purpose of enabling the defendant to prepare his defense, and it was held that the section countenanced no such claim and did not indicate that either party could procure such disclosure to enable him to state his case; that he must

first state his case and then seek the disclosure for the purpose of proving it. *Downie v. Nettleton*, 61 Conn. 538.

The statute was not designed to enlarge the scope of an equitable principle, but simply to enable a court of law, in administering legal remedies, to exercise and clearly define the power of a court of equity. *Ibid.*

In *Welles v. Rhodes*, *supra*, it was said that it was very doubtful whether the plaintiff, who was seeking to remove a cloud upon title, could not have obtained, under the provisions of chapter 22 of the Public Acts of 1890, all that he was seeking in equity by way of discovery.

Dakota.

Under section 438 of the Dakota Code, ed. 1885, page 128, no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

Georgia.

Under section 8810 of the Code of Georgia, ed. 1882, page 991, discovery may be had from the opposite party, either nominal or real, in any case pending in any court in this state.

In *Mahone v. Central Bank of Georgia*, 17 Ga. 111, relief was asked in equity for the purpose of discovery, the defendant contending that under the Act of 1847, the plaintiff had a right to administer interrogatories at common law, and that therefore the proceedings in equity could not stand. The court held that the Act of 1847 did not preclude any person from exhibiting his bill in chancery for discovery touching the same matters, and that therefore the plaintiff's right to a discovery in equity was not lessened by such act.

Illinois.

Where an administrator filed a bill of discovery against the defendant, to ascertain the date, time of maturity, rate of interest, and place of payment of promissory notes given to the intestate, plaintiff alleging his inability to declare upon the said notes by reason of want of such knowledge, and the defendant relied upon section 81 of chapter 8 of the Revised Statutes of Illinois, giving an adequate remedy at law, and also upon the provisions of the statutes, compelling the testimony of the defendant on his behalf in a suit at law and allowing amendments to the declaration which such evidence might make requisite,—it was held that the original power of equity in such cases was not to be

the profits of some company or copartnership, and also that they have in their possession at the time of filing this, your petitioners' bill of complaint some money or bank bills; or that they have money deposited in some bank or elsewhere to their credit; or that they have money or securities for the payment of money held by some other person, in trust or otherwise, for their benefit. And if the defendants, Frank Cargill and E. L. Dennis, have made any sale or assignment of their property or effects, or any part thereof, your petitioners expressly charge that they believe that such sale, transfer, or assignment is merely colorable, and made with the view of protecting the property or effects of the defendants, so assigned, and placing the same beyond the reach of your petitioners' said judgment, and to enable the defendants to control and enjoy the same, and the avails thereof, and that it would so appear if the defendants, Frank Cargill and Edward L. Dennis, would state and set forth

when and to whom such sale, transfer, or assignment was made, and what was the amount, in value, of the property and effects assigned, sold, or transferred, and what were the terms and conditions upon which such sale, transfer, or assignment was made, and what disposition had been made of the property or effects so sold, transferred, or assigned, and in whose possession the same is now, or what has been done with the avails thereof. And your petitioners claim a full discovery and complete disclosure of all such property and effects and things in action belonging to the defendants, Cargill & Dennis, and all trusts whereby any property, debts, or other effects are held for the use and benefit of the defendants, Frank Cargill and Edward L. Dennis, and of every sale, transfer, or assignment which defendants have made of their property, debts, or other effects, and of the person or persons to whom such assignment, sale, or transfer has been made, the amount and value

questioned, the statutory provisions containing no words prohibiting or restrictive of the original powers of such courts. *Grimes v. Hilliary*, 38 Ill. App. 246.

In *Kendallville Refrigerator Co. v. Davis*, 40 Ill. App. 616, it was held that the legislature did not deprive equity of jurisdiction to compel discovery, where such jurisdiction would be exercised by the statute, particularly where there was another ground of jurisdiction as in the case of an account.

A strict bill of discovery to obtain evidence to be used in an action at law, may be abrogated by implication; but even that is doubtful. *Kendallville Refrigerator Co. v. Davis*, *supra*.

Iowa.

Under section 3723, McClain's Annotated Code of Iowa, ed. 1883, vol. 2, page 972, no action to obtain a discovery shall be brought, except that where any person or corporation is liable, either jointly or severally with others by the same contract, an action may be brought against any parties who are liable to obtain discovery of the names and residences of the others who are liable.

Under this section it has been held that no action can be brought for the purpose of discovery alone. *Searcy v. Miller*, 57 Iowa, 613.

In *Greene v. Woods*, 24 Iowa, 573, it was held that the law gave the defendants the right to take the testimony of the plaintiffs by interrogatories, the method of procuring the testimony of the opposite party in such a manner being additional to the other ordinary methods, and therefore an interrogatory tending to elicit evidence pertinent and material to the issue would not be stricken out. *Rev. Stat. § 2365*.

Maryland.

It is quite a familiar principle, that where a court of equity has original jurisdiction and its statutes confer upon the common-law courts the same power, the jurisdiction of equity is not thereby ousted. *Union Pass. R. Co. of Baltimore v. Baltimore*, 71 Md. 238; *Harnes v. Crafn*, 8 Gill, 368.

In *Union Pass. R. Co. of Baltimore v. Baltimore*, *supra*, a bill was filed for an account of the company's earnings and discovery and the payment of a tax, and was demurred to upon the ground that equity had no jurisdiction to compel discovery, as under article 75, section 69, of the Code, (section 94 of the Code of 1888) the precise relief could have been obtained in an action at law. It was held that it never had been understood to be the law in that state, that a court of equity was deprived of

its jurisdiction by reason of the powers conferred by act of assembly on the courts of common law.

By the section of the Maryland Code above referred to, this court has power to require the parties to answer any bill of discovery, only in case and under circumstances where they are compellable to produce original books or writings, or to answer such bill of discovery according to the rules of procedure in chancery.

By the Code of Maryland, article 16, sections 20, 21, power is conferred upon the courts of equity on the application of either party, on the trial of any action at law or suit in chancery, either for discovery or relief, to require a decree that the parties shall produce either the original books, writings, or papers, or copies certified before a justice of the peace by all such parties, of such books or papers in their possession or power as contain evidence pertinent to the issue, or relative to the matters in dispute between the parties, to be used as evidence at the trial of such cause, provided the party making the application shall satisfy the court, on oath or affirmation, that such books, writings, or papers contain material and necessary evidence, and that he cannot safely proceed to the trial of his case without the benefit of such testimony; and if the party required to produce shall fail to obey the order to that effect, the court may in its discretion take the allegations of the bill *pro confesso* and decree *ex parte* in such manner as shall appear just and reasonable.

Michigan.

Since the Michigan statutes have allowed parties to become general witnesses, there seems to be no further office for the bill of discovery. *Riopelle v. Doelner*, 26 Mich. 102, 155.

It is well settled that no discovery will be granted when the court of law wherein the proceedings are pending has means of compelling the defendant to make disclosure. *Ibid*.

So, it has been decided that since parties have become general witnesses, under the statutes, a bill of discovery will not lie where the facts sought to be discovered are within the knowledge of any witness. *Id.*; *Shelden v. Walbridge*, 44 Mich. 251; *M'Creery v. Cobb*, 93 Mich. 463.

In *Hubbard v. McNaughton*, 43 Mich. 223, 38 Am. Rep. 176, it was said that no universal rule could be laid down where most of the facts necessary are within the knowledge of the defendant. Under the old practice before parties became competent as witnesses, it was often necessary to draw out

of the property, debts, or effects so assigned, sold, or transferred, and the trusts or other conditions upon which said sale or assignment or transfer was made, and all the facts and circumstances relating thereto, and particularly what is the situation of the property, debts, or other effects assigned or transferred at the time of the filing of this, your petitioners' bill of complaint. And your petitioners further represent that they have reason to believe, and so charge the fact to be, that the defendants have property, debts, and other equitable interests, things in action, or effects, of the value of more than \$1,054, interest and costs, exclusive of all prior just claims thereon, and which your petitioners have been unable to reach by execution on said judgment against said defendants, Cargill & Dennis, and that this, your petitioners' bill of complaint is not exhibited by collusion with the defendants, or

with any other person, or for the purpose of protecting the property or effects of defendants, Frank Cargill and Edward L. Dennis against the claim of other creditors, but for the sole and only purpose of compelling payment and satisfaction of the judgment so as aforesaid recovered by your petitioners against the defendants, Frank Cargill and Edward L. Dennis." The petition concludes with a prayer that each of the defendants be required to disclose, under oath, all their assets, of every description whatever, and that they also be required to answer certain special interrogatories, which are set out therein. The trial court sustained a demurrer to the petition, and dismissed the suit. The plaintiffs having sued out a writ of error, the court of civil appeals reversed the judgment, and remanded the cause. The case came to us upon a writ of error from this court to the court of civil appeals.

such matter by a discovery, and it is still competent, although not common to do so.

It has always been held that when a court of law can enforce the production of documents, or any other disclosure required by a party of his adversary, that was a complete answer to a bill of discovery, and this can now be done in all cases more readily and completely than was possible by bill in equity. *Riopelle v. Doellner, supra*.

In *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 393, the right to compel discovery in a judgment creditor's bill was said still to exist.

And in *McCreery v. Cobb, supra*, the court stated that it did not think that the provisions of the statute, relating to the powers of chancery to compel discovery, were repealed by the statutes making parties witnesses, and held that the right of discovery existed, and therefore sections 6614 and 6615 of Howell's Statutes, relating to judgment creditor's bills, and sections 8168 and 8169 of the same statutes, relating to proceedings against corporations giving jurisdiction in chancery to compel discovery, were not affected by the statute making parties competent witnesses.

Mississippi.

In *Mississippi* the jurisdiction in chancery, in aid of a proceeding at law, has by statute been conferred upon the courts of law. *Kearny v. Jeffries*, 43 Miss. 357.

In the above case, the court stated that under the system which enabled the plaintiff to examine the defendant as a witness at law, and to file in court the ancillary petition for discovery, the plaintiff might nevertheless have a right to resort to a court of chancery for discovery, and that the jurisdiction of that court had not been taken away by the statutory changes, but yet the court of equity will not undertake to try the case where a plaintiff had a legal title and needs discovery. *Ibid*.

Missouri.

In *Bond v. Worley*, 26 Mo. 263, it was held that no bill of discovery was allowable in that state since the statutes provided other more convenient modes by which every purpose of such bills could be attained.

Montana.

Section 668 of the Compiled Statutes of Montana, ed. 1897, page 234, provides that no action to obtain a discovery under oath, in aid of the prosecution or defense of another action or proceeding, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in

the manner provided by this and the foregoing chapter.

New Jersey.

Courts of equity will always compel discovery in aid of prosecuting or defending suits at law, and to make such discovery of use on the trial at law will restrain the suit from proceeding until the discovery is had. *Shotwell v. Smith*, 20 N. J. Eq. 79.

Such jurisdiction is not taken away by the fact that courts of law have been clothed with powers to compel the discovery in such cases, by the oath of the complainant. *Ibid*.

The jurisdiction in equity is concurrent with that of the court of law. *Hoppock v. United New Jersey R. & Canal Co. and Pennsylvania R. Co.*, 27 N. J. Eq. 236.

The power given to courts of law is not so complete and ample as the power of the court of equity, the plaintiff not being actually compellable to answer at law, the only consequence of his not answering being the right of the court to stop his proceeding in his suit. *Shotwell v. Smith, supra*.

New York.

Under section 1914 of Bliss's Annotated Code of New York, vol. 2, page 238, an action cannot be maintained to obtain a discovery under oath in aid of the prosecution or defense of another action.

Section 389 of the New York Code does not prohibit the obtaining discovery, but declares that it can be sought only in the mode specified in that chapter. In the same action in which the relief is sought must the discovery be sought also. *Glenny v. Stedwell*, 51 How. Pr. 329.

And section 390 makes it lawful to examine as a witness a party to an action, whether that action be equitable or at law. *Ibid*.

In *Cutter v. Pool*, 54 How. Pr. 311, it was held that section 388 of the New York Code of Procedure, relating to the inspection of documents and the discovery of evidence, was auxiliary to and not a substitution for the provisions of the revised statutes.

In *McVicker v. Ketchum*, 1 Abb. Pr. N. S. 453, it was held that the authority given under the code for the examination of the adverse party was intended to be in lieu of the former bill of discovery, and such right exists immediately on the commencement of the suit and not only after issue joined.

A bill of discovery can be maintained in chancery not only before issue joined, but even before the suit was commenced, and under the code such right may be had at any time before the trial,

Measner, Goldthwaite & Ewing and H. F. Ring, for plaintiffs in error:

There is no such thing as an inherent jurisdiction in any court, not derived from the law of its creation; nor does the constitution grant to the district court every remedy that may have been administered by the chancery system of England, but only jurisdiction for relief where there is a suit with a matter in controversy amounting to \$500. Here there is no pretense of controversy about the judgment, no matter in controversy of any value is alleged, only a fishing for a matter of some value or other. The petition invoked no jurisdiction lodged in the court by the organic law.

Tex. Const. art. 5, § 8; *Measner v. Giddings*, 65 Tex. 308.

The bill is one for discovery as an independent remedy. Such a bill never lay in the state

courts of Texas, except in aid of a pending suit (*Cronin v. Gay*, 20 Tex. 460), and is now superseded entirely (*Love v. Keowne*, 58 Tex. 197). A bill very similar to the one in question was expressly characterized as an anomaly, and dismissed as such without demurrer, in *Cronin v. Gay*, 20 Tex. 461, and 464.

See too, *Carter v. Hightower*, 79 Tex. 185; *Noyes v. Brown*, 75 Tex. 458; *White Sewing Mach. Co. v. Atkeson*, 75 Tex. 830; *Price v. Brady*, 21 Tex. 614; *Taylor v. Gillean*, 23 Tex. 508; *Donovan v. Fine*, Hopk. Ch. 59, 2 L. ed. 342, 14 Am. Rep. 531.

While a plaintiff with a suit involving matter in controversy of proper value, may have any relief given in equity consistent with our system or policy of law, yet he cannot invoke a remedy dependent solely upon the practice peculiar to chancery of bill and specific answer, and which is utterly at war with our

and is not limited to cases where issue has been joined. *Hadley v. Fowler*, 12 Abb. Pr. N. S. 244.

The examination allowed by the New York code, and which is to be had on a summary application to the court, is a substitute for the bill of discovery under the former practice, and the settled rules in relation to those bills may with propriety be regarded as controlling with respect to the examination under the code, when they did not conflict with the letter or reason of that act. *Ibid.*

In *Hauseman v. Sterling*, 61 Barb. 247, it was said to have become the universal practice to refuse applications to compel the production of books and papers on the examination of a party before trial, that the code did not warrant it, the statute pointing out the only mode by which such a discovery can be obtained before a trial, and that if either party wished for such a discovery, he must adopt the course provided by the statute.

Unless there is some other mode of examining a party than conditionally, by commission or at the trial, the suitor has not the benefit which the former bill of discovery would have given him. *Glenny v. Stedwell*, *supra*.

In the above case the court found that section 860 of the Code gave the right to examine at any time before trial at the option of the party claiming it, and such testimony may be perpetuated.

In *Knoch v. Funke*, 27 Jones & S. 240, plaintiff sought an account of an alleged partner in a partnership dissolved by death, the defendant being examined as a party before the trial and denying the partnership relations; the court held that the plaintiff could not obtain a discovery and inspection.

Whenever the production of books can be compelled by *subpoena duces tecum*, the provision of the code allowing the examination of parties to the action has practically become a substitute for the mode prescribed by the revised statutes to an action by or against a corporation, but is not among the cases where such a subpoena would be effectual to compel the corporation to bring its books into court. *Shoe & Leather Reporter Assn. v. Bailey*, 17 Jones & S. 365.

Where a creditor's bill was filed to obtain discovery of certain book accounts, concealed, withheld, and transferred in fraud of creditors, it was stated that the ancient equitable jurisdiction of the courts in regard to creditor's bills had been preserved, and that the complaint showing a sufficient cause of action for equitable relief was not open to demurrer under the present mode of procedure. *Hart v. Albright*, 28 Abb. N. C. 74.

In *Shoe & Leather Reporters Assn. v. Bailey*, 24 L. R. A.

supra, the defendant moved for discovery and inspection of writings in an action for an alleged conversion of the contents of a certain printing office. It was held that the rule in chancery upon the late bill of discovery was not abrogated or changed by the code of civil procedure, and that the plaintiff might make a discovery of matters necessary to maintain his own title, but was not entitled to discovery of the title of his adversary from whom he sought the discovery and whose title he denied; that it was only when the plaintiff was entitled to a discovery of deeds or documents for the purpose of establishing his own case, that his right to such discovery was held not to be affected by the circumstances, that the same deed or documents were also evidence of the defendant's action.

North Carolina.

By section 579 of the Code of Civil Procedure of North Carolina, chapter 5, vol. 1, page 228, ed. 1883, it is provided that no action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by that chapter.

Ohio.

Section 5206 of the Revised Statutes of Ohio, ed. 1891, vol. 2, now regulates the practice in actions for discovery in that state.

Although the doctrine and rules concerning the subject-matter of discovery, established by courts of equity, are believed to be still in force and to control the same matters in the new procedure, yet the bill of discovery, as a separate action, is practically obsolete in the state of Ohio. *Chapman v. Lee*, 45 Ohio St. 366.

Pennsylvania.

In *Milne's App. (Pa.)* Jan. 25, 1888, it was held that a bill in equity would lie in some cases for the discovery of facts material to a just determination of an issue pending in an action at law, but that the reason for sustaining such bill was much less now than before the parties could be compelled to testify.

In that case an action had been brought upon a bill and discovery was refused both in the action and by a subsequent bill in equity, the reason of refusal being that the defendants were special partners and had not the custody of the books for which discovery was sought. *Milne's App. supra*.

In *Phillips v. Kern*, 6 Phila. 2, it was sought to compel the defendants to disclose certain facts by bill of discovery, and the court held that where one might be called as a witness, he could not be

very system of practice, in which a plain, concise positive statement of facts is required on the one side, and a general denial merely is permissible on the other. Such a remedy comes within the exception of grant of equity jurisdiction, because inconsistent with the policy of our system as existing under organic law from the earliest days.

Newson v. Chrisman, 9 Tex. 117.

The statutes of attachment, garnishment (a mode of discovery) and execution purport to furnish a complete system for the forced collection of debts, and thereby repeal all laws on that subject.

Rogers v. Watrous, 8 Tex. 63, 58 Am. Dec. 100.

Where positive law, enlarging the unwritten law on the subject, prescribes the remedy to be pursued for a given purpose, as the collection of debts, courts will not add another rem-

edy by supplemental proceedings, except where the positive law so provides, as it does in Illinois (Underwood's Stat. 75), New York from a very early day (N. Y. Code, § 292), California (Cal. Code Civ. Proc. §§ 714, 715), Ohio (Ohio Code Civ. Proc. §§ 459, 460), Iowa (Iowa Code, §§ 8185-8188), South Carolina (S. C. Code Civ. Proc. § 818), Nevada (Nev. Comp. Laws, § 1801), Wisconsin (Wis. Stat. § 100), Indiana (Ind. Code, §§ 518, 519), North Carolina (N. C. Code Civ. Proc. 264), and in Arkansas, Kentucky, Missouri, Maine, Oregon, New Jersey, and other states.

Messrs. Stewart & Stewart, for defendants in error:

The district court shall have original jurisdiction in civil cases of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or

made a party to a bill of discovery, because his testimony could be procured in another way, and it would be a mere disclosure by a third party and inadmissible in evidence if taken.

South Carolina.

Under section 890, chapter 6, of the Code of Civil Procedure of South Carolina, no action to obtain discovery, under oath in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

The exclusion of the courts of equity from jurisdictions, in cases in which an adequate remedy is conferred at law, rests upon the statutes. *Eno v. Calder*, 14 Rich. Eq. 154.

A new remedy at law operates to destroy the existing remedy in equity allowed for the want of such legal remedy. *Hall v. Joiner*, 1 S. C. N. S. 186, 190.

A simple contract creditor has no standing in equity *inter vivos* to set aside a fraudulent conveyance, but must exhaust his remedy at law and have judgment in aid of his execution, and have a discovery of assets after satisfaction at law has failed by bill in equity. *Eno v. Calder*, *supra*.

Texas.

Under article 2216, title 38, of Sayles' Texas Civil Statutes, vol. 1, ed. 1889, page 665, it is provided either party to a suit may examine the opposing party as a witness, and should have the same process to compel his attendance as in the case of any other witness. His examination should be conducted and his testimony should be received under the same rules applicable to other witnesses.

And under article 2239 of chapter 3, either party to a suit may examine the opposing party as a witness upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted and his testimony received in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of the chapter.

In *Chonin v. Gay*, 20 Tex. 400, it was decided that the statute gave the right as auxiliary to the regular suit, but not as an independent remedy disconnected from the suit.

In the above case a discovery was sought in aid of a separate action already commenced and pending for trial of the right to property in slaves. *Cronin v. Gay*, *supra*.

In *Love v. Keowne*, 58 Tex. 191, it was held that 24 L. R. A.

although a bill of discovery, technically so called and known in equity practice, was not known in the practice of that state, yet the statute was intended to answer the same purpose, the statute authorizing a party to make his opponent a witness or to propound interrogatories to him which, if not answered, should be taken as confessed.

West Virginia.

Sections 22 and 23 of chapter 130 of the Code of West Virginia authorize the examination of the parties to the suit in the same manner as any other witness, and it has been held that such powers are neither restrictive nor prohibitory of the right of the party to discovery in equity. *Russell v. Dickeschied*, 24 W. Va. 61.

A jurisdiction in equity is not taken away by the courts of law entertaining jurisdiction in such cases where they formerly rejected it, for being once vested legitimately in the court it must remain there until the legislature shall abolish or limit it. *Ibid*.

Nor is the jurisdiction to be taken away by express enactment conferring on courts of law the same jurisdiction, for unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent and not exclusive remedial authority. *Ibid*.

Wisconsin.

Both the form and substance of the bill in equity for discovery were abolished by section 4096 of the Wisconsin Revised Statutes.

By section 4096 of Sanborn & Berryman's Annotated Statutes of Wisconsin, vol. 2, page 2123, no action to obtain a discovery under oath in aid of the prosecution or defense of another action shall be allowed, but the examination of a party, or in case a corporation be a party, the examination of the president, secretary, or other principal officer or general managing agent of such corporation, otherwise than as a witness on a trial, may be taken by deposition at the instance of the adverse party, in any action or proceeding, at any time after the commencement thereof and before judgment.

In *Noonan v. Orton*, 23 Wis. 386, discovery in equity was held to be abolished and discovery could be had under chapter 137 of the Revised Statutes, sections 54 and 93, in a court of justice the same as it was when delivered in an action and therefore brought in equity under the former practice instead of driving a party to his action in equity.

The bill of discovery was abolished and provision made for compelling an adverse party to testify at or before the trial by sections 54 and 55 of chapter

amount to \$500, exclusive of interest and to hear and determine any cause which is, or may be cognizable by courts either of law or equity, and to grant any relief which could be granted by said courts or either of them.

Tex. Const. art. 5, § 8; Tex. Rev. Stat. arts. 1117, 1122; *Smith v. Smith*, 11 Tex. 105.

Whatever ordinary or extraordinary writ can be issued by a common-law judge or chancellor in those states where the jurisdiction of these offices is separate and distinct, can in this state be issued by a district judge.

Jones v. McMahan, 30 Tex. 728; *Johnston v. Powell*, 34 Tex. 529; *Shulls v. Hoffman*, 18 Tex. 678.

Whatever suits may be instituted in equity courts, may be instituted in ours. The rule that courts of equity will interfere only where the party is remediless at law, has but little application under a system in which the litigants in a suit can demand, and obtain all the

relief, which can be granted by either courts of law or equity.

Smith v. Olopton, 4 Tex. 118; *Farrar v. Reeman*, 68 Tex. 180; *Grabenheimer v. Blum*, Id. 378; *Voigtlander v. Brotze*, 59 Tex. 286; *Douglas v. Neil*, 87 Tex. 547.

The giving of a remedy by statute in a court of law has never been deemed to take away, or in any degree to abridge the original and inherent powers and jurisdiction of the court of chancery. Our courts, possessing the powers of courts of chancery, may proceed to administer relief upon the principles of equity as fully and completely as a court of chancery in England could do, without the aid of the statute. The foundation of the jurisdiction of equity is not in the statute, but in the judicial incompetency of the courts of common law to furnish a plain, complete, and adequate remedy.

Grassmeyer v. Beeson, 18 Tex. 766, 70 Am.

187 of the Revised Statutes of Wisconsin of 1868. *Kelly v. Chicago & N. W. R. Co.* 80 Wis. 480.

The statutes give him the same relief in a proceeding in the action wherein it is required, and at that stage in the progress of the action where such discovery is needed. *Noonan v. Orton*, *supra*.

It is clearly a provisional remedy and under subdivision 3, section 10, chapter 284, of the Laws of 1860, an appeal will lie from an order giving provisional remedies. *Ibid*.

The statute being remedial must be liberally construed. *Cleveland v. Burnham*, 60 Wis. 16.

In *Cleveland v. Burnham*, *supra*, it was held that the procedure provided by the above section of the act was undoubtedly intended as a substitute for a bill of discovery under the old practice.

The object of the statute is to elicit the full and complete disclosure of whatever may be relevant to the controversy to be ascertained, in case the pleadings are in by the issues thereby made; and in case the issues have not been joined, then by such order limiting the subjects to which such examination may extend. *Kelly v. Chicago & N. W. R. Co. supra*.

In the same case it was held that to hold that such examination should be limited to cases where discovery might be had in equity under the old practice, would be a perversion of the statute as it now exists, in other words an interpolation of an exception not warranted by the letter or spirit of the statute. *Ibid*.

The examination of the party under the above section, when had after issue joined in the action, is as full and ample as the examination of any other witness in the case, and he may be examined, not merely as to such matters as would enable the plaintiff to make out his cause of action, but as to matters relating to the defense. *Wheratt v. Ellis*, 45 Wis. 639.

Practice in the United States Supreme Court, and the Circuit Courts.

In *Ex parte Boyd*, 105 U. S. 657, 26 L. ed. 124, the Supreme Court intimated that at the present time bills of discovery were not only useless but obsolete. See also *United States v. McLaughlin*, 24 Fed. Rep. 825; *Preston v. Smith*; *Rindskopf v. Platto*; *Guyot v. Hilton*; *Manchester Fire Assur. Co. v. Stockton Combined Harvester & Agr. Works*,—all *in ra*.

In *Heath v. Erie R. Co.*, 9 Blatohf. 317, it is stated that the theory and basis of a bill of discovery in equity in aid of a defense in another suit, was, that the court in which such other suit was pending had no means of compelling a discovery from the plaintiff therein of facts material to the defense. 34 L. R. A.

A complainant's bill seeking discovery for the want of all other testimony, should not be retained after the answer has denied the matter sought. *Brown v. Swann*, 35 U. S. 10 Pet. 497, 9 L. ed. 508.

By the 15th section of the Judiciary Act in the trial of actions at law, on motion of either party, and due notice thereof being given, the circuit court has power to require the opposite party to produce any books or writings in his possession or power, which contain evidence pertinent to the issue in cases and under circumstances where the party might be compelled to produce the same by the ordinary rules of proceeding in chancery. *Merohant's Nat. Bank v. State Nat. Bank*, 8 Cliff. 201.

In the above case it was stated that production before the trial was not perhaps contemplated by the words of the provision, nor was it in general necessary, but that where the motion was accompanied by satisfactory proof that the case was one in all respects within the conditions of the provision, and it was shown that there was just ground to apprehend the destruction or transfer of the documents or their removal out of the jurisdiction before the trial, that the order might be made without delay and be absolute. *Ibid*.

Although at one time courts of equity entertained bills of discovery in aid of executions at law, the latter courts not having adequate powers to render the assistance necessary, yet the moment such powers were sufficiently enlarged and enabled the courts of law to accomplish the same results, the jurisdiction in equity, if it did not cease as unwarranted, at least became inoperative and obsolete. *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200.

A bill in equity to compel disclosures from a plaintiff or a defendant of matters of fact particularly within his knowledge and essential to the maintenance of the legal rights of either in a pending suit at law, would now scarcely be resorted to unless under special circumstances, the parties being now competent witnesses and compellable to answer under oath all relevant interrogatories properly exhibited, and to produce documents important as instruments of evidence, and the courts at law in which such suits are pending are now authorized by summary proceedings to enforce the same rights. *Ibid*.

In *Ex parte Boyd*, *supra*, it was stated that at common law a judgment creditor was entitled, under the New York statutes, to an examination of the judgment debtor as therein provided as a supplementary measure and in aid of his execution.

But in *Colgate v. Compagnie Francaise du Tele-*

Dec. 309; *Duncan v. Magette*, 25 Tex. 251; *Castro v. Gentiley*, 11 Tex. 28.

The procedure in courts of equity in actions of this nature is usually by order made upon proof of return of an execution unsatisfied, requiring the debtor to appear in person in court, to be examined concerning his property. A receiver is then appointed to collect the assets, and upon qualifying, he becomes vested with the assets without conveyance or assignment by the debtor, (Wait, *Fraud. Conv.* § 60; High, *Receivers*, 2d ed. 401 *et seq.*) and the receivership may extend to property of any nature, real or personal, in which the debtor has such an interest as may avail his creditor.

High, *Receivers*, 2d ed. § 482.

Chancellor Green, in *Robert v. Hodges*, 16 N. J. Eq. 302, says: "It is a familiar and unquestionable doctrine of equity, that the court has power to aid a judgment creditor to reach the property of his debtor, either by removing fraudulent judgments or conveyances which obstruct or defeat the plaintiff's remedy under the judgment, or by appropriating in satisfaction of the judgment, rights or equitable interests of the defendant, which are not the subject of legal execution."

See also *Fowler's App.* 87 Pa. 454; Wait, *Fraud. Conv.* p. 92; *Wright v. Oroville Gold, Silver & Copper Min. Co.* 40 Cal. 20; *Buck v. Voreis*, 89 Ind. 117; *Livermore v. McNair*, 34 N. J. Eq. 482.

On petition for rehearing.

To reach the equitable interest of a debtor in real estate by suit in chancery the creditor should first obtain a judgment at law; and to reach personal property both a judgment and execution should be shown. One exception to this rule is where the debtor is deceased; another exception is where the claim is to be satisfied out of a fund accessible only by aid of a court of chancery.

Russell v. Clark, 11 U. S. 7 Cranch, 69, 3 L. ed. 271; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671, 1 L. ed. 975; *O'Brien v. Cullter*, 2 Blackf. 421; *Clout v. Hamilton*, 3 Yerg. 81; *Rhodes v. Cousins*, 6 Rand. (Va.) 188, 18 Am. Dec. 715.

Where a bill seeks a discovery of fraud, or of fraudulent acts of the defendants, if they do not subject him to criminal proceedings, he is bound to make the discovery.

Janson v. Solarte, 2 Younge & C. Exch. 182; *Hare, Discovery*, 140, 142; *Green v. Weaver*, 1 Sim. 404; *Story, Eq. Pl.* § 589, and note 3; *Robinson v. Kitchin*, 35 Eng. L. & Eq. 558.

It is unquestionable that chancery will decree a discovery to detect frauds and imposition.

Bennett v. Muggrove, 2 Ves. Sr. 51; *Bicknell v. Gough*, 3 Atk. 558; *Kimberly v. Sells*, 3 Johns. Ch. 467, 1 L. ed. 636; *Deloraine v. Browne*, 3 Bro. Ch. 633; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Lonsdale v. Littledale*, Id. 451; *King v. Martin*, 2 Ves. Jr. 641.

graphe de Paris a New York, 23 Fed. Rep. 82, it was held that a party could not obtain the testimony of the defendant before the trial in an action pending in the circuit court, although he could do so in the state courts of that state (New York), because section 861 of the Revised Statutes required such testimony, unless taken *de bene esse* or by a commission, to be taken in the presence of the court and jury at the trial, and therefore a bill in equity seeking a discovery was a proper process.

In *United States v. McLaughlin*, 24 Fed. Rep. 825, it is said to be very doubtful whether a pure bill of discovery in an equity suit would lie at the present day, that it might be that a discovery might be asked for relief, but that it was probable that no prudent counsel would file a pure bill of discovery, or call for a discovery in a bill for relief, and thus unnecessarily give the defendant an advantage which he would not otherwise have under the present practice, which enabled the complainant to place the defendant upon the stand and examine him as a witness.

In *Preston v. Smith*, 26 Fed. Rep. 384, the court stated that a bill could not be sustained solely for the sake of discovery, such bills being rarely of late resorted to, having fallen into a condition of "innocuous desuetude."

In *Rindskopf v. Platto*, 29 Fed. Rep. 180, where discovery was sought in aid of a suit at law, brought for the recovery of certain moneys alleged to have been collected by the defendant as an attorney, the court refused the bill, stating that before the passage of the statute of the United States, permitting parties to be sworn and examined as witnesses in suits at law, there could have been no doubt but that such a bill would lie, but that since the passage of that act July the 2d, 1864, section 858 of the Revised Statutes of United States, providing that no witness shall be excluded in any civil action on account of his being a party to or interested in the issue, a party to a suit might be a witness, and be called by the adverse party and com-

pelled to disclose all facts within his knowledge touching the controversy.

The procedure authorized by section 724 of the Revised Statutes of the United States relating to the discovery of documents, has been held not to apply to suits in equity. *Bischoffsheim v. Brown*, 29 Fed. Rep. 341.

And in *Guyot v. Hilton*, 32 Fed. Rep. 742, where an application was sought under the above section, to require the plaintiff to produce as official liquidator for inspection the books of the company, the application was refused and the plaintiff left to seek the relief by way of a bill of discovery.

In *Paine v. Warren*, 33 Fed. Rep. 357, it was held that the above section of the statutes did not apply to production for the purpose of aiding the plaintiff in the framing of his complaint.

In the above case the plaintiff filed a bill in equity in aid of his suit at law, and it was held that if the original suit was at law the protection was authorized, such suit being auxiliary to the action at law, the plaintiff having the choice at his election of either of the two courses, namely, to dismiss his bill and treat his original action as one at law and apply to compel an inspection and production of the documents, or to treat the suit as in equity, frame his bill for discovery, and move for an inspection according to the equity practice. *Paine v. Warren, supra.*

In *Manchester F. Assur. Co. v. Stockton Combined Harvester & Agr. Works*, 38 Fed. Rep. 373, it was stated that there could be no need of a discovery, as the testimony could be much more effectively obtained by examining all the parties having knowledge as witnesses under the provisions of the revised statutes.

In *Smythe v. Henry*, 41 Fed. Rep. 715, it is stated that the mere fact that statutes have conferred upon courts of law the power to compel parties to the record to testify as witnesses did not deprive a party in courts of the United States of the right of discovery in equity when seeking equitable re-

The court of chancery decreed payment of debt and by its process for obtaining discovery, it was enabled effectually to ascertain assets.

2 Spence, Eq. Jur. p. 579; Cary, p. 11.

A bill of this nature lies against third persons, for the discovery of moneys paid after notice of a sequestration.

Simmonds v. Kinnaird, 4 Ves. Jr. 735.

So it lies for a discovery of concealments of a bankrupt's estate.

Boden v. Dellow, 1 Atk. 289.

It lies also against assignees to discover a fraudulent bankruptcy to defeat the plaintiff's execution.

King v. Martin, *supra*.

Such a bill lies by the attorney-general against an outlaw, to discover his real and personal estate.

The Protector v. Lumley, Hardr. 22, Eq. Cas. Abr. 75.

Or by the patentee of the goods of a felon, or one outlawed.

Cary, 1, 21; *The Protector v. Lumley*, *supra*; 2 Fonblanque, Eq. p. 481.

Judgment creditors have a right to a discovery where the creditor's real or personal property is, in order to make their judgments available.

Mountford v. Taylor, 6 Ves. Jr. 792.

If A obtains a judgment against B, and takes out execution, and gets it returned, *nulla bona*, he may bring a bill against the defendant or any other, to discover goods or personal estate of B, and by that means to effect the same.

Balch v. Wastall, 1 P. Wms. 445; *Smithier v. Lewis*, 1 Vern. 899.

Here, such legal remedy not being as effectual as the equitable remedy.

In *Babbott v. Tewksbury*, 46 Fed. Rep. 86, where a bill of discovery was sought in equity for the purpose of ascertaining the amount of sales made by the complainant for the defendant, upon which the former was entitled to commissions, it was held, the remedy at law being complete, that under section 724 of the Revised Statutes of the United States, relief could be had without recourse to equity, and the court sustained the defendant's demurrer to the bill.

In an action brought upon an alleged oral agreement, to pay a commission on the capital stock of any companies formed, or caused to be formed for the use of certain patents, the court refused equitable relief by way of discovery, since the complainant had a plain, adequate, and complete remedy at law, and therefore under section 723 of the United States Revised Statutes, a suit in equity could not be sustained, and under section 724 he could require the production of the books and writings in the defendant's possession, containing evidence pertinent to the issue. *Babbott v. Tewksbury*, *supra*.

In *Heath v. Erie R. Co.*, 9 Blatchf. 319, it was stated that since the passage of the above act bill for discovery of facts resting in the knowledge of the opposite party was unnecessary, as such discovery could be obtained by an examination of the party.

Under the English practice.

In *Hunnings v. Williamson*, L. R. 10 Q. B. Div. 429, 52 L. J. Q. B. 400, 48 L. T. N. S. 382, 31 Week. Rep. 624, it was held that the provisions regarding discovery, contained in the supreme court of judicature acts and rules, were not intended to introduce

In the case of *Mitchell v. Burch*, 2 Paige, 606, 2 L. ed. 1049, 22 Am. Dec. 669, it is stated that independent of the statute the court had jurisdiction to compel a debtor, whose body is exempt from execution at law, to discover his property, so that it may be applied in satisfaction of his just debts.

Edgell v. Haywood, 3 Atk. 352; 86 Hen. VI. 36; Cary, 16.

Gaines, J., delivered the opinion of the court:

We are of the opinion that the district court was correct, and that the court of civil appeals erred in its ruling. Broad expressions of eminent text-writers would seem to sanction this proceeding. We think, however, the propositions announced by them are not supported by the cases cited, except in a restricted sense.

Mr. Freeman, in enumerating "the objects which may be accomplished by proceedings in equity to obtain satisfaction of a judgment at law," says: "(1) A full and complete discovery may be obtained of all the defendants' assets, and, when discovered, they may be compelled to contribute to the payment of the plaintiff's judgment." 2 Freem. Executions, § 424. A review of the cases cited by the learned author will show that none of them can be held a precedent for a general bill of discovery, like that under consideration. The first is *Cresswell v. Smith*, 8 Lea, 688. Its nature is shown by the following quotation from the opinion: "The bill must therefore be regarded as filed against the defendant Smith alone, and the

any novelty into the law concerning discovery, and that the parties were only entitled to discovery in accordance with the terms of the order in cases where, according to the law and practice in courts of law or equity, there would have been a right to discovery, previously to the judicature acts as it was not intended to enlarge or alter the scope of the right to discovery by Order 31 of the Judicature Rules.

In *Anderson v. Bank of British Columbia*, L. R. 2 Ch. Div. 644, 45 L. J. Ch. 449, 35 L. T. N. S. 76, 24 Week. Rep. 624, decided under Rule 2 of Order 31 of the Supreme Court of Judicature Act, it was held that although the discovery under such rule differed very little from the similar provision in the common-law procedure act, yet having regard to the general rule that the principles of equity were to prevail, there could be no doubt that the rules previously existing respecting discovery in the court of chancery were binding then upon all the courts.

Such order only applies in cases where discovery was obtainable before the act. *Hunnings v. Williamson*, *supra*.

In *Atty-Gen. v. Gaskill*, L. R. 20 Ch. Div. 519, 51 L. J. Ch. 870, 46 L. T. N. S. 180, 30 Week. Rep. 553, it was held that the right to discovery as it existed under the chancery practice was still in force, except not so far as to have been modified by the judicature act and general orders, and the plaintiff was now entitled, as he always was, not only to discovery of facts not in the knowledge of the plaintiff, or of facts which the defendant knows personally and which the plaintiff does not know, but he is also entitled to admissions if he can get them, so as to render it unnecessary to adduce evidence.

R. W.

question is, Can it, in this view, be maintained? The question is a new one in this state, so far as I know, and merits, as I think, a very careful consideration. It will be observed that it is not a bill for the purpose, merely, of compelling the defendant to discover generally whether he owns property, money, or effects for the payment of the debts, in the nature of a 'fishing bill.' It is true there is a prayer that the defendant be required to discover whether he owns any property or stock or choses in action, of any character; but the stating part of the bill points out specifically the property about which the discovery is specially sought, and states circumstantially the information upon which it is charged that the defendant owns the property. If the right to discovery and relief in this particular property can be maintained, then that the prayer of the bill is too broad would not be material. We think the prayer is too broad, but that part should be rejected." The opinion then proceeds to hold that the jurisdiction of the court to entertain the bill should be upheld as to the property specially pointed out by virtue of the authority conferred by a statute of the state. *Carter v. Hampton*, 77 Va. 631, was a bill brought by the creditor of a decedent against the administrators and heirs, to compel a discovery of assets belonging to the estate. *Thomas v. Adams*, 80 Ill. 37, and *Clarks v. Webb*, 2 Hen. & M. 8, are cases of the same character. It is well established that such a bill may be maintained, as we shall hereafter show. *Gordon v. Lowell*, 21 Me. 251, was a suit to set aside a fraudulent conveyance of certain property, specifically described, and to subject it to the payment of the complainant's debt. *Lore v. Gelsinger*, 7 N. J. Eq. 191, was a bill filed under the provisions of the New York statute. *Miers v. Zanesville & M. Turnp. Co.*, 11 Ohio, 278, was a proceeding against a corporation for the discovery of assets, and specifically pointed out the assets in reference to which the discovery was sought. Among other things, it sought to subject unpaid subscriptions to the capital stock to complainant's debt, which is a well-recognized ground for equitable interference. *Cadwalader v. Granville Alexandrian Soc.*, 11 Ohio, 298, was a suit to subject the defendant's interest in a specific tract of land upon the ground that the interest was equitable, and not subject to sale under execution. *Goss v. Lenter*, 1 Wis. 48, was an action to set aside fraudulent conveyances. *Hacker v. Robeson*, 8 R. I. 141, was a bill filed by certain creditors against the assignees of their debtor to recover a surplus of assets in their hands, and for an account. It gives no countenance to the proceeding in the present case. *Hendricks v. Robinson*, 2 Johns. Ch. 288, 1 L. ed. 390, was a suit to set aside certain fraudulent conveyances, specifically described. We fail to see that *Kimberly v. Sells*, 8 Johns. Ch. 467, 1 L. ed. 686, also cited by Mr. Freeman, has any application whatever to the doctrine announced by him: In *Botten v. Dellow*, 1 Atk. 289, the bill was filed by the assignees of a bankrupt suspected of having concealed his assets, against himself and certain relatives, to compel a

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discovery. The cases involved both fraud and trust, and the proceeding was probably specially authorized by statute. The report of the case is very meager. The case of *Le Roy v. Rogers*, 3 Paige, 284, 3 L. ed. 132, would be authority in support of the petition in the present case, were it not for the fact that at that time the statutes of New York expressly authorized the proceeding. A careful reading of the opinion will show that it involved the construction of a statute.

Mr. Pomeroy says: "Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual, as for the discovery of assets," etc. 3 Pom. Eq. Jur. § 1415. In support of this proposition, some of the authorities already reviewed are cited. The additional authorities we will now proceed to consider. *Hadden v. Spader*, 20 Johns. 554 (same case, under name of *Spader v. Davis*, 5 Johns. Ch. 280, 1 L. ed. 1083), was a suit by judgment creditors against their debtors and their assignees of a stock of goods alleged to have been fraudulently transferred to him by such debtors, to subject the goods, or their proceeds, to the payment of the judgment. A discovery was prayed, and, answers having been filed, the case was discussed and determined upon the question of the right to subject the proceeds of the property to the payment of the debt. *Bay State Iron Co. v. Goodall*, 39 N. H. 228, 75 Am. Dec. 219, was a case like the present. But it is apparent from the opinion that there was a statute of the state of New Hampshire which authorized the proceeding, although the court says the remedy existed in equity without the statute. The main authority cited to support the last proposition is *Le Roy v. Rogers*, *supra*, which, we have seen, was a proceeding under the revised statutes of the state of New York. In *Trego v. Skinner*, 42 Md. 427, the complainant, a judgment creditor, sought to subject real estate alleged to have been paid for by his debtor, and to have been conveyed to his wife, to the satisfaction of his judgment. A discovery was also prayed as to other assets fraudulently concealed by the debtor, and by a firm of which he was a member. The court held that a demurrer to the bill was properly overruled. The bill was certainly good in part, and the decision of the court was correct. The expressions in the opinion show that the court were also of the opinion that the bill was good as to the discovery, but for this they cite no authority.

In Bispham on Equity, p. 572, in speaking of creditors' bills, it is said: "They may also be made use of for the purpose of obtaining discovery of the debtor's property." The only case cited in support of the text is *Newman v. Willets*, 52 Ill. 98, which was merely a proceeding to set aside a fraudulent conveyance of certain real estate belonging to the debtor, and to subject it to the payment of the complainant's debts.

In the latest edition of Story's Commentaries on Equity Jurisprudence it is to be noted that the editor, in a note, says "that a creditor who has exhausted his remedy at law may maintain a bill for discovery of assets

and relief." 3 Story, Eq. Jur. 18th ed. § 1498, citing *Treadwell v. Brown*, 44 N. H. 351. We have already seen that the remedy was authorized by the statutes of New Hampshire. The text of the work, so far as we have been able to see, does not lay down that doctrine; and it is a little remarkable that, if the court of chancery had authority to entertain a bill by a judgment creditor merely to discover the assets of his debtor, so important a doctrine should have escaped the scrutiny of that able and learned commentator.

Turning to the English authorities, we find in Spence's *Equitable Jurisdiction of the Court of Chancery* a section upon the subject of "Suits in Chancery by Creditors," in which the author says: "The jurisdiction of the ecclesiastical court being, as before mentioned, defective, in the case of creditors, rendered it necessary to resort to the court of chancery, which court required, not only the executor or administrator to swear to his account, but, supplying the defects of the ecclesiastical law, allowed the creditor to contest it. The court also decreed payment of the debt, where there were assets, and which the court of chancery, by its process for obtaining discovery, was enabled effectually to ascertain. Suits of this description, and proceedings upon them, are found in the calendars from the reign of Edward VI. downward. The court was necessarily resorted to in order to recover merely equitable demands, as where a creditor sought to enforce an equitable security not giving any legal title, and on which, therefore, there was no remedy at law, or when the debtor had conveyed or devised his property in special trust for the payment of his debts." 2 Spence, Eq. Jur. 580. In *Adams' Equity*, also, the doctrine of the right of the creditor of an estate to file a bill in the court of chancery to compel the executor or administrator to disclose the assets is distinctly recognized. *Adams*, Eq. 257. But neither of these authors anywhere recognize the right of a judgment creditor to compel his debtor, by a bill of discovery, to make a disclosure of the property owned by him. We have been cited to no English case in which the court of chancery ever exercised such a jurisdiction, and we have found none; and it may be doubted if there be any well-considered case in the American courts in which a discovery of that character has been compelled, in the absence of a statute conferring the authority.

Every original bill in equity, according to the practice of the court of chancery, is a bill of discovery. Story, Eq. Pl. § 811. They are usually bills of discovery and relief; that is to say, they pray the court to grant some relief, and as an aid thereto they seek to purge the conscience of the defendant, in order to establish some fact necessary to be proved as a basis for the decree. But a bill for discovery, merely, does not pray a decree. It is brought in aid of a pending action at law, or of a suit at law to be brought, in order to procure evidence. *Judge Story* says: "The bill should set forth the particular matters to which the discovery is sought, for the other party is not bound to

make answer to vague and loose surmises. On this account, when a bill of discovery was brought by an executrix, stating generally that a demand had been made upon her, as executrix, by the defendant, which she had refused to pay, and he had sued her therefor, and that the executrix knew nothing of the demand, of her own knowledge, but believed it to be unjust, because the defendant took no measures to liquidate it in the testator's lifetime, and did not produce any vouchers, and that she could not, without a discovery of all the facts, safely proceed to a trial at law in the suit, and prayed a discovery, it was held that the bill was bad, and a mere fishing bill, amounting only to a statement that the executrix was sued at law, and did not show for what, and therefore asked a discovery beforehand, although she had reason to conclude that the suit was upon some groundless pretense." Story, Eq. Pl. § 825.

The petition in the present case, although it has the semblance of great particularity, is, in effect, as general as it is possible to make it. It seems to us to amount to no more than an allegation that the defendants have concealed or covered up, somewhere, some assets, legal or equitable, subject to be applied to the satisfaction of plaintiffs' judgment, which they have been unable to discover. The authorities we have considered indicate to our minds that such a proceeding was not allowable under the English equity practice. It is provided for by statute in many of our states, and many cases may be found where the jurisdiction was exercised by virtue of such statutes. Bills against executors for a discovery of assets, and against assignees for account and discovery, were frequently entertained in the court of chancery. These all involved a trust. In cases of fraudulent conveyances, equity will extend its aid to the creditor, by entertaining a bill against the proper parties, which points out the property, and specifies the particulars in which the fraud consists, and will, as in all other cases, grant a discovery, as ancillary to the action. In this case there is no trust. There is the simple relation of debtor and creditor. The bill alleges a surmise of fraud, but specifies none. *Cronin v. Gay*, 20 Tex. 460, was a case somewhat like this. The court, in its opinion, characterized the proceeding as anomalous, and held that the suit could have been properly dismissed without motion or demurrer. The court also says: "Our statute has prescribed a mode of discovery as auxiliary to a suit, but not as an independent remedy, disconnected from a regular suit." This remark was pertinent to the question before the court, if not indispensable to its decision. In *Love v. Keowne*, 58 Tex. 191, *Mr. Justice Bonner* says: "Although a bill of discovery, technically so called, and known in equity practice, is not known to our practice, yet we have a statute which is intended to answer the same purpose. . . . In *Cronin v. Gay*, 20 Tex. 460, it is decided that the statute prescribes this mode of discovery as auxiliary to a regular suit, but not as an independent remedy disconnected from such suit." Our

statutes have largely extended the legal remedies of judgment creditors, as recognized at common law. Under execution they may levy upon and sell the interest of the defendant, whether legal or equitable, in both his real and personal property. They may subject, by process of garnishment, his choses in action, and his shares in incorporated companies, to the satisfaction of their judgment. But we have held that equity will not aid in the writ of garnishment. *Noyes v. Brown*, 75 Tex 458. In *Price v. Brady*, 21 Tex. 614, it was decided that promissory notes could only be subjected to the payment of a judgment by a writ of garnishment served upon the makers; that they could not be sold under execution; and that, therefore, an agent holding them for collection could not be made liable by the writ of garnishment. And it seems to us the general trend of our decisions is to confine creditors to their statutory remedies, and not to aid them in a court of equity, except in cases of trusts and frauds. Our courts will, at the instance of a creditor, set aside a fraudulent conveyance of a debtor, so as to subject the property to sale under execution, and to enable the creditor to realize at such sale a fair price. But this court has never countenanced a proceeding to make the debtor apply his assets to the payment of a judgment against him, or to compel him to disclose his assets so that an execution may be levied, or a writ of garnishment served, to reach them; and we are of opinion that, in the absence of a statute conferring authority for the proceeding, it should be held that none exists. Many of the states have statutes authorizing bills of discovery in cases like the present. It is in the power of our legislature to make such a law, and it must be left to its wisdom to determine whether or not it is proper to confer this inquisitorial power upon the courts of the state.

For the reasons given the judgment of the Court of Civil Appeals is reversed, and that of the District Court is affirmed.

A petition for rehearing was subsequently filed in response to which on February 5, 1894, *Gaines, J.*, on behalf of the court delivered the following opinion:

Counsel for defendants in error, in support of their motion for a rehearing in this case, have filed an able and learned argument, supported by an ampler citation of authority than was contained in their original brief. At the time the former opinion was delivered, the text-books exclusively devoted to the law of "Discovery" were not at our command. This probably arose from the fact that it was thought that the rules in regard to discovery had been substituted by statutory enactment, and that the learning upon the subject had become, in a measure, obsolete. Since the filing of this motion, we have procured the authorities necessary to enable us to make an exhaustive examination of the question, with the result that we deem it proper to modify some of the expressions in the former opinion, without changing our disposition of the case.

In *Hare on Discovery* (chap. 5, § 1, p. 80), it is laid down that a discovery is given only in aid of some trial. But in a succeeding 24 L. R. A.

section (sec. 8, p. 84) that author says: "There are some early cases which appear opposed to the rule which has been stated in the preceding sections,—that a discovery will only be given to be used as evidence at a trial." The text is mainly predicated upon a case in Cary's Reports (page 21), the name of which is not given; upon *The Protector v. Lumley*, Hardr. 22; and upon *Mountford v. Taylor*, 6 Ves. Jr. 788. *The Protector v. Lumley*, and the case in Cary were bills for the discovery of the goods of an attainted felon, which had been forfeited to the crown in the one case, and for the goods of an outlaw, which had been forfeited to the commonwealth, in the other. The origin and nature of that jurisdiction is explained by Reeves, in his *History of the English Law*, as follows: "A grant was made, by letters patent, of goods forfeited by a person attainted. The grantee brought his bill in chancery against the person who had possession of them, for this reason: That as the king could not have an action at law for the goods of an outlaw, or one attainted, before they had been seized for the king's use, or found by a matter of record, much less could the grantee, without having had the possession. Accordingly, it was held the subpoena was his only remedy; and the defendant was ordered to exhibit an inventory of the things the next day, on pain of being committed to the Fleet." 2 Reeves, *Hist. Eng. Law*, 602. In *Mountford v. Taylor*, Lord Eldon granted a discovery in aid of an elegit; but, from the report of the case, we have but little doubt in our minds. In 1 Eq. Cas. Abr. 182, the case of *Taylor v. Hill* is thus reported: "The plaintiff, having recovered judgment against J. S. (but no writ of execution sued out), supposing some particular effects of J. S. to be in defendant's hands, brought a bill to discover them, in order to subject them to his judgment. The defendant demurs because there is no equity to compel such a discovery, and no such bill would lie against the debtor himself,—much less against a third person. My lord keeper seemed to agree it would not lie against the debtor himself, nor to have a general discovery from a third person, but only for particular things, as this bill was, and overruled the demurrer." This would seem to indicate that the court was of opinion that no bill of the character would lie, except to discover property specifically described, though it admits of the construction that the demurrer may have been urged upon the ground that no execution had been sued out. We note, in this connection, that the bill was very similar to the petition in *Cronin v. Gay*, 20 Tex. 460, in which it was held, expressly, that bills of discovery had been abolished in this state.

These authorities seem to us to leave the matter in doubt; and there, as an original question of equity jurisdiction, we are content to leave it. We have commented upon the cases merely for the purpose of modifying our former opinion in so far as the intimation may be drawn from it that no case can be found in the English courts which gives color of authority to the proceeding instituted in this case. If the courts of equity in England

ever entertained bills of discovery of this character, and if the jurisdiction became incorporated into our system of jurisprudence by the adoption of the common law, we are still of opinion that it is no longer the law of this state. Neither the decisions of the English courts upon the effect of their statutes, which allow a discovery in the courts where the suits are pending, nor the decisions of the courts of other states upon similar statutes, can be taken as a guide, in determining the effect of our own laws upon the subject. There is an apparent conflict of authority in our state courts. Some hold merely that statutes which permit the parties to testify, or which allow interrogatories to be filed to the opposite party, do not take away the jurisdiction of courts of equity to compel a discovery. *Shotwell v. Smith*, 20 N. J. Eq. 79; *Elliston v. Hughes*, 1 Head, 225; *Russell v. Dickeschied*, 24 W. Va. 61; *Cannon v. McNab*, 48 Ala. 99; *Milleaps v. Pfeiffer*, 44 Miss. 805.

In all of these states the separate jurisdiction of the law and equity courts is maintained. The contrary is held in Missouri, where the courts exercise both law and equity jurisdiction (*Bond v. Worley*, 26 Mo. 253), and in *Hurd v. Dutchess County Bank*, 1 Morris (Iowa), 291; *Riopelle v. Doellner*, 26 Mich. 102,—where the jurisdictions were separate. See also *Heath v. Erie R. Co.* 9 Blatchf. 317.

Not only were law and equity blended into one system of jurisprudence by our statutes at the same session of the congress of the re-

public at which the common law was adopted, but at the same time a system of procedure was established which is borrowed from the practice both of the courts of law and those of equity, as recognized at common law. Writs peculiar to courts of equity were prescribed for by statutory regulation, and at an early day provision was made by statute for the perpetuation of testimony, and for the discovery of evidence, in a pending suit, by simply filing interrogatories to the opposite party, the answers to which had the effect of an answer under oath to a bill in equity. At a later day it was provided, as a cumulative procedure, that either party to a suit could take the deposition of the adverse party. The effect of our statutory system was passed upon in *Cronin v. Gay*, *supra*, and it was held that bills of discovery were thereby abolished. This decision was doubtless well known to the able lawyers who compiled our revised statutes, and yet all the provisions of the old statutes in regard to the law of evidence were incorporated in that revision without change. See Report of Commissioners, 2 Sayles' Civ. Stat. p. 726. When the legislature re-enacts a statute which has been construed by the courts, the presumption is that it intended that the new enactment should receive the same construction as the old. The rule is universal, and is conclusive of the question under consideration. If, however, the question were one of first impression, we see no good reason which would impel us to a different conclusion.

The motion for a rehearing is overruled.

CALIFORNIA SUPREME COURT (In Banc).

Ex parte SING LEE.

(96 Cal. 364.)

Constitutional authority to make and enforce all such police, sanitary, and other regulations as are not in conflict with general laws does not justify a municipality in prohibiting the maintenance of a public laundry in any except two designated blocks of the town without a license to be granted only on obtaining the written consent of the owners of a majority of the real estate in the block where the business is to be conducted and in the four surrounding blocks.

(October 6, 1892.)

APPPLICATION for a writ of habeas corpus to procure the release of petitioner from the custody of the marshal of the town of Chico, to which he had been committed for the alleged violation of a municipal ordinance regulating the laundry business. *Petitioner discharged.*

The facts sufficiently appear in the opinion. **Mr. F. C. Lusk** for petitioner.

Messrs. William H. Schooler and W. H. H. Hart, Atty-Gen., for respondent.

De Haven, J., delivered the opinion of the court:

The petitioner was, at the date of the issuance and service of the writ of habeas corpus herein, restrained of his liberty by the marshal of the town of Chico, upon a charge of having violated section 1 of a certain ordinance of that town, "in that he did . . . unlawfully establish, maintain, and carry on the business of a public laundry . . . without having first obtained a written permit from the board of trustees of said town to establish, maintain, and carry on such public laundry." It is claimed by the petitioner that the section of the ordinance which he is charged with violating is unconstitutional, and that, therefore, his imprisonment is illegal. For the purpose of passing upon the question thus presented, it is only necessary to consider sections 1 and 2 of the ordinance referred to. They are as follows: "Section 1. On and after the passage of this ordinance it shall be unlawful

NOTE.—The delegation of municipal power as to license, franchises, and buildings is the subject of annotation with the case of *St. Louis v. Russell* (Mo.) 20 L. R. A. 721. It will appear from that note that the distinction taken in the present case be-

tween an inoffensive business of the ordinary kind and a kind of business which is in itself offensive or subject to police regulation has been quite generally acted upon in deciding the lawfulness of conditions as to consent of property owners.

for any person or persons to establish, maintain, or carry on the business of a public laundry or public washhouse, where clothes or other articles are cleaned for hire, within the corporate limits of the town of Chico, except in block No. twenty-four (24) and block No. ninety-six (96) of said town, according to the official map thereof on file in the recorder's office of Butte county, Cal., without first having obtained a written permit from the board of trustees to establish, maintain, or carry on such public laundry or public washhouse. Sec. 2. No permit shall be granted by said board of trustees, unless the person or persons so applying for the same shall have first obtained the written consent of a majority of the real property owners within the block in which it is proposed to establish, maintain, or carry on such public laundry or public washhouse, and also of the four blocks immediately surrounding the block in which it is proposed to establish, maintain, or carry on such public laundry or public washhouse."

It is provided by section 11 of article 11 of the Constitution of this state that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws;" and it is argued here in behalf of respondent that the ordinance in question is a police regulation, and therefore one which the town of Chico was authorized to enact by this section of the constitution. The power conferred upon cities and towns by the section just quoted is undoubtedly a very broad and comprehensive one, and would sustain the enactment of any ordinance having a reasonable tendency to promote the health, the comfort, safety, and welfare of the municipality, and which would not be in conflict with some general law of the state. But, broad as is this power, the ordinance before us cannot be considered as falling within the limits of its proper exercise.

The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity; and no municipal corporation has the power to make the right of a person to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, as is attempted in the ordinance under review. A town or city may, when deemed necessary for the public health or safety, adopt reasonable regulations as to the manner in which such a business shall be conducted, and for this purpose may, in the exercise of its police power, impose reasonable restrictions as to the kind of building which may be used for such purposes, as, for instance, that it shall be of brick or stone in large and closely-built cities, and that it shall have sufficient drainage, and may prescribe within reasonable limits the hours during which the work of the laundry shall be suspended. *Ex parte Moynier*, 65 Cal. 36; *Barbier v. Connolly*, 113 24 L. R. A.

U. S. 27, 28 L. ed. 923; *Soon Hing v. Crowley*, 118 U. S. 703, 28 L. ed. 1145.

Regulations such as these were held in the cases above cited to be merely police regulations, which any municipality possessed of the ordinary powers of such corporations may exercise with a view to promote the health and safety of the community. But the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety. The sections of the ordinance above quoted bear no kind of relation to such objects, and do not attempt to regulate the business mentioned with the view of accomplishing such ends, but they commit the right to carry on such business at all, in all but two blocks of the town, to the unrestricted will and caprice of a majority of the real property owners within the block within which it is proposed to establish such laundry, and of the four blocks immediately surrounding such block. Such a condition imposed upon the right of a person to maintain a public laundry is not only an unauthorized interference with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose. The personal liberty of the citizen and his rights of property cannot be thus invaded under the disguise of a police regulation. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. In the case of *Pick Wo v. Hopkins*, 118 U. S. 373, 30 L. ed. 227, the Supreme Court of the United States had before it the question of the validity of an ordinance of the city and county of San Francisco, which made it unlawful for any person to "carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." This provision of the ordinance was in that case held void, as conferring upon the municipal authorities an arbitrary power to give or withhold consent to the carrying on of such business in buildings not made of brick or stone. In passing upon that question the court, speaking by *Mr. Justice Matthews*, said: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom this consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are

tenants at will, under the supervisors, of their means of living."

The ordinance now before us is not less illegal and arbitrary in its provisions, as it makes the right of the trustees to grant permission to carry on a laundry outside of the two blocks dependent entirely upon the consent of a certain number of property owners who are not accountable to any one for their action, and who are not required to give or have any other reason for their refusal to give such consent than their mere will. It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in all civilized communities, cannot be thus made to rest upon the caprice of a majority or any number of those owning property surrounding that which he desires to use. An ordinance in all respects similar to this was held unconstitutional in the *Laundry Ordinance Case*, 7 Sawy. 528, 13 Fed. Rep. 229, and it was there said by the court: "In the business of a laundry there is nothing objectionable that may not be urged against all occupations in the city and county. If, therefore, the supervisors can make its prosecution depend upon the approval of others in its neighborhood, they may require a similar approval for the prosecution of other business equally inoffensive."

Such a restriction upon the freedom of the pursuit of a lawful occupation is not authorized by any power vested in the board of supervisors, and it may be doubted whether it could be authorized by any legislative body under our form of government." There is a wide distinction between the ordinance in this case and that which was upheld by this court in *Ex parte Christensen*, 85 Cal. 213. This ordinance deals with an occupation which is harmless in itself and useful to the community, while the other was sustained as a police regulation of a business in which the citizen has no inherent right to engage, but which may be prohibited altogether, or only permitted under such conditions and restrictions as will, in the judgment of the lawmaking power, limit to the utmost the evils which often attend it.

Petitioner discharged.

We concur: *Beatty, Ch. J.; Sharpstein, J.; Garoutte, J.; Paterson, J. McFarland, J.:* I concur in the judgment.

(Department 2).

Henry WITTENBROCK, *Appt.*,

v.

John A. PARKER *et al.*

(.....Cal.....)

1. Knowledge acquired by one member of a firm of lawyers obtained while trans-

NOTE.—For notice imputed by reason of an agent's knowledge, see *Akers v. Rowan* (S. C.) 10 L. R. A. 705, and *note*; *Constant v. University of Rochester* (N. Y.) 2 L. R. A. 784, and *note*; *McGurk v. Metropolitan L. Ins. Co.* (Conn.) 1 L. R. A. 883, and *note*.

As to effect of knowledge of subagents, see 24 L. R. A.

acting business of the firm and relating thereto is constructive notice to the other members of the firm.

2. The constructive notice to one attorney of knowledge of his partner of matters pertaining to the firm business does not extend to a distinct transaction at a subsequent time in which he is acting for a different client.

(March 29, 1894.)

APPEAL by plaintiff from a decree of the Superior Court for Tehama County in favor of defendants and from an order denying motion for a new trial in a suit brought to have a satisfaction of mortgage set aside and canceled. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. Armstrong & Platnauer and P. H. Coffman for appellant.

Messrs. A. L. Hart, S. Solon Holl, Robert T. Delvin, and Isaac Josephs for respondents.

Searls, C., filed the following opinion:

This was an action by Henry Wittenbrock, as plaintiff, to have a satisfaction of a mortgage set aside and canceled, and to foreclose said mortgage, which was executed by the defendant John A. Parker. Defendants Bithell and Harlow were made defendants, and set up mortgages in their favor, which, by the decree of the court were adjudged valid and subsisting against the defendant Parker, and the liens thereof prior to the lien of plaintiff's mortgage. Plaintiff appeals from the decree, and from an order denying a motion for a new trial.

The following facts illustrate the important question in the case: Plaintiff's mortgage was executed May 22, 1885, by the defendant John A. Parker, upon certain real property in the county of Tehama to secure the payment of his certain promissory note for \$6,000, and interest, payable two years after date to the Union Building & Loan Association or order. The mortgage was duly recorded May 23, 1885. L. S. Taylor and S. Solon Holl were attorneys at law and copartners under the firm name of Taylor & Holl, and engaged as such firm in the practice of law in all its various branches, including the examination of land titles, giving opinions as to the validity thereof, and drawing deeds, mortgages, assignments, and other instruments in writing. In February, 1888, the note of Parker was due and unpaid, and the Union Building & Loan Association was pressing him for payment, whereupon L. S. Taylor, the senior member of the firm of Taylor & Holl, at the request of Parker, negotiated with plaintiff for the purchase by him of said note and mortgage, and to grant further time for the payment thereof. To this plaintiff agreed, and in February, 1888, the holder of the note and mortgage, in con-

Bates v. American Mortg. Co. of Scotland (S. C.) 21 L. R. A. 340, and *note*.

As to effect of knowledge of insurance agent in respect to falsity of statements in application, see *Clemans v. Supreme Assembly Royal Soc. of Good Fellows* (N. Y.) 16 L. R. A. 83, and *note*.

sideration of \$7,000, which plaintiff paid, assigned to him, the said plaintiff, the note and mortgage. This assignment was drawn by Taylor, and at his request recorded March 5, 1888. Holl knew nothing of the assignment. On or about October 4, 1888, John A. Parker, the maker of the note and mortgage, had contracted to sell a portion of the mortgaged premises, and applied to plaintiff through said Taylor for a release of the lien of his mortgage upon the land to be sold upon his payment of \$4,000 upon the note, the mortgage to remain upon the residue of the land as security for the balance due on the note. Plaintiff agreed to this, and said L. S. Taylor then prepared a release, which he represented to plaintiff and Parker was a release of the land to be sold, and plaintiff, believing this to be true, executed and acknowledged the release, but which in fact was, as the court finds, by mistake and inadvertence so drawn as to read "that said mortgage was fully paid and satisfied." Plaintiff did not himself read the release, but took the statement of Taylor that it was all right. This release came into the hands of W. F. Huntoon, at whose request it was duly recorded on the 22d day of October, 1888. The copartnership between Taylor and Holl was formed January 1, 1885, prior to which time Taylor had been an attorney for plaintiff and defendant Parker; his services consisting mainly in preparing deeds, mortgages, assignments, and releases, and examining abstracts. That, after the formation of said copartnership, plaintiff and Parker continued to employ his services in like manner, and his partner, Holl, who occupied a separate office or room, knew little or nothing of their business, and knew nothing of the mortgage in question, its assignment, or the release thereof, or of any of the agreements relating thereto, nothing in relation thereto having been in fact imparted to him. For some years prior to 1888 defendant Bithell was accustomed to loan money on real-estate security, and was accustomed to require the borrower to furnish an abstract of title to the land offered as security, and to submit such abstract to an attorney selected by him, the said defendant, and to pay said attorney for his opinion as to title, and for preparing mortgages, etc., where the loans were consummated. Bithell had for some years selected S. Solon Holl as the attorney to examine and report upon titles in all such cases, and to prepare all necessary papers, to which said Holl gave his individual attention. On the 24th day of October, 1888, defendant John A. Parker applied to defendant Bithell for a loan of \$6,000, and offered real estate as security therefor. Bithell applied to Holl to examine the abstract of title of the real estate offered, and to prepare notes and mortgages if he approved the title. The title was approved by Holl, and the notes and mortgages prepared and executed by Parker on the same day, and the money, \$6,000, was then and there received by said Parker. The mortgages, four in number, covered the property mortgaged to plaintiff. Neither Bithell nor Holl knew of the plaintiff's mortgage, or the assignment or release thereof, except

24 L. R. A.

as shown by the abstract, and had no actual notice or knowledge of any mistake in the release. The record showed plaintiff's mortgage to have been released. Holl advised Bithell that the land was clear of incumbrance, and Bithell relied upon and acted upon this belief in making his loan, and neither he nor Holl had in fact any information as to the mistake in plaintiff's release until January, 1891.

Upon this state of facts the question arises, Had Bithell such constructive notice of the mistake in the release of the mortgage of plaintiff that the lien of his own mortgages upon the same land was postponed and rendered subject and subordinate to that of plaintiff under his mortgage, so by mistake released? Taylor and Holl being engaged as copartners in the practice of the law, including business of the character transacted for the several parties to this controversy, the knowledge acquired by one member of the firm, obtained while transacting such business and relating thereto, was constructive notice to the firm as to such knowledge. An attorney is an agent for his client within the scope of his employment, and two or more attorneys practicing together as copartners are joint agents as to the business transacted for their clients as such copartners. Notice to one of two or more joint agents is notice to all. *Wade, Notice*, § 681; *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 127, 8 L. ed. 372; *North River Bank v. Aymar*, 8 Hill, 262; *Bank of U. S. v. Davis*, 2 Hill, 451; *National Secur. Bank v. Cushman*, 121 Mass. 490. Like other copartners, each is at the same time a principal and an agent for all the others.

The important branch of the question relates to the situation of defendant Bithell as affected by the knowledge imputed to Holl, who was his attorney and agent in passing upon the abstract of title to the land and in preparing the mortgages. We say he was the attorney and agent of Bithell in the transaction, because he was employed by him, and it was to and for him the services were rendered, and the fact that his employer required the mortgagor to furnish an abstract and pay Holl for his services did not constitute him the attorney of the latter. The burden cast upon the mortgagor of paying for the services of the attorney selected by Bithell to guard his interests was simply a condition of the loan, and did not alter the status of such attorney, or diminish the duty or responsibility which he owed to his employer. Holl was, then, the agent of Bithell. It was not a general and continuing agency, extending to a range as comprehensive as the functions of an attorney, but limited to the particular business in hand, for the transaction of which he was specially employed. It is not sought to charge Bithell with any actual notice of plaintiff's mortgage or of any knowledge of facts to put him upon inquiry as to the mistake in its satisfaction or cancellation of record. The case turns upon the point of the constructive notice to the principal of the facts within the knowledge of the agent. This question presents a broad field of inquiry. A somewhat careful exam-

ination of its several phases awakens a desire to discuss it at length, and to review some of the many authorities converging and diverging in relation to its several branches, but economy of time and space forbids, and I content myself with a concise statement of what seem to be the settled propositions on the subject, so far as applicable to this case, which may be briefly stated thus: A principal is bound by the knowledge of his agent, and will in law be deemed to have constructive notice of such knowledge. In order to thus bind the principal by knowledge possessed by the agent, it is, as a general rule, essential that the information "be obtained by or imparted to the agent while he is in fact acting as agent,—while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent." Pom. Eq. Jur. § 670. Within these limits and to this extent there has been but little divergence of opinion on the part of the courts, either in England or this country, and the doctrine is elementary. *Connelly v. Peck*, 6 Cal. 348; *May v. Borel*, 12 Cal. 91; *Stanley v. Green*, Id. 148; *Hunter v. Watson*, Id. 363, 78 Am. Dec. 548; *Bierce v. Red Bluff Hotel Co.* 81 Cal. 161; *Donald v. Beale*, 57 Cal. 399; *Watson v. Sutro*, 86 Cal. 500.

It is the duty of an attorney at law, or other agent, to communicate to his client or principal whatever information he acquires in relation to the subject-matter involved in the transaction, and he will be presumed to have performed his duty in that respect; and notice to him is constructive notice to his client or principal. *Bierce v. Red Bluff Hotel Co. supra*; *The Distilled Spirits*, 78 U. S. 11 Wall. 856, 20 L. ed. 167; *Watson v. Sutro, supra*. The facts constituting knowledge, or want of it, on the part of the agent, are proper subjects of proof, and are to be ascertained by testimony as in other cases; but, when ascertained, the constructive notice thereof to the principal is conclusive, and cannot be rebutted by showing that the agent did not in fact impart the information so acquired. *Watson v. Sutro, supra*. In the present case it does not appear that Holl, who acted as the attorney of Bithell, acquired any knowledge in relation to plaintiff's mortgage, or the mistake in its satisfaction, during the time he was engaged in effecting the Bithell loan. Whatever notice he had of the mistake in such satisfaction of plaintiff's mortgage, if any, was constructive and previously obtained. There is abundant authority to the point that notice to an agent, to be notice to his principal, must be given to him while acting in the course of his employment. *Weisser v. Denison*, 10 N. Y. 68, 41 Am. Dec. 781; *Doe v. Ingersoll*, 11 Smedes & M. 249, 49 Am. Dec. 57; *Russell v. Sweeney*, 22 Mich. 235; *Smith v. Dunton*, 42 Iowa, 48; *Goodwin v. Dean*, 50 Conn. 517; *Pringle v. Dunn*, 87 Wis. 449, 19 Am. Rep. 772. Lord Hardwicke, in discussing this rule, remarked that a different rule "would make purchasers' and mortgagees' titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." In

Trentor v. Pothen, 46 Minn. 298, Mitchell, J., in referring to the question, expresses like views in the following language: "If a party who employs an attorney for the special purpose of examining an abstract, and passing upon the record title, is to be charged with notice of all knowledge which the attorney may have previously acquired from other transactions for other parties, it would be very dangerous to employ an attorney at all for any such purpose; and the one whom it would be most dangerous to employ would be the attorney having the most experience and the most extensive practice." The authorities in this state have, so far as observed, confined the limits of constructive notice to the bounds hereinbefore stated. It must be admitted, however, that the rule has in many instances and by eminent jurists been extended so as to deem the principal to have constructive notice of information acquired by the agent prior to and independent of the scope of the agency. A synopsis of the rule, as thus indicated, taken from the syllabi of *The Distilled Spirits*, 78 U. S. 11 Wall. 856, 20 L. ed. 167, indicates fairly well the result of the reasoning of the court in that case: "The rule that notice to the agent is notice to the principal applies, not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence." Pom. Eq. Jur. § 672, states the general rule to be limited by cases in which the transaction in question closely follows, and is intimately connected with, a prior transaction in which the agent was also engaged, and in which he acquired material information, or where the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory in the second transaction; then such information operates as constructive notice to the principal in such second transaction. The same author adds that, "while this particular rule is settled by a strong array of authorities, the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits."

It seems conceded on all hands that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the agent, at the time of the second transaction, is necessary in order to bind the principal in such second transaction by constructive notice of the prior information of the agent. Conceding, then, this enlargement of the rule of notice, which in a few cases may prove a salutary one, but which needs to be closely guarded to prevent injustice from the difficulty and uncertainty which must attend its application, and it is not perceived how appellant's case is strengthened. The constructive notice to a principal comes from information—knowledge—possessed by his agent. Holl, as the attorney and agent of Bithell, had no knowledge or information to put him upon inquiry

as to the prior mortgage of plaintiff, its assignment, or the mistake in its satisfaction. His only information was that furnished by the abstract and satisfaction, all of which showed the property clear of incumbrance. Constructive notice to the principal springs from actual knowledge, or such information as should awaken inquiry in a reasonable man, imparted to or acquired by the agent. The reason of the rule is that the agent has acquired knowledge which it was his duty to impart to his principal, and the presumption is that he has performed that duty. The knowledge of the agent is a prerequisite to the presumption, and, where the former fails, the latter has no application. The knowledge which Taylor possessed that plaintiff's mortgage was not to be satisfied in full, and which constructively bound his law partner, Holl, applied to their then principal, the plaintiff, and to their liabilities to each other. When Holl came to act in another capacity for a new principal and in a different matter, the notice to him which constructively bound such new principal was actual notice, founded upon knowledge or information which it was in his power to impart, the facts constituting which it was necessary to prove, and which, when proven, would raise an irrebuttable or conclusive presumption against such principal. The evidence and findings show that the mistake in the satisfaction of plaintiff's mortgage was a separate and distinct transaction, and that, so far from being in the mind of the attorney, Holl, at the date of the execution of the Bithell mortgage, he had not previously been aware of any fact in the matter, and did not become aware of the mistake in satisfying plaintiff's mortgage for many months thereafter. The case presented is this: Plaintiff and Bithell are both innocent parties. Plaintiff had a prior mortgage, which he, by mistake, satisfied in full without reading the satisfaction. This was negligence on his part, and, as one of two innocent parties must suffer as a consequence of such negligence, it is equitable and just that the loss should fall upon the plaintiff, by whose negligence the mishap was brought about. *Schulte v. McLean*, 98 Cal. 856; *Somes v. Brewer*, 2 Pick. 201, 18 Am. Dec. 406; *Mundorf v. Wickersham*, 63 Pa. 87, 8 Am. Rep. 531; Civil Code, § 3543.

The argument of appellant directed to the allegations of the pleadings, and the issues formed thereby, does not call for special notice, for the reason that, so far as any doubt is left as to the matters discussed, it is upon questions not going to the merits of the case.

The several objections made to the introduction of evidence, and the errors assigned upon the rulings relating thereto, do not require special notice, beyond the remark that, as between plaintiff and Bithell, they involved no error, and, as between them, the judgment and order appealed from should be affirmed. G. W. Harlow, administrator with the will annexed of the estate of David Fuhrman, deceased, was made a party defendant, who, it was alleged, claimed "some estate or interest in said mortgaged land, but

that said estate or interest therein is subsequent to said mortgage lien (of plaintiff) thereon, and should be postponed thereto," etc. Harlow answered, denying that his estate or interest in certain of the mortgaged land, which he described, was subsequent to the alleged mortgage lien of plaintiff, but alleged that plaintiff's mortgage lien was inferior and subject to the mortgage lien of defendant thereafter set forth. Defendant then proceeds, as it is expressed, in "further answering said amended complaint," to set out in an orderly and usual manner, as in a complaint or cross complaint, and to aver that on the 23d day of January, 1889, the defendant Parker made to David Fuhrman his promissory note for \$2,000, payable one year after date, with interest at 10 per cent per annum; the execution of a mortgage, to secure the payment thereof, upon certain described land, being upon a part of the land described in plaintiff's mortgage; the due recording of the mortgage on the 24th day of January, 1889; that the note is due and unpaid; the death of Fuhrman February 22, 1889; probate of his will; appointment of Harlow as administrator with the will annexed that he duly qualified, etc.; that plaintiff and certain other named parties claim some interest in the premises, or some part thereof, as purchasers, mortgagees, or otherwise, all of which interests and claims, except that of the defendant Bithell, are subsequent to the lien of defendant's mortgage. The prayer is in the usual form for foreclosure of the mortgage, sale of the property, etc. In other words, although denominated an answer, it is in fact a cross-complaint. The court in its findings and decree designates it as a cross-complaint, and such in point of law it was and is. So treating it, the court found as follows: "I find all the allegations of the defendant Harlow's cross-complaint true." There is in the complaint no allusion to the mortgage of Fuhrman or to Harlow, except that, as administrator, etc., he, in common with others, claimed some interest in the mortgaged premises, which was averred to be subsequent and subject to the lien of the plaintiff's mortgage, and should be foreclosed. Harlow denied that the lien of plaintiff's mortgage was prior to his, as above set forth. This was all there was in the complaint for him to deny. Having set out the mortgage of his testator, and asked for its foreclosure, he was entitled to make proof, as was done, of its due execution, etc. There was neither allegation nor proof that he had notice of plaintiff's mortgage. When Harlow's mortgage was recorded, it was constructive notice to the world; and as against the prior mortgage of plaintiff, which had before that time been discharged of record, it is, in the absence of proof of actual notice, to be deemed prior in lien. If there was actual notice of plaintiff's mortgage imparted by Harlow, it was an affirmative matter, the proof of which devolved upon plaintiff; failing in which, he cannot complain. The judgment and order appealed from should be affirmed.

We concur: **Haynes, J.; Vanciel, C.**

Per Curiam:

For the reasons given in the foregoing

opinion, the judgment and order appealed from are affirmed.

COLORADO SUPREME COURT.

PEOPLE of the State of Colorado, *ex rel.*
Eugene ENGLE, *Atty-Gen., et al.,*

v.

D. J. MARTIN.

SAME

v.

Jackson ORR.

(.....Colo.....)

1. The power of the governor over the fire and police board of the city of Denver, in respect to orders of appointment and removal, depends entirely upon the terms of the charter, as amended by the legislature in 1893; and it is the province of the courts to construe such legislative act, in cases of actual litigation arising thereunder.
2. "The several departments of the government are equal in dignity, and of co-ordinate authority, and neither can subject the other to its jurisdiction, or strip it of any portion of its constitutional powers; but the judiciary is the final authority in the construction of the constitution and the laws, and its construction should be received and followed by the other departments."
3. The decision in *Trimble v. People*, 19 Colo. —, approved.
4. The limitation clause in the charter of 1893, forbidding the governor to remove members of the fire and police board for political reasons, was intended to promote efficiency in the fire and police departments, and to prevent their being used to advance the interests of any political party or individual; but, as the charter now stands, practical effect cannot be given to such limitation, except as it may operate upon the conscience of the executive, and so control his official conduct.
5. It is a presumption of law that every public officer does his duty, and this presumption is especially strong in the case of the governor,—the chief executive officer of an independent state.
6. Under the charter of 1893, when the governor makes an order for the removal of a member of the fire and police board, and states the cause therefor in writing, such written statement by the governor must be held the exclusive and conclusive proof of the cause for making such order.

(April 16, 1894.)

PETITIONS for writs of quo warranto to oust defendants from the offices of excise and fire commissioners of the city of Denver. *Judgments of ouster.*

*Headnotes by ELLIOTT, J.

Note.—The decision in the above case which practically denies effect to the provision that officers should not be removed for political reasons has an added interest by reason of the extrinsic facts as to the disturbed condition of public affairs which is merely mentioned by the court, but which constituted one of those dangerous and disgraceful conditions of the city of Denver.

Statement by ELLIOTT, J.:

The above-entitled cases are considered together in the opinion. They were argued and submitted together, the pleadings being substantially the same, except as to the names of the parties and offices. The informations show, *inter alia*, that respondent Martin was excise commissioner; that respondent Orr was fire commissioner, and that, as such, they were members of the fire and police board of the city of Denver when the controversy herein arose; and that they have ever since continued to act as such officers. In January, 1894, while respondents were so holding said offices, the governor preferred charges against them for misconduct. Upon a hearing before the governor, evidence was introduced, and the parties were heard in their own behalf; and upon the conclusion of the hearing the following findings were made, and stated in writing, by the governor: "I therefore find from the evidence in this case that—First, the defendants, as members of the fire and police board, in knowingly sending special policemen to the gambling houses of Denver for the protection of said houses by the city police, were guilty of malfeasance in office, and, second, that, in failing to cause to be arrested persons whom they knew to be in open violation of the law, they were guilty of neglect of duty. It is therefore, for the causes hereinbefore specified, ordered, this 7th day of March, 1894, that Jackson Orr be, and he is hereby, removed from the office of fire commissioner of the city of Denver; and D. J. Martin be, and he is hereby, removed from the office of excise commissioner of the city of Denver. Davis H. Waite, Governor of Colorado." A copy of the order of removal was on March 7, 1894, duly served upon said Orr and Martin. On March 8, 1894, the said Davis H. Waite, governor aforesaid, at the executive office in the city of Denver, and under his hand, as governor aforesaid, in writing, appointed one Samuel D. Barnes excise commissioner of said city of Denver, *vice* D. J. Martin, removed, and Dennis Mullins to be fire commissioner, *vice* Jackson Orr, removed. Said appointments, in writing, were in words and figures as follows:

"Executive Order. March 8th, 1894. Ordered, that Samuel D. Barnes, of 126 Lincoln avenue, Denver, be, and he is hereby, appointed excise commissioner of the city of Denver for the unexpired term ending on the second Tuesday of April, 1895, *vice* D. J. Martin, removed. [Signed] Davis H. Waite, Governor of Colorado."

flits of authority which courts have been called upon in a considerable number of recent cases to settle.

As to summary removal of officers, see *Trainor v. Wayne County Auditors* (Mich.) 15 L. R. A. 95, and note; also *State v. Johnson* (Fla.) 18 L. R. A. 410; *Speed v. Detroit* (Mich.) 22 L. R. A. 842.

"Executive Order. March 8, 1894. Ordered, that Dennis Mullins, of 3050 Larimer street, Denver, be, and he is hereby, appointed fire commissioner of the city of Denver for the unexpired term ending on the second Tuesday of April, 1895, *vice* Jackson Orr, removed. [Signed] Davis H. Waite, Governor of Colorado."

The answers of respondents contain, among other things, the following: That respondents, as members of the fire and police board, "were not guilty of sending special policemen to the gambling houses of Denver for the protection of said houses by the said police, but, on the contrary thereof, the said special policemen were sent to the gambling houses of the city of Denver for the purpose of preserving the public peace; preventing riots and disturbance; preventing minors, intoxicated persons, or others under disability, from frequenting such houses; to apprehend persons guilty of any disturbance or breach of the peace, and for the purpose of giving information as to the presence and whereabouts of suspicious characters; to ascertain the names of persons frequenting such houses and carrying them on, and the places where gambling was carried on at the said city of Denver, with a view to restricting and controlling the said evil and vice, in order to its eventual suppression. Avers, howsoever, that the said assumed, attempted, and pretended removal of this defendant from the said office was for political reasons, and no other, for that this defendant had refused, before that time, to remove from their positions and places members of the police force and of the fire department of the city of Denver who were, and long had been, faithfully serving in their said positions and places, at request of the said Davis H. Waite, solely because the said persons were not of the same political faith and affiliation with the said Davis H. Waite, and had refused to appoint, in the stead of the said persons, those of the same political party, faith, and affiliation of the said Davis H. Waite, which said removals and appointments so requested by the said Davis H. Waite, this defendant avers, were, and would have been, in violation of the provisions of the charter of the city of Denver; and the defendant avers that the said attempted and pretended removal of this defendant by the said Davis H. Waite, for political reasons, only, as aforesaid, was in violation of the forty-fifth section of the third article in the certain act of the general assembly of the state of Colorado entitled 'An act to revise and amend the charter of the city of Denver,' approved April 8, 1893."

Sess. Laws 1893, p. 172: "Sec. 45. Immediately upon the passage of this act, and biennially thereafter, the governor of the state of Colorado shall, by and with the advice and consent of the senate, appoint the fire commissioner, the police commissioner and the excise commissioner for the term of two years, who shall in 1893 take the places, and shall exercise the powers and perform the duties of the fire and police board of the city of Denver. The governor may in vacation of the senate, fill vacancies by appointments in writing filed with the secretary of

state; and all appointments by the governor shall be made with power of suspension or removal at any time for cause, to be stated in writing, but not for political reasons. The fire commissioner shall be the president of said board. Not more than two (2) members of said board shall be of the same political party, and all of said appointments shall be made to expire on the second (2d) Tuesday in April."

The informations show that Mullins and Barnes, having qualified, demanded possession of the offices, and that Orr and Martin refused to vacate. Thereupon, these proceedings were instituted.

The remaining facts sufficiently appear in the opinion.

Messrs. J. Warner Mills, Platt Rogers, Robert W. Steele, Eugene Engley, and Thomas Ward, Jr., for plaintiffs.

Messrs. Wells, Taylor & Taylor for defendants.

Elliott, J., delivered the opinion of the court:

The taking of original jurisdiction of these proceedings must not be understood as establishing a precedent. If this court were to take cognizance of every application within its original jurisdiction, there would be little time remaining to devote to appellate business. We have felt constrained to entertain these original proceedings because of the disturbed condition of public affairs incident to the fire and police board controversy. In so doing, we have yielded to the fears of others, rather than to any serious apprehensions of our own. While we have been constrained by a desire to speedily allay public anxiety by avoiding the delays of *nisi prius* trials, and probable appellate proceedings, it should not be overlooked that the delays, thus far, have not been confined to the courts. From the informations filed herein, it appears that on January 17, 1894, the governor cited Messrs. Orr and Martin to appear before him to answer the charges preferred against them; that two days afterwards the evidence was taken upon said charges; and that seven weeks thereafter, March 7, 1894, the orders of removal were made. During the three weeks following, there were legal proceedings in the courts, in various forms; but not until Saturday, March 31, was any application made to this court, by which the controversy could be settled and determined. On the Monday following, this court indicated its willingness to take original jurisdiction. It is true a question was presented by the governor on March 17, 1894, asking this court to determine, upon an *ex parte* statement, what persons were entitled to the offices of fire and excise commissioners. To that question, and the matter stated in connection with it, this court gave a clear and explicit opinion, indicating the remedy, based upon the assumption that the facts stated were true. See recent opinion of Mr. Justice Goddard in *Re Fire & Excise Comrs.* (Colo.) 86 Pac. Rep. 284. But it could not be assumed that such *ex parte* statement could not be controverted, nor that an opinion based

thereon might not require modification, when the other side should present their cause in court, as they had a right to do. It would have been highly improper to have given an unqualified opinion upon such *ex parte* statement. No opinion based upon such statement could have been made to bind the parties contending for official place upon the fire and police board. While the constitution requires this court to "give its opinion upon important questions upon solemn occasions when required by the governor," it does not require, nor does the constitution permit, this court to render judgment in connection with such opinion. The court may give its opinion upon the law, based upon the facts submitted by the executive, but it cannot render judgment thereon, nor can it, upon such questions, undertake to determine questions of fact. *Re Appropriations by General Assembly*, 13 Colo. 822. In *Re Senate Resolution on Irrigation*, 9 Colo. 620, speaking of executive and legislative questions, it was said: "It could not have been the intention to authorize an *ex parte* adjudication of individual or corporate rights by means of a legislative or executive question. Parties must still litigate their rights in the ordinary and regular course of judicial proceedings." It is manifest that no decision or judgment affecting the rights or claims of contending parties can be rendered upon an *ex parte* question without violating that fundamental principle of our jurisprudence which guarantees to every person his day in court before judgment is rendered against him. Every lawyer, and all intelligent citizens, understand this principle. As was said by Chief Justice Marshall, of the Supreme Court of the United States, more than three quarters of a century ago, "It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard." *Mende v. Deputy Marshal of Virginia Dist.* 1 Brock. 328, Fed. Cas. No. 9,372.

1. In argument, counsel expressed much solicitude lest this court should trespass upon the executive rights and powers of the governor. There is no occasion for such anxiety. This court has always been careful not to encroach upon the province of other departments of the government. It has always recognized them as co-ordinate, and independent in their respective spheres, under the constitution and laws of the state. In the present controversy, no constitutional rights of the executive are involved. Neither the power of appointing nor of removing commissioners of the fire and police board is in any manner vested in the governor by the constitution. His power to make such appointments and removals depends entirely upon a statute enacted by the legislature, and it certainly is the proper province of the judiciary to construe and apply statutes, in case of actual litigation arising under such statutes. Cooley, Const. Lim. pp. 108, 118. This controversy affords a practical illustration of the workings of our governmental system. The legislature makes the law providing for the appointment and removal of members of the

fire and police board, vesting the power of appointment and removal in the governor. The governor selects and appoints the officers. He makes orders of removal, and appointments to fill the vacancies. The courts have nothing to do with making the law, nor with making the orders of appointment and removal. But when such orders are questioned, and there arises a controversy, resulting in actual litigation, concerning conflicting claims to such offices, then the courts, which have had nothing to do with making the law, or with making the orders of removal and appointment, are the proper tribunals to construe the law made by the legislature, and apply the same to the orders made by the governor, and thus pass upon and determine between the rival claimants to such offices. Thus, by a division of governmental powers, the interests of the public, and the claims of the contending parties, are more thoroughly and impartially considered than as though the whole power were lodged in a single department, and thus there is a peaceable solution of the controversy.

2. Mr. Justice Cooley clearly states the American doctrine upon this subject as follows: "The several departments of the government are equal in dignity, and of co-ordinate authority, and neither can subject the other to its jurisdiction, or strip it of any portion of its constitutional powers. But the judiciary is the final authority in the construction of the constitution and the laws, and its construction should be received and followed by the other departments. This results from the nature of its jurisdiction. Questions of construction arise in legal controversies, and are determined by the courts, and, when determined, the courts have power to give effect to their conclusions."

Within the sphere of his authority under the constitution, the executive is independent, and judicial process cannot reach him. But when he exceeds this authority, or usurps that which belongs to one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts therefore, consists in their ability to keep the executive within the sphere of his authority, by refusing to give the sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability. The executive can have no corresponding authority to pass upon the validity of either legislative or judicial action. His judgment of proposed legislation may be expressed in his veto, but if that is overruled the executive is as much bound as is any private citizen. He is also equally concluded by the judgment of a competent court; and it may become his duty, as executive, to assist in enforcing a judgment he believes erroneous should enforcement by the ordinary process of the court, and by its own officers, become impossible." Cooley, Const. Law, pp. 139, 157. See also 1 Story, Const. § 521; and 1 Bl. Com. pp. 146, 269; also *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 15 L. R. A. 369, and authorities there cited.

The power of appointing and making

changes in the membership of the fire and police board was conferred upon the governor by the charter of the city of Denver, as amended in 1898. The legislature was not obliged to confer such power upon the governor. It might have conferred the power upon the mayor, the city council, or some other body, or it might have provided that the people should elect the members of the fire and police board. The power conferred upon the governor being purely statutory, its extent and limits are to be ascertained, and judicially determined, by a careful consideration of the terms of the statute. Mechem, Pub. Off. §§ 447-456.

3. In *Trimble v. People*, 19 Colo. —, Chief Justice Hayt, delivering the opinion of the court, said: "Under the statute, the cause that may be sufficient to warrant removal is to be determined by the governor." The same opinion further declares: "In considering removals under this act, we must assume that the lawmaking body was of the opinion that the requirement that the cause of removal should be stated in writing was the only check necessary to prevent an arbitrary and oppressive abuse of the power." The opinion in the *Trimble Case* is authority, also, for the doctrine that the sufficiency of the cause of removal is a matter to be determined by the governor, and that the cause need not be such as would have weight with the courts; in short, that the governor is at liberty to remove for any cause to which he gives the sanction of his name in writing, provided such removal be not made for political reasons. The opinion in the *Trimble Case* concludes thus: "It is the duty of the courts to uphold the executive power as it has been conferred by the legislature." After much argument and consideration, our confidence in the correctness of the views expressed in the *Trimble Case* remains unshaken. We are aware now, as we were when that case was decided, that there are judicial decisions which, if followed, would have led to the conclusion that the removal of Phelps was invalid; but we chose to follow what we then considered, and what we now consider, the better-reasoned opinions. By pleadings duly filed, the parties have set forth their respective claims to the offices of fire and excise commissioners, respectively. It is not denied that in making the orders of removal the governor stated the cause therefor in writing. Respondents do not question the regularity of the acts of the governor in making such orders, but, by their answers, they do question his good faith. Without antagonizing the *Trimble Case* opinion, respondents claim that it is still open to them to show that the orders for their removal were made for political reasons, and for no other cause. By their answers they allege, in substance that all that they did or omitted to do in respect to gambling houses (the cause stated in writing for their removal) was done "with the knowledge and approval" of the governor. They allege further, in effect, that the motive which prompted the governor to order their removal was not their action in respect to the offense of gambling, but that he made such orders for political

reasons. They allege, in substance, that the governor had requested respondents to remove members from the police force and from the fire department of the city who had been for a long time faithfully serving in such positions; that they were thus requested to remove such members because they were not of the governor's political faith and affiliation; and that they were requested to appoint, in the place of the members thus to be removed, persons who were of the same party faith and affiliation as the governor. Respondents allege, further, that they refused to comply with the governor's requests because such requests were in violation of the charter of the city, and that because of their refusal the governor made the order for their removal, and for no other reason. The answers are sworn to by respondents. It must be admitted that the matters set forth in the answers of respondents are of a serious nature. The truth of the matters alleged in the answers is not denied in these proceedings, but motions are interposed in behalf of the new appointees, claiming that the matters and things thus alleged are immaterial, irrelevant, and insufficient in law. The motions pray judgment that respondents, Orr and Martin, be ousted, and that the new appointees, Mullins and Barnes, be declared entitled to hold the offices of fire and excise commissioners, respectively. Thus, an issue of law is presented, and the jurisdiction of the court is invoked to determine what persons are entitled to hold and exercise the powers and duties of said offices.

Stated in plain language, the question to be determined is, Have respondents the legal right to allege and prove, in these proceedings, that the real cause of the orders for their removal was other and different from the cause stated in writing by the governor; that is, have they the right to show that the orders for their removal were really made for political reasons, and for no other cause? The question is not free from difficulty. It is a question that respondents had a right to have judicially determined, in an action to which they themselves should be parties. The matters set forth in respondents' answers are especially forcible in view of the words of limitation inserted in the charter of 1893, forbidding the governor to remove "for political reasons." These words were not in the former charter. The language of the charter of 1891 was, "The governor shall at all times have power and authority to revoke the appointment of any member of said board for good and sufficient causes to be specifically stated in such revocation." Sess. Laws 1891, p. 65.

It is contended that some effect must be given to these additional words in the Act of 1893, forbidding the governor to remove for political reasons. It is insisted that such words were added for a purpose; and this, according to well-settled rules of statutory construction, cannot be denied. That the additional words were inserted for a purpose is plain, and what that purpose was is also plain. The purpose was that the fire and police department of the city should not be used to advance the interests of any political party, or

the political ambition of any individual, or set of individuals. The fire and police departments should be maintained for their efficiency in protecting the interests of the people, and for no other purpose. But, while it is easy to perceive the purpose of the additional words in the charter of 1893 forbidding removals for political reasons, it is not so easy to determine how to give practical effect to such additional words. It is a presumption of law that every public officer does his duty. This presumption is especially strong in the case of the governor,—the chief executive officer of an independent state. If any court should attempt to institute an inquiry into the reasons or motives which have controlled the official action of the governor, great difficulties would be encountered. These difficulties are all the greater in cases where improper political motives are charged, and this for the reason that the persons making such charges may themselves be actuated by improper political motives. Charges of improper motives are easily made, are often untrue, and are always hard to prove. When such charges are made in respect to an act not wrong in itself; an act expressly authorized for cause to be determined by the officer performing the act; an act which is wrong only when prompted by an improper reason or motive,—it is practically impossible to determine judicially that the act done was illegal, on the sole ground that it was prompted by an improper motive or unlawful reason; and this is especially true where the officer is required by law to state in writing the cause for his act, and his written statement shows no unlawful reason.

There are other reasons which make against the claim of respondents to have the order for their removal declared invalid upon evidence other than the written statement made by the governor. When the legislature provided that the governor might remove members of the fire and police board for cause to be stated in writing, but not for political reasons, it was doubtless considered that such removals might be required to be summarily made. In reason, it could not have been contemplated that the cause for removal stated in writing might be overthrown by other evidence showing that such order was made for political reasons, and not for the written cause stated by the governor. Such a course would involve much delay,—perhaps, a trial by jury, with right of appeal,—and thus the wheels of municipal government would be blocked in a manner entirely inconsistent with the control of the police and fire department of a great city. If the legislature had intended such a course to be pursued, a different wording of the statute would undoubtedly have been adopted. If it was contemplated that the cause of removal should remain an open question, to be litigated and determined upon evidence *in pais*, why did the legislature require the governor to preserve written evidence of it? It being shown by the information herein, and not denied, that the governor made the orders for the re-

moval of respondents, as members of the fire and police board, and stated in writing the cause for such orders, our conclusion is that it is not a sufficient answer to the informations to allege, and offer to show by evidence other than the written statement of the governor, that the real cause for making such orders was other and different from the cause so stated in writing; in other words, that an order of removal under section 45 of the charter, and the cause therefor stated in writing by the governor, when regularly made, must be held the exclusive and conclusive proof of the cause for making such order. It follows that when the proceedings before the governor, including the written statement showing the order and cause for removal, are regular and valid upon their face, the words of limitation forbidding removals "for political reasons" cannot, as the statute now stands, be given practical effect, except as they may operate upon the conscience of the executive, and so restrain and control his official conduct.

We have examined the many authorities cited by counsel for the respective parties. Unfortunately, none of them are based upon statutes exactly like ours; but the better-reasoned decisions, based upon statutes somewhat analogous, support the conclusion at which we have arrived. In addition to the authorities cited in the *Trimble Case*, we cite the following (in citing authorities, it is not to be understood that all the views expressed therein are necessarily approved): *Mechem*, Pub. Off. chap. 6; *Throop*, Pub. Off. § 396; *Cooley*, Const. Lim. *187; *State v. Board of Public Works of Jersey City*, 51 N. J. L. 240; *State v. Lamantia*, 33 La. Ann. 448; *State v. Watertown*, 9 Wis. 254; *State v. Camden*, 48 N. J. L. 433; *State v. Newark Police Comrs.* 49 N. J. L. 170; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128; *People v. Therrien*, 80 Mich. 187; *State v. Smith*, 35 Neb. 13, 16 L. R. A. 791, 25 Am. L. Rev. 228.

The informations do not pray that any fine be imposed upon respondents for unlawfully holding the offices in question. Hence, we need not determine whether section 295 of the Code, in respect to fines, is applicable to original proceedings in this court.

The answers of respondents cannot be held sufficient in law, or available as a defense, in these proceedings. Judgments will therefore be entered that respondents be excluded from the offices of fire and excise commissioners, respectively, and that they deliver possession of such offices, together with all the books, records, papers, and paraphernalia of said offices, and other property pertaining thereto, to the new appointees, Mullins and Barnes, respectively, on or before 12 o'clock noon, Tuesday, April 17, 1894, and that respondents pay the costs of these proceedings, respectively, to be taxed, and that writs of ouster and execution may issue therefor at or after the time last specified.

Judgment of ouster.

INDIANA SUPREME COURT.

James S. BROWN, *Appt.*,

FIRST NATIONAL BANK OF COLUMBUS, Indiana.

(....Ind....)

1. The fact that a justice of the peace has, in reality, no jurisdiction of the case will not prevent a contract by him to secure the arrest of a person against whom a prosecution has been instituted before him from being against public policy, where the extent of his compensation is contingent on the recovery of property from the defendant.
2. The principle of estoppel by receiving benefits does not apply to prevent a defense that a contract is void as against public policy.

(April 19, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Bartholomew County in favor of defendant in an action brought to recover a reward which had been offered by defendant and which plaintiff alleged that he had earned. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hord & Emig for appellant.

Messrs. Stansifer & Baker, for appellee:

The contract is against public policy. There is no principle of law better settled, more frequently applied, and more preservative of the integrity of the law and the good order of society than that embodied in the maxim, *ex turpi causa non oritur actio*.

Morck v. Abel, 3 Bos. & P. 35; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Stanton v. Allen*, 5 Denio, 435, 49 Am. Dec. 282; *Holman v. Johnson*, Cowp. 341.

A contract against public policy will not be enforced.

Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746.

Any contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void.

Greenhood, Pub. Pol. 337.

No polluted hand shall touch the pure fountains of justice.

Collins v. Bluntern, 2 Wils. 341; *Stropes v. Greene County Comrs.* 72 Ind. 42; *Elkhart County Lodge v. Crary*, *supra*.

All agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void.

8 Am. & Eng. Encyclop. Law, pp. 879-881; *Bishop*, Cont. § 549.

An agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void.

Pollock, Cont. 286.

The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

Providence Tool Co. v. Norris, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *State v. Johnson*, 52 Ind. 197; *Clippinger v. Hepbaugh*, 5 Watts & S. 815, 11 Am. Dec. 519; *Oscanyan v. Winchester Steeping Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 648, 32 L. ed. 819; *Greenhood*, Pub. Pol. 5, 445, 446.

It is lawful to petition the city council for the improvement of the street in front of one's property, but not to do so for a consideration moving from another.

Maguire v. Smock, 42 Ind. 1, 13 Am. Rep. 353.

A contract whereby a justice of the peace agrees to charge smaller fees in suits to be brought before him by a certain corporation than prescribed by statute, and that such fees shall not be collected unless paid by the defendants to the corporation, is contrary to public policy and void.

Hawkeye Ins. Co. v. Brainard, 72 Iowa, 130; *Willemín v. Bateson*, 63 Mich. 309.

Where a candidate for judge pledges himself, if elected, to perform the duties of such office for less than one half the fees allowed by law, his election is invalid as against public policy.

State v. Collins (Mo.) 8 Cent. L. J. 495.

The fact that the thing contracted for was in itself lawful does not give the plaintiff any right of recovery.

Gleason v. Chicago, M. & St. P. R. Co. (Iowa) Oct. 17, 1889.

If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief. It cannot be rendered valid by invoking the doctrine of estoppel.

Hutchins v. Weldin, 114 Ind. 80; *Perkins v. Jones*, 26 Ind. 499; *Dumont v. Dufore*, 27 Ind. 263; *Root v. Stevenson*, 24 Ind. 115; *Wheeler v. Wheeler*, 5 Lans. 335; *Robinson v. Patterson*, 71 Mich. 141; *Snyder v. Willey*, 38 Mich. 483; *Gleason v. Chicago, M. & St. P. R. Co. supra*; *Greenhood*, Pub. Pol. p. 6, and note 3; 7 Wait, Act. & Def. 92; *Broom*, Legal Maxims, 729 *et seq.*

Dailey, J., delivered the opinion of the court:

This was an action by the appellant against the appellee in the court below to recover a reward upon an alleged contract made and entered into by the parties, wherein the appellee agreed to pay the appellant a reward for the capture of one William H. Schreiber, who was the appellee's bookkeeper, and who had embezzled about \$100,000 in money and bonds belonging to the appellee, and fled to Canada. Schreiber was arrested by the appellant, and the money and bonds restored.

The complaint is as follows:

NOTE.—For public policy to defeat contracts which may indirectly affect the impartiality of judicial proceedings as in the present case, see 24 L. R. A.

Goodrich v. Tenney (Ill.) 19 L. R. A. 371, and note on validity of contracts to procure testimony; *Bowman v. Phillips* (Kan.) 8 L. R. A. 631.

"(1) The plaintiff James S. Brown, complains of the First National Bank of Columbus, Indiana, defendant, and says that the plaintiff was at the time of the facts herein after averred, and prior thereto, a citizen and resident of the city of Columbus, in the state of Indiana; that the defendant was then, and for a long time prior thereto, and is now, a corporation duly organized under the acts of congress in such cases made and provided for the purpose of carrying on a national bank at the city of Columbus, in Bartholomew county, state of Indiana. Plaintiff avers that the defendant, as such corporation, was carrying on and conducting a banking business in the said city, and had in its employ as bookkeeper one William H. Schreiber, and while acting as such employé of the defendant the said Schreiber, at the county of Bartholomew and state of Indiana, did steal, take, embezzle, and take away from the defendant money and property of the defendant, and appropriate the same to his own use, as follows, to wit, the sum of fifty thousand dollars (\$50,000) in money, and bonds, promissory notes, and books of defendant of the value of one hundred thousand dollars (\$100,000), and said Schreiber fled and escaped to Canada and beyond the limits of the United States. And, the defendant being desirous of capturing and arresting said Schreiber, the plaintiff and defendant made and entered into a contract in writing, duly signed by Francis T. Crump, vice-president, L. K. Ong, cashier, and W. O. Hogue, director, of said defendant, for the defendant, which is now in the possession of defendant, and plaintiff files a copy thereof with this complaint, who were duly authorized thereto by said defendant, wherein and whereby the plaintiff agreed to engage actively in the capture of said William H. Schreiber, and arrest or cause to be arrested the said Schreiber. The defendant agreed to pay to plaintiff the sum of forty dollars (\$40) per month, and his fare to and from the city of Detroit, in the state of Michigan, and his board while there, and, if the plaintiff secured said Schreiber's arrest, the defendant agreed to and with the plaintiff to pay him one fourth or twenty-five (25) per cent of all the money or property restored to defendant by said Schreiber. If plaintiff was unsuccessful in such arrest, the defendant agreed to pay to plaintiff forty dollars (\$40) per month and his board and fare while engaged in an effort for his capture. The plaintiff avers that he immediately entered upon the performance of said contract, and was actively engaged in the attempt to capture and arrest said Schreiber from the 15th day of April, 1890, until the 28th day of September, 1890, when said Schreiber was arrested, and returned to the city of Columbus, in the state of Indiana. The plaintiff, on the — day of September, 1890, arrested and caused to be arrested the said Schreiber at the said city of Detroit, in the state of Michigan, and thereafter, at defendant's request, he was immediately transferred to the county of Bartholomew, in the state of Indiana, where said crime was committed, and delivered to the

sheriff of said Bartholomew county; and thereafter said Schreiber was duly indicted by the grand jury in the Bartholomew circuit court for his said crime, and thereafter, on the 10th day of October, 1890, he was tried and convicted in said court, and sentenced to imprisonment in the penitentiary for the term of twelve (12) years, and he is now in the penitentiary serving out his term under such conviction. The plaintiff avers that the said defendant received and recovered of said money and property stolen and embezzled as aforesaid, from said Schreiber, the sum of fifty thousand dollars in money, and notes, stocks, bonds, books, and other personal property of the value of one hundred thousand dollars, all of which was restored to defendant and is in its possession. The plaintiff avers that he has fully performed said contract on his part, and the defendant has failed and refused to pay to plaintiff for the time expended by him in his said effort to arrest said Schreiber, and has failed and refused to pay him the said sum of twenty-five per cent of the value of said money and property restored to defendant, although requested to do so, and the defendant is indebted to plaintiff under said contract in the sum of thirty-seven thousand and five hundred dollars (\$37,500), which is due plaintiff from defendant, and remains wholly unpaid; and the plaintiff has no knowledge of any legitimate expense for which defendant is entitled to a reduction, and plaintiff denies that there are any other expenses to be deducted. Wherefore plaintiff demands judgment for thirty-seven thousand and five hundred dollars, and for all other proper relief. Hord & Emig, Attorneys for Plaintiff.

"(2) The plaintiff, for second and further paragraph of complaint herein, says that the plaintiff was at the time of the facts herein after averred, and prior thereto, a citizen and resident of the city of Columbus, in the state of Indiana; that the defendant was then, and for a long time prior thereto, and is now, a corporation duly organized under the acts of congress in such cases made and provided, for the purpose of carrying on a national bank at the city of Columbus, in Bartholomew county, state of Indiana. Plaintiff avers that during all of said time the defendant, as such corporation, was carrying on and conducting a banking business in said city of Columbus, and had in its employ as bookkeeper one William H. Schreiber, and while acting as such employé of the defendant the said Schreiber, at the county of Bartholomew, and state of Indiana, did steal, take, embezzle, and carry away from the defendant money and property of the defendant, and appropriated the same to his own use, as follows, to wit, the sum of fifty thousand dollars in money; also bonds, promissory notes, stocks, and books of the defendant to the value of one hundred thousand dollars; and the said Schreiber fled and escaped beyond the limits of the state of Indiana and the United States into the dominion of Canada. And, the defendant being desirous of capturing and arresting said Schreiber and recovering said money and property so stolen and embezzled, the plaintiff proposed in

writing, duly signed by him, to engage actively in the capture of said William H. Schreiber, and arrest, or cause to be arrested, the said Schreiber, and cause him to be delivered to the Detroit police or any person or place the defendant might select; and said defendant was to pay to the plaintiff forty dollars per month and his fare to and from Detroit, in the state of Michigan, and his board while there, and, if plaintiff should secure the arrest and delivery as aforesaid, defendant was to pay to plaintiff one fourth, or 25 per cent, of all the money or property restored to defendant by said Schreiber, after deducting all expenses that defendant may have incurred; the said per cent to be paid only out of such restored funds, and after it was clearly and fully in defendant's possession. If plaintiff was unsuccessful, the board and fare of plaintiff and forty dollars per month was to be plaintiff's only charge, and the plaintiff's work was to cease at defendant's command; and said defendant accepted said proposition, and caused said acceptance by the defendant to be written on said offer and proposition of plaintiff for and on behalf of the defendant, and to be signed by L. K. Ong, cashier of defendant, Francis T. Crump, vice-president, and W. O. Hogue, director of defendant, for and on behalf of the defendant. A copy of said contract is filed herewith, and made a part hereof, the original of which is in defendant's possession. Plaintiff avers that he immediately entered upon the performance of said contract, and was actively engaged in an effort to capture and arrest Schreiber from the 15th day of April, 1890, until the 28th day of September, 1890, when said Schreiber was arrested, and, at the request of defendant, returned to the city of Columbus, in the state of Indiana. The plaintiff, on the — day of September, 1890, arrested and caused to be arrested the said Schreiber, at the city of Detroit, in the state of Michigan; and thereafter, at the request of defendant, he was immediately transferred to the county of Bartholomew, in the state of Indiana, upon a warrant duly issued by the governor of the state of Michigan, upon requisition made by the governor of the state of Indiana upon him for the arrest and apprehension of said Schreiber, and said Schreiber was duly delivered to the custody of the sheriff of said Bartholomew county, in said state of Indiana; and thereafter said Schreiber was duly indicted by the grand jury in the Bartholomew circuit court for his crime; and thereafter, on the 10th day of October, 1890, said Schreiber was tried and sentenced by said court to imprisonment in the penitentiary for the term of twelve years, and he is now in the penitentiary at the city of Jeffersonville, in said state, serving out his time under said sentence. The plaintiff avers that the said Schreiber restored to defendant the said sum of fifty thousand dollars in money, and said notes, bonds, stocks, books, and other personal property of the value of \$100,000, and turned over to said defendant money, real estate, and personal property in full payment and satisfaction thereof, which said defendant has sold and reduced to cash and

received by the defendant, and said property so stolen and embezzled was fully restored to the defendant, and the said defendant now possesses and holds the same, and the plaintiff has no knowledge of any legitimate expenses to which defendant is entitled as a reduction upon this contract, and plaintiff denies that he has paid out any legitimate expenses to be deducted from said one fourth of money and property restored to be paid to plaintiff. And plaintiff avers that he has fully performed said contract on his part, and the defendant has failed and refused, and still fails and refuses, to pay to plaintiff anything for his said time expended by him in his said effort to apprehend said Schreiber, and has failed and refused, and still fails and refuses, to pay to plaintiff the said sum of twenty-five per cent of the value of said money and property restored to defendant by said Schreiber, although requested to do so, and the defendant is indebted to the plaintiff under said contract in the sum of \$37,500, which is due and wholly unpaid. Wherefore plaintiff demands judgment for \$37,500 and all proper relief. Hord & Emig, Attorneys for Plaintiff."

"Copy. No. 1,066. First National Bank of Columbus, Ind. Wm. J. Lucas, President. F. T. Crump, Vice-President. L. K. Ong, Cashier. Columbus, Ind., April 15th, 1890. L. K. Ong, Cashier: I make the following proposition: I will go to Detroit, Michigan, and vicinity, prepared to engage actively in the capture of Wm. H. Schreiber, your defaulting bookkeeper, and deliver to the Detroit police, or any person or place you select. My compensation to be as follows: You pay me forty dollars per month, my fare to and from Detroit, and my board while there. If I secure Schreiber's arrest and delivery, as above you are to pay me one fourth (1/4) (or 25 per cent) of all the money or property restored to you, after deducting all expenses you may have incurred. This 25 per cent to be paid only out of such restored funds, and after it is clearly and fully in your possession. If unsuccessful, my board, my fare, and forty dollars per month my only charge. Work to cease at your command. James S. Brown.

"Accepted for the bank. L. K. Ong, F. T. Crump, W. H. Hogue, Com."

The appellee filed the following answer:

"(1) The defendant in the above-entitled cause, for answer to plaintiff's complaint herein, says that at the time of the execution of the contract sued on herein, and for a long time prior and subsequent thereto, the plaintiff, James S. Brown, was an acting justice of the peace, duly elected and qualified, in and for Columbus township, in Bartholomew county, in the state of Indiana; and, further, that at the time said contract was executed, and prior and subsequent thereto, there was filed and pending before said plaintiff, as justice as aforesaid, an affidavit charging the said William H. Schreiber, mentioned in plaintiff's complaint, with the larceny of certain money and property alleged in plaintiff's complaint to have been stolen by said Schreiber from the defendant therein. That the apprehension and capture contemplated

and mentioned in the contract sued on herein was of and concerning the said William H. Schreiber, and on account of the matters and facts charged in said affidavit. Wherefore, and by reason of the foregoing, defendant says said contract was and is null and void. Stansifer & Baker, Attorneys for Defendant.

"(3) For second paragraph of answer herein defendant denies each and every material allegation contained in plaintiff's complaint. Stansifer & Baker, Attorneys for Defendant."

The appellant filed a demurrer to the first paragraph of answer, which was overruled, and appellant excepted thereto. He thereupon filed his reply to the first paragraph of answer as follows:

"The plaintiff, James S. Brown, for reply to defendant's first paragraph of answer, says that said Schreiber committed said crime set forth in the complaint and answer on the 26th day of November, 1888. He avers that said Schreiber immediately fled from the state of Indiana and the United States of America to the dominion of Canada. He avers that on or about the 12th day of July, 1889, after said Schreiber had fled, and while in Canada, which defendant well knew, one L. K. Ong, the cashier of defendant's bank, made an affidavit charging said Schreiber with the commission of said crime, and filed the same with plaintiff as a justice of the peace. He avers that he never issued any warrant on said affidavit for the arrest of said Schreiber. He avers that said Ong, cashier, and the president and officers of defendant, and the counsel representing the defendant, and the prosecuting attorney in and for Bartholomew county, immediately after the filing of the same, took and carried away said affidavit, and the same was never at any time thereafter on file with plaintiff as a justice of the peace, or in his hands, or in his possession, and the plaintiff made no record thereof in his office. He avers that said Schreiber was never brought before plaintiff upon said charge, and the plaintiff never understood that said Schreiber was to be brought before him as such justice of the peace on said charge. He avers that said contract was made between plaintiff and defendant on the 15th day of April, 1890, while said Schreiber was still at large, and residing in the dominion of Canada, and outside of and beyond the limits of the state of Indiana and the United States of America, which defendant well knew. Said Schreiber had never theretofore been arrested on said charge, and at the time of making said contract said affidavit was not on file with the plaintiff as a justice of the peace, and the same had never been returned by defendant's said officers, or by any one, and the plaintiff supposed and believed that said Schreiber had been indicted for said crime by the grand jury of Bartholomew county, in the state of Indiana, whereat said crime was committed, and the plaintiff supposed and believed that said indictment was pending against said Schreiber, and have no knowledge to the contrary up to and until after the time of his arrest and return to Bartholomew county, Indiana; and upon his return to said county said Schreiber was never brought before plaintiff to answer for said

crime, or any charge whatever. He avers that said Schreiber was returned to the city of Columbus, in Bartholomew county, Indiana, under arrest upon said charge, on the 28th day of September, 1890, and the defendant procured and caused said Schreiber to be held in jail in the custody of the sheriff of said county until defendant caused an indictment to be found against him, and said sheriff held said Schreiber upon the request of defendant until indictment was found against him, and on the 9th day of October, 1890, the grand jury of said Bartholomew county returned an indictment in the Bartholomew circuit court against him for said crime, and thereafter said Schreiber was held in custody by the sheriff of said county on said indictment until he was convicted of said crime and sentenced to the penitentiary of the state of Indiana; and the plaintiff never at any time took, assumed, or had jurisdiction of said Schreiber as a justice of the peace on the charge of said crime, and did not know or understand that he could or was to take jurisdiction of said Schreiber upon any prosecution for crime at the time of making said contract or the rendition of said services by him. Hord & Emig, Attorneys for Plaintiff."

The appellee filed a demurrer to the reply, which was sustained by the court, to which ruling the appellant excepted at the time. The appellant failing and refusing to reply, further judgment was rendered against him, from which he prosecutes this appeal.

The errors assigned are as follows: "(1) The court erred in overruling the demurrer filed by the appellant to appellee's first paragraph of answer. (2) The court erred in sustaining the demurrer filed by appellee to appellant's reply to appellee's first paragraph of answer, and rendering judgment against appellant for refusing to reply further."

The first paragraph of the answer above set out, taken in connection with the complaint, presents this state of facts: The appellant, then a justice of the peace, before whom an affidavit was at the time filed charging one William H. Schreiber with the crime of larceny, entered into a contract with the appellee by which the appellant agreed to go to Detroit, Mich., and arrest and deliver said Schreiber, for \$40 per month, fare to and from Detroit, and board while there, and a contingent fee of 25 per cent of all money or property restored to the appellee, after deducting all expenses the appellee may have incurred. By the terms of the agreement on which recovery is sought a judicial officer engages to doff the judicial ermine, and for a stipulated price assume the role of a detective in a cause pending before him for judicial consideration. It places the liberty of the accused at the mercy of a court, subject to a fee of 25 per cent in the event of his success in causing the arrest of the accused. If such undertaking is permissible in a justice of the peace, and constitutes a binding obligation, it is equally so in a circuit, federal, or other judicial officer. The moral turpitude of the transaction would be the same in either instance. To preserve the integrity of the law and the good order of society,

public policy forbids this class of contracts. It has long been established that a contract against public policy will not be enforced. *Elkhart County Lodge v. Crary*, 98 Ind. 288-240, 49 Am. Rep. 746. An agreement of this character shocks the moral sense of the people, as being grossly wrong and injurious. In *Greenhood on Public Policy* (page 387) it is said: "Any contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void." The same author, on page 388, says: "The policy of the law will not allow an officer to do more than his official duty with a view to increase his fees and emoluments. It cannot change the principle because it happens that he has made a bad bargain. The rule is intended to keep public officers within the line of their duties, and not allow them to take advantage of their official position to make money by entering into engagements which tempt them to abuse the process of the courts, and oppress those who are affected by their official proceedings." In *Collins v. Blantern*, 2 Wils. 841, on page 850, Wilmot, Ch. J., said, in speaking of an illegal contract: "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community. It is void by the common law, and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this: No polluted hand shall touch the pure fountains of justice." In line with this expression, Elliott, J., speaking for the court in *Stropes v. Greens County Comrs.*, 72 Ind. 42, on pages 48 and 44, said: "There is neither a more wholesome nor sounder rule of law than that which requires public officers to keep themselves in such position as that nothing shall tempt them to swerve from the straight line of official duty. Officers ought not to be permitted to place themselves in a position in which personal interest may come in conflict with the duty which they owe to the public." In *Elkhart County Lodge v. Crary*, 98 Ind. on page 241, 49 Am. Rep. 746, the court says that contracts which may tend to the injury of the public service are void, and contracts which will tend to subordinate the public welfare to individual gain are not enforceable in any court of justice. It follows, to state the rule comprehensively, that all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void, though not open to the charge of actual corruption. 3 Am. & Eng. Encyclop. Law, pp. 879-881; Bishop, Cont. § 549. And this is true regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract. This proposition finds expression in the words of Judge Elliott in *Elkhart County Lodge v. Crary*, 98 Ind. on page 242, 49 Am. Rep. 746, as follows: "It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the par-

ties entered into it honestly, and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that an evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit."

In Pollock's Principles of Contracts (page 286) it is said: "But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void." All agreements for pecuniary considerations to control the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 56, 17 L. ed. 868, 871; *State v. Johnson*, 52 Ind. 197; *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 11 Am. Dec. 519; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 589.

Greenhood on Public Policy (page 5) thus lays down the rule: "The question of the validity of the contract does not depend upon the circumstance whether it can be shown that the public has in fact suffered any detriment, but whether the contract is, in its nature, such as might have been injurious to the public. It matters not that any particular contract is free from any taint, or actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts." The evil tendency of the contract in suit is clearly manifest. The mere statement of it shocks the sense of justice and fair play. By virtue of the contract, appellant assumed a position where selfish motives might have impelled him to sacrifice the public good for private gain, for there is no greater public good than the right of every person charged with the commission of a crime to have a fair and impartial hearing, and there is no higher security for that right than the preservation of the courts free from corrupting influences. While there is no imputation of actual wrong committed in this case, it may be properly claimed that a contract of this character puts it in the power of a corrupt and designing official, in the event the property and money out of which to get his per cent should not willingly be turned over, to compel payment after arrest, through fear of commitment, though the accused might be innocent, or, if the accused were guilty, the temptation would be presented to acquit for a like reason. The wrong of such a contract consists in the fact that the influence of the compensation—the contingent fee of 25 per cent—does not necessarily stop with the arrest of the accused, but continues

until the property and money shall be restored. High contingent rewards may lead to improper means and the use of undue influence. The duties of appellant, as counsel suggest, terminated with the arrest, but not his interest and power. The contract in suit did not require appellant to do any act injurious to the interest of Schreiber, but it allowed and induced it. As shown by the authorities, judicial officers are not permitted to place themselves in a position in which personal interest may come in conflict with the duties which they may owe to the public. They are prevented from even assuming such a position. It is the tendency of the contract, and not its binding obligation to wrong, which the courts consider. No design need, therefore, be manifest; the motive is not inquired into. It is true, as appellant's learned counsel contend, a justice may lawfully make an arrest out of his jurisdiction for an offense committed out of his presence. The thing which he undertook and contracted to do was in itself lawful, but it is only part of this case. We are now confronted with the question, Can a justice before whom an affidavit is filed, charging an individual with the crime of larceny, enter into a valid contract with the prosecuting witness to make an arrest of such person for a pecuniary consideration, when the recompense is contingent on the amount of property that may be recovered? What the law authorizes cannot be against public policy, but it may be the subject of a contract which is against public policy. The question is not, does the law authorize the arrest, but does it authorize the contract? It does not follow that a contract to do what is lawful within itself is not against public policy. It is lawful to petition the city council for the improvement of the street in front of one's property, but not to do so for a consideration moving from another. The affirmation of good faith and denial of fraud do not relieve the act of culpability. Courts will not aid either party to enforce such contracts, but leave them where they find them. *Maguire v. Smock*, 42 Ind. 1, 18 Am. Rep. 353; *Elkhart County Lodge v. Crury*, 98 Ind. 242, 49 Am. Rep. 746. A justice has control of his fees. He may tax them large or small, so they are not in excess of the amount provided for by statute. It is lawful for him to make no charge. But he cannot, in advance, enter into a valid contract binding him to make no charge for services to be rendered. A contract whereby a justice of the peace agrees to charge smaller fees in suits to be brought before him by a certain corporation than are prescribed by statute, and that such fees shall not be collected unless paid by the defendants to the corporation, is contrary to public policy and void. *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 180; *Willemín v. Bateson*, 63 Mich. 309.

When a candidate for the office of judge, in order to secure his election, pledges himself, if elected, to perform the duties of such office for a sum less than one half of the fees allowed by law, and voters are thereby induced to vote for such candidate, and he thus receives a majority of the votes cast for such

office at such election, his election, secured by these means, is invalid as against public policy. *State v. Collier* (Mo.) 8 Cent. L. J. 495. The facts that the thing contracted for was in itself lawful, and that the defendant was benefited by the agreement, do not give the plaintiff any right of recovery. *Gleason v. Chicago, M. & St. P. R. Co.* (Iowa) 48 N. W. Rep. 517. Numerous illustrations might be cited to sustain the doctrine. The argument that in cases like the present the justice sits merely as an examining court, and can commit only, while in other cases he may convict, and assess the penalty, has little force. The judicial function is the same in each instance. The judgment or discretion of the court, which may be improperly influenced, is exercised in each class with this difference as to results: in one case the finding is "guilty," and in the other "probably guilty." The contracts of police officers to make arrest beyond their territorial jurisdictions stand upon a different footing. They have no judicial functions to perform.

The contention of counsel that the appellee, having received the benefit of the contract, is estopped to defend against it on the principle that a corporation which has such benefit is estopped to assert that it had no power to contract, is unsound, as applied to the case at bar. The rule suggested applies to cases where private rights alone are concerned, while in contracts void as against public policy the public is interested. The public concern cannot be made a matter of private bargain. A number of maxims apply to interdict the enforcement of such a contract, and many decisions hold that the receipt of benefits and retention of property under such a contract give no right of recovery. If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief. It cannot be rendered valid by invoking the doctrine of estoppel. *Hutchins v. Weldin*, 114 Ind. 80; *Perkins v. Jones*, 26 Ind. 499; *Dumont v. Dufore*, 27 Ind. 263; *Root v. Stevenson*, 24 Ind. 115; *Gleason v. Chicago, M. & St. P. R. Co. supra*; *Wheeler v. Wheeler*, 5 Lans. 355; *Snyder v. Willey*, 33 Mich. 433; *Greenhood*, Pub. Pol. pp. 2, 3, 6, note 3; *Broom*, Legal Maxims, p. 729, § 730; 7 Wait, Act. & Def. 92.

The demurrer to the answer was properly overruled. The matters alleged in the reply by which it was sought to avoid the answer are: (1) Good faith on the appellant's part at the time the contract was entered into; (2) that the affidavit, after being filed, was taken away, and not returned; (3) that appellant made no record of the affidavit in his office; (4) that appellant issued no warrant upon the affidavit; (5) that Schreiber was never brought before appellant in said cause. The first and fifth points have been fully considered by the authorities heretofore cited. It is well settled that the validity of the contract cannot be tested by the good faith of the appellant, nor by anything occurring subsequent to its execution. It is equally clear that the case cannot be in any way affected by the taking of the affidavit from the office of the justice. The jurisdiction does

not terminate with the absence of the papers from the court with or without leave. Nor does it matter that the justice had not copied the affidavit on the docket, and made no record of the affidavit. While the statute requires him to make entries in his docket, it has been held to be directory merely, and the omission in this respect is not a jurisdictional defect. *Indianapolis & C. R. Co. v. Wiley*, 20 Ind. 229. Especially should this be true when the officer seeks to take advantage of his own neglect of duty. The same reason applies to his failure to issue a warrant, if this act were in any sense material. He could not ask the court to enforce a contract which would only be valid because of his failure to discharge his duty as a justice. But the issuance of a warrant by him was not material. The pleadings show that Schreiber was a fugitive from justice, and that

appellant's agreement was to go to Detroit, Mich., and arrest and deliver the accused there, or at any place appellee might select. If the undertaking was, as counsel insist, to do a lawful act, the warrant in such case would be issued at the end of a requisition. If the warrant were issued without the state, it would be without avail. But, aside from all this, the question is, not had the justice jurisdiction in fact, not what should have been decided had the prisoner been brought before him, but, might the temptation of a possible fee of 25 per cent influence a justice's judgment in such an event, he having placed himself in a position where such a contingency could occur? If so, the contract is void. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel a wrongful act.

The judgment is affirmed.

KANSAS SUPREME COURT.

STATE of Kansas

v.

A. D. CULLINS, *Appt.*

(.....Kan.....)

"The purchaser of intoxicating liquor, which is sold in violation of law, is not a participant with the seller, and therefore is not guilty as the principal offender.

(March 10, 1894.)

A PPEAL by defendant from a judgment of the District Court for Marion County con-

*Headnote by HOBSON, Ch. J.

victing him of participating in an illegal sale of intoxicating liquors. *Reversed.*

Statement by **Horton, Ch. J.**:

On the 12th day of July, 1893, an information was filed in the district court of Marion county against A. D. Cullins, charging him with selling intoxicating liquor without first taking out and having a permit as required by law. The information contained five counts. Upon the trial, William Dannenfeiser testified as follows: "Q. How much [whiskey] did you get? A. Well, I got a fourth of a pint. Four of us got a pint. Q. Who were the four of you? A. Why, there

NOTE.—Liability of purchaser on illegal sale of intoxicating liquors.

The rule has been quite uniform to refuse to recognize any liability on the part of the purchaser at an illegal sale of intoxicating liquor. The reasons for this ruling are somewhat different but the general trend is in the same direction. A remarkable fact is that notwithstanding the numerous expressions of opinion on the subject the cases in which the question was the point at issue are very few.

In *State v. Bonner*, 2 Head, 136, it is held that one who buys liquor from a slave is guilty of an offense.

But in the subsequent case of *Harney v. State*, 8 Lea, 112, in which it was held that the purchaser could not be convicted, the *Bonner* Case is distinguished on the ground that in making a sale by a slave unlawful, it must be presumed to have been intended that it would also be an offense to tempt the slave to sell.

The buyer cannot be held liable as an aider or abettor. *Reg. v. Heath*, 13 Ont. Rep. 471.

In *Com. v. Kostenbauder*, 17 W. N. C. 308, a judgment quashing an indictment against several persons for conspiring to procure the violation of the Sunday liquor law was confirmed by a divided court, where it appeared that they visited several saloons on Sunday for the purpose of procuring a violation of the law, and then informed against the violators with the intention of sharing in the penalty.

In *Campbell v. State*, 79 Ala. 271, the prosecution was against one who procured the liquor for the 24 L. R. A.

consumer, and it was said his guilt could not be greater than that of the buyer, and it would not be pretended that he either sold or aided in the sale proved.

In a case in which it was held unnecessary to name the buyer in the indictment, the court says the statute is "intended to punish those who sell and not those who buy." *State v. Hiekerson*, 3 Helak. 375.

An indictment for selling is not supported by evidence of a purchase. *State v. Miller*, 26 W. Va. 106.

But under a statute punishing any person found illegally dealing in intoxicating liquors, the words "illegally dealing" must be taken to include the purchasing as well as the selling; and a person purchasing must be punished for an offense under the statute. *McKenzie v. Day* [1895] 1 Q. B. 299.

Assisting purchaser.

The general rule is that an agent of the purchaser is subject to no greater liability than the purchaser himself. But there are a few cases in which a special protection is intended to be given to the purchaser by the statute in which aid given to the purchaser has been punished.

Thus in *Foster v. State*, 45 Ark. 361, it was held that one who purchases liquor for a minor is liable as a seller.

So one who procures liquor for another may be guilty under a statute providing punishment for the sale, furnishing, or giving away of intoxicating liquor. *State v. Hasset*, 64 Vt. 42.

But passing the money from a slave to the seller

was me, and I think George Ray, and Ed. Winters was one, and I think he was the other. Q. Who was the other? A. Cullins. Q. Did you pay anything for it? A. I paid twenty-five cents for my share, and I think the others paid theirs. Q. To whom did you pay it? A. Cullins. Q. What did you call for? A. We didn't call for anything in particular. Cullins spoke up, and said, 'Let's get a pint of whiskey,' and we chipped in and got a pint of whiskey. Q. To whom was that money given? A. Cullins. Q. You say that Cullins went and got this whiskey? A. Yes, sir. Q. How long was he gone? A. Well, I suppose, something like five minutes. Q. Did you inquire where he went? A. No, sir." The defendant, A. D. Cullins, testified as follows: "Q. You heard Mr. Dannenfels's testimony, didn't you? A. Yes, sir. Q. You did go and get some whiskey for him and yourself and some other fellows, didn't you? A. Just as much for myself as for them. Q. Well, did you get that at one of the joints, too? A. I got in a joint, sir. Q. Didn't get it at a drug store? A. No, sir. Q. You can tell what joint you got it at? A. I went to Wolf's, on the John Hess corner. Q. Is that on the east side of Main street, right next to the depot? A. Yes, sir." The court instructed the jury, among other things, as follows: "If you believe from the evidence in the case, beyond a reasonable doubt, that the defendant, A. D. Cullins, under either of the counts in this case, did himself sell intoxicating liquor, within two years prior to the filing of the information in this case, without having a permit so to do, within the county of Marion, state of Kansas, or if you believe from the evidence in the case, beyond a reasonable doubt, that the defendant, A. D. Cullins

did aid or abet in the unlawful sale of intoxicating liquors,—that is, by going into a place where intoxicating liquors are sold unlawfully; places spoken of by the witnesses by the name of 'joints,' and known to the defendant as a place where intoxicating liquors are unlawfully sold,—and then and there buy intoxicating liquors with money furnished to him by parties for that purpose, he would be guilty of aiding and abetting in the unlawful sale, and he could be convicted, the same as the principal offender." The jury returned a verdict finding the defendant guilty as charged in the second count. The motion for a new trial was overruled, and exceptions taken. The defendant, upon the verdict, was sentenced to pay a fine of \$100 and costs, taxed at \$99.25, and to be imprisoned in the jail of Marion county for a period of thirty days. He appeals.

Messrs. Keller & Dean for appellant.

Messrs. John T. Little, Atty-Gen., and C. M. Clark, for appellee:

Whoever purchases liquor at a place where the same is unlawfully sold is guilty of aiding, assisting, and abetting in such unlawful sale, and may be convicted as for making the sale. Logically there is no escape from this conclusion. The vendee solicits the sale, accepts the liquor and pays for it; except for these contemporaneous acts no offense could be committed. He is such a voluntary party to the crime that without him there can be no offense consummated.

State v. Bonner, 2 Head, 136.

Horton, Ch. J., delivered the opinion of the court:

The question in this case is whether the purchaser of liquor which is sold in viola-

and the liquor from the seller to the slave does not constitute an indictable offense. *State v. Hopkins*, 49 N. C. 306; *State v. Wright*, Id. 308.

How far purchaser disqualified as a witness.

Many of the rulings upon this subject have been made in reference to claims on the part of the buyer to be exempt from testifying on the ground that the evidence might tend to criminate him, or objections to the testimony of the buyer as being that of an accomplice, so that the cases are not direct authority as to the liability of the buyer, but may be considered valuable as showing the tendency of the judicial thought in reference to them.

In *State v. Rand*, 51 N. H. 361, 12 Am. Rep. 127, and *Wakeman v. Chambers*, 69 Iowa, 169, 58 Am. Rep. 218, it was held that the purchaser cannot be excused from testifying.

A purchaser of liquor cannot be regarded as aiding and abetting the crime so as to be entitled to be relieved from testifying as to the seller's guilt, on the ground that it would tend to criminate himself. *State v. Teaban*, 60 Conn. 92.

In *Com. v. Willard*, 23 Pick. 476, it is held that the purchaser may be compelled to testify, and in *Ex parte Barker*, 30 N. B. 406, and Page v. State, 11 Lea, 202, it is held that for refusal to testify, he may be committed for contempt.

While in *State v. Baden*, 37 Minn. 212, it is held that the fact that the prosecuting witness was in pursuit of evidence against the seller does not make him an accomplice so as to exclude his evidence, and in *Com. v. Downing*, 4 Gray, 22, it is 24 L. R. A.

held that, although the liquor is purchased for the express purpose of prosecuting the seller, it is not sufficient to make the buyer an accomplice whose testimony cannot be received.

Upon trial for selling liquor to a slave, who had been sent to buy by his master, who remained in the street outside to see if the seller would violate the law, in which testimony of the master was objected to as that of an accomplice, the court says the statutory offense consists in the act of selling, not in that of buying, and that neither the purchaser nor one participating in the purchase can be made the accomplice of the seller. *Harrington v. State*, 36 Ala. 236.

Collateral rulings.

As illustrating the policy of the law it has been held that—

A mortgagee of liquors is not so far *particeps criminis* as to avoid the mortgage and defeat his title. *Cobb v. Farr*, 16 Gray, 588.

So one who has given the seller credit on account for liquors sold illegally, and settled the account on that basis, may maintain an action to recover back the price. *Walan v. Kerby*, 99 Mass. 1.

Although the statute merely provided for the recovery back of money paid. *Adams v. Goodnow*, 101 Mass. 81.

In *Yerteau v. Bacon*, 65 Vt. 516, a recovery back of the amount paid for liquor was permitted on the ground that it was authorized by statute, although it was intimated that, in the absence of the statute, it could not be done. H. F. F.

tion of law is guilty of unlawfully selling the same; that is, whether, by purchasing, he counsels, aids, or abets in the unlawful sale, and may be convicted in the same manner as if he were the principal. The precedents are against the conviction of the purchaser, although he knows that the circumstances will render the sale of the liquor illegal. 1 Bishop, Crim. L. § 857; Black, Intoxicating Liquors, § 381, and cases cited; *State v. Rand*, 51 N. H. 361, 12 Am. Rep. 127; *Com. v. Willard*, 22 Pick. 476. In the last case, Chief Justice Shaw observed: "We know of no case where an act which, previously to the statute, was lawful or indifferent, is prohibited under a small, specific penalty, and where the soliciting or inducing another to do the act by which he may incur the penalty is held to be itself punishable. Such a case, perhaps, may arise, under peculiar circumstances, in which the principle of law, which in itself is a highly salutary one, will apply; but the courts are all of opinion that it does not apply to the case of one who, by purchasing spirituous liquor of an unlicensed person, does, as far as that act extends, induce that other to sell in violation of the statute." In that case a distinction is drawn between cases which are usually considered *mala in se*, or criminal in themselves in contradistinction to *mala prohibita*, or acts otherwise indifferent, than as they are restrained by positive law. *State v. Bonner*, 2 Head, 186, is cited in support of the instruction of the court. In that case it was held to be an offense for a white man to purchase liquor from a slave without a written permit from his master; but that case has been distinguished in *Harney v. State*, 8 Lea, 113, where it is held that a person who buys liquor sold contrary to the provisions of the statute is not equally as guilty as the seller. It is insisted, however, that as the sale of intoxicating liquors is forbidden in this state by the constitution, excepting for medical, scientific, and mechanical purposes, the purchaser is a participant with the seller in the offense. Notwithstanding the amendment to the constitution prohibiting the sale and manufacture of intoxicating liquors, the offense of selling intoxicating liquors in violation of the constitution and the statute is an offense *mala prohibita*, and is not of the class which are considered *mala in se*. In Iowa, which has adopted a statute prohibiting the sale of intoxicating liquors similar to our own, it was recently said by the court of that state: "As the prohibitory statute does not provide that the purchaser is guilty of any crime, it seems to us this fact, practically, ends the inquiry. If such had been

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the intent, it would certainly have been so provided, in express terms. So far from this being so, the implication is clearly the other way. The prohibitory statute does not regard the purchaser an aider and abettor in any criminal act." *Wakemyn v. Chambers*, 69 Iowa, 169, 58 Am. Rep. 218.

It is further insisted, as the statute expressly provides that the person to whom intoxicating liquors are unlawfully sold shall be a competent witness, and that no person shall be excused from testifying touching any offense committed against the statute tending to criminate himself, but that such testimony shall in no case be used against him, these provisions tend to sustain the argument that a purchaser is equally guilty with the seller. We think otherwise. The first provision adopts the ruling of the courts that the purchaser of intoxicating liquors cannot excuse himself from testifying on the ground that his testimony would tend to criminate himself. The other provision relates to members or shareholders of clubs or associations where intoxicating liquors are kept for the purpose of use or sale as a beverage, making every person directly or indirectly keeping or maintaining such a club or association alike guilty. Sess. Laws 1881, chap. 128, §§ 16, 21; Gen. Stat. 1889, pars. 2536-2540.

Finally, it is insisted that the defendant, upon his own testimony, is guilty of taking or receiving an order for intoxicating liquors, under section 12, chap. 149, Sess. Laws 1885; paragraph 2550, Gen. Stat. 1889. The testimony does not show that the defendant took or received any order for intoxicating liquors, within the provisions of the statute. At most, according to his testimony, he was a purchaser of liquor for himself, and acted as the agent or intermediary of his associates or the other buyers. If the defendant had sold the liquor himself, or if he had acted as agent or clerk for the seller, upon proper instructions to the jury he could have been convicted. If this court should determine that, in prosecutions against parties for the unlawful sale of intoxicating liquors, the purchaser is equally guilty with the seller, the statute would be much more difficult of enforcement. Most of the convictions, in prosecutions of this kind, are sustained by the testimony of purchasers; and, if purchasers and sellers are equally guilty, prosecutions will be less successful than heretofore, even if the testimony of the purchasers cannot be used against them.

The judgment of the District Court will be reversed, and cause remanded.

All the Justices concur.

WEST VIRGINIA SUPREME COURT.

J. M. POLING, Admr., etc., of Charles Swain, Deceased,
v.

OHIO RIVER R. CO., *Plff. in Err.*

(38 W. Va. 645.)

- *1. A declaration for negligence is good if it contains the substantial elements of a cause of action, the duty violated, the breach thereof, properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given.
2. An ex parte map or diagram made by a witness, and shown by him to be correct, may be given in evidence for the consideration of the jury, not as independent evidence, but to be considered by them in connection with other evidence, so as to enable them to understand and apply it.
3. To make an objection made during the trial to the admission of evidence available in the appellate court, the point must be made and properly saved by bill of exception. It is not enough to note the objection in the certificate of evidence.
4. As a general rule, a railroad company is not responsible for the negligent acts of United States postal clerks or agents upon its trains.
5. A railroad company has a platform and mail crane near a postoffice at which the mail train does not stop, but the postal clerk from the mail car, with a "catcher," takes in from the crane the mail pouch suspended thereon, without the train slackening speed. A person who stations himself on the company's land, near the mail crane, for the purpose of witnessing the catch, or for some other purpose of like kind, as a mere voluntary licensee, is subject to the concomitant risks and danger of injury thus assumed, and the company does not owe him the duty of keeping the mail crane in suitable and safe condition. The railroad company is only liable for such wanton injury as may be done to such licensee by the gross negligence of the company, its agents and servants.
6. A defendant who, after the plaintiff has given in his evidence in chief, and rests, then moves the court to instruct the jury to render a verdict for defendant, but, the motion being overruled, goes on with his case, will be held to have waived his exception taken to such ruling of the court.
7. The road surveyor may change any county road in his precinct with the consent of the owner of the land (Code, § 21, chap. 43); and, when any road is altered, the former road shall be discontinued to the extent of such alteration, and no further, and the new one established. Chap. 43, § 32.
8. When the verdict of a jury, viewed according to the ordinary rules of considering the evidence on motion

*Headnotes by HOLZ, J.

for a new trial, is plainly against the law of the case upon the facts proved, the court, on motion of the party aggrieved, will set the same aside and award a new trial; but not more than two new trials can be granted to the same party in the same cause.

9. A case in which the foregoing rules are applied, and various instructions and rulings are considered and discussed.

(December 6, 1898.)

ERROR to the Circuit Court for Jackson County to review a judgment in favor of plaintiff in an action brought to recover damages for the death of his intestate alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mrs. V. B. Archer and D. H. Leonard, for plaintiff in error:

Negligence is the doing of something which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty which, under the circumstances, a reasonable person would do, and which act of commission, or omission, as a natural consequence, directly following, produces damage to another.

Washington v. Baltimore & O. R. Co. 17 W. Va. 190.

Negligent omission is the omission to do something in discharge of a legal duty which, under the circumstances, a reasonable person would do, and which act of omission as a natural consequence directly following produces damages to another.

However great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public, in a matter whereof he had the right to avail himself, there is nothing which the law will redress.

Bishop, Non-Cont. L. § 446.

The plaintiff must show a breach of some duty owing to him, or which was imposed for his benefit.

1 *Shearm. & Redf. Neg.* § 816.

The railway is not liable to licensees for injuries resulting from the condition of its premises, or caused by its failure to maintain those premises in repair, but it is liable to licensees for injuries caused by negligence in the operation of its line.

Patterson, Railway Accident Law, 176. See also *Whittaker's Smith*, Neg. 61-63; *Wharton*, Neg. 2d ed. § 844.

A person who, without invitation, visits a telegraph office merely for the purpose of paying a friendly call to the operator, which office is owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land, and near its track, from which occasional messages are sent and received for outside parties for pay, visits said office as a mere voluntary licensee,

NOTE.—As to the liability of a railroad company for negligent acts of United States postal clerks or agents upon its trains, see also *Galloway v. Chicago, M. & St. P. R. Co.*, 23 L. R. A. 442.

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As to duty of care toward mere licensees on premises, see *Benson v. Baltimore Traction Co. (Md.)* 20 L. R. A. 714, and cases and notes there referred to in footnotes.

subject to the concomitant risks and perils, and no duty is imposed upon the owner or occupant to keep its premises in safe and suitable condition for such visitors, and the owner is only liable for such willful or wanton injury as may be done such licensee by the gross negligence of its agents or employes.

Manning v. Chesapeake & O. R. Co. 16 L. R. A. 271, 36 W. Va. 329.

Swain was not in the public road but was upon the lands bought by the defendant from J. V. Hall and wife.

Talbott v. King, 82 W. Va. 7.

A land owner is not required to take active measures to insure the safety of intruders where he has set no trap for the purpose of injuring trespassers, nor is he liable for an injury resulting from the unlawful use of his premises to one entering upon them without right.

Ray, Negligence of Imposed Duties, 23, also § 7, pp. 20, 21, par. 1; *Whittaker's Smith*, Neg. 61; *Indermaur v. Dames*, L. R. 1 C. P. 274; 1 Thomp. Neg. 288, and note.

Affirmative negligence must be proven to entitle licensee to recover.

Washington v. Baltimore & O. R. Co. 17 W. Va. 190; 1 Ray, Negligence of Imposed Duties, p. 20, par. 6.

The distinction between active or affirmative negligence and omissions to act has received the sanction of the courts in England, and in many of the states of the Union.

Hounsell v. Smyth, 7 C. B. N. S. 781; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Sutton v. New York Cent. & H. R. R. Co.* 66 N. Y. 243; *Victory v. Baker*, 67 N. Y. 866; *Cusick v. Adams*, 115 N. Y. 55; *Severy v. Nickerson*, 120 Mass. 806, 21 Am. Rep. 514; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 877; *Byrne v. New York Cent. & H. R. R. Co.* 104 N. Y. 867, 68 Am. Rep. 512.

Deceased was at most a wayfarer loitering around defendant's premises for his own amusement, and as such, the defendant was only bound not to purposely or willfully injure him.

A loiterer around the station of a railroad company is entitled to no other duty.

Wharton, Neg. §§ 653, 821, 822; *Manning v. Chesapeake & O. R. Co.* 16 L. R. A. 271, 36 W. Va. 329; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 817; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. 258, 47 Am. Rep. 706.

Unless contrivances are placed on such premises with an actual or constructive intent to hurt intruders, the proprietor is not liable for injuries resulting to persons by reason of the condition in which the premises have been left, or from the prosecution of the business thereon in which the owner had a right to engage.

Schmidt v. Bauer, 5 L. R. A. 581, and note, 80 Cal. 565.

The fact that the premises were owned by a railroad company does not change the rule.

Where one enters upon the premises of another as a mere licensee, without any enticement or inducement, he does so at his own risk, and as to him the owner owes no duty of care or vigilance.

Sterger v. Van Sieten, 16 L. R. A. 640, 132 24 L. R. A.

N. Y. 499; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500, 23 Am. Rep. 112; *Spicer v. Chesapeake & O. R. Co.* 11 L. R. A. 885, 84 W. Va. 514.

The right of the public in a highway crossing a railroad, is simply a right of passage across the railroad. The public, and no individual thereof, have the right to commit a trespass upon the railroad company's property within the limits of the highway crossing. He cannot interfere with the rails or grounds, or obstruct the tracks, simply because it is in the highway, without committing a trespass.

Kelly v. Michigan Cent. R. Co. 65 Mich. 186.

A person who without right, with a full knowledge of the location, voluntarily places himself upon a railroad track at a place where there is no crossing, and which is a known place of danger, and is killed by a passing train, is negligent, and no damages can be recovered for his death except for wanton injury.

Pittsburgh, Ft. W. & O. R. Co. v. Collins, 87 Pa. 405, 80 Am. Rep. 871.

It was only where an injury is shown to have been willfully or purposely committed, that contributory negligence ceases to be a defense.

Pennsylvania Co. v. Sinclair, 62 Ind. 301, 30 Am. Rep. 185; *Beysel v. Newport News & M. V. R. Co.* 84 W. Va. 588.

The cause of this accident was the failure of the postal clerk, who had only been on duty for a few days, to elevate the hook used by him in catching mail sacks, to a sufficient height to miss the lower arm of the crane.

A railroad company is not responsible for the negligent acts of postal clerks or agents upon its trains.

Muster v. Chicago, M. & St. P. R. Co. 61 Wis. 825, 50 Am. Rep. 141; *Mellor v. Missouri Pac. R. Co.* 10 L. R. A. 86, 105 Mo. 455; *Snow v. Fitchburg R. Co.* 186 Mass. 552, 49 Am. Rep. 40.

Reargument.

The cause of an injury in the contemplation of law is that which immediately produces it as its natural consequence; and therefore if a party be guilty of an act of negligence, which would naturally produce an injury to another, but, before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the accident could never have occurred but for his negligence.

Washington v. Baltimore & O. R. Co. 17 W. Va. 190.

The action of the mail clerk was an independent action absolutely, wholly, and totally outside the operation of the train, or any part thereof, and he is disconnected with any agent of the company or any of its servants in charge of said train, and absolutely beyond the reach and control of any person connected with the railroad company.

16 Am. & Eng. Encyclop. Law, p. 444, and note.

Messrs. N. C. Prickett, James H. Couch, Jr., Charles E. Hogg, for defendant in error:

It is neither usual nor necessary to specify the acts or omissions of the defendant which

constitute the negligence. This is a matter of proof and need not be specified in the declaration.

Hawker v. Baltimore & O. R. Co. 15 W. Va. 635, 36 Am. Rep. 825; *Gulf, C. & S. F. R. Co. v. Washington*, 4 U. S. App. 121, 49 Fed. Rep. 847; *Mansf. Dig.* § 5005; *Fordey v. Merrill*, 49 Ark. 277; *Green v. New York*, 8 Abb. Pr. 27; *Meyer v. Staten Island R. Co.* 7 N. Y. S. R. 245.

A general allegation of negligence, without stating the particular acts which constitute the negligence, is good against a general demurrer.

Harper v. Norfolk & W. R. Co. 36 Fed. Rep. 102; *Mobile & M. R. Co. v. Orenshaw*, 65 Ala. 566; *Anderson v. East*, 2 L. R. A. 712, 117 Ind. 126; *Scott v. Hogan*, 73 Iowa, 614; *McFadden v. Missouri Pac. R. Co.* 92 Mo. 843.

May not the defendant's liability in this action be classified with those cases where persons on the highway are injured from something thrown from or falling from the adjoining property, treating the defendant as the owner from whose property the dangerous mail crane arm (by reason of its malconstruction and non-repair) was thrown?

Beach, Contrib. Neg. §§ 276-284; 9 Am. & Eng. Encyclop. Law, 884, note 1.

A railway is liable to persons who are rightfully on the highway, if it so negligently transacts its business as to render movement thereon dangerous to passers-by.

Patterson, Railway Accident Law, 143-151; *Angell, Highways*, § 845; *Gulf, C. & S. F. R. Co. v. Washington*, *supra*.

Could the defendant build the crossing, open the road thence to the river landing, and then be heard to say that such was not the public road, when it was built for the public, intended for public use, and actually used as the public road in the room and stead of the old road that had been filled up and destroyed by the defendant.

Hanks v. Boston & A. R. Co. 147 Mass. 495; *Washburn v. Chicago & N. W. R. Co.* 68 Wis. 474.

And though decedent may have been standing on the verge of the bank made by cutting down the road in order to put it on the proper grade, he was none the less in the highway as he was clearly within the thirty feet allotted thereto.

Beach, Contrib. Neg. § 244; *Harrower v. Ritson*, 87 Barb. 308; *Rea v. Russell*, 6 East, 427; *Dickey v. Maine Teleg. Co.* 46 Me. 483; *Little Miami R. Co. v. Greene County Comrs.* 81 Ohio St. 838; 4 Am. & Eng. Encyclop. Law, 916; 9 Am. & Eng. Encyclop. Law, 411.

To render a railroad company liable for injuries caused by its negligence, it is only necessary that the person injured shall have been free from fault, and that the company shall have failed to perform an obligation which it owed to the public generally, and thereby caused the injury. It is not necessary that the company shall have been guilty of negligence, particularly in its relations to the person injured.

Pennsylvania Co. v. Langendorff, 13 L. R. A. 190, 48 Ohio St. 816.

By placing the crane at a public crossing and on the side of a public highway, it became the duty of the defendant at all times and under 24 L. R. A.

any and all circumstances to see that it did not render the highway near thereto and the crossing thereat less safe to the public than before; and whether it did become less safe to the public by reason of its location at such crossing, or by reason of the manner of its construction as a crane, or by reason of its being in bad repair, are all questions for the jury.

4 Am. & Eng. Encyclop. Law, 909, citing *Roberts v. Chicago & N. W. R. Co.* 35 Wis. 679.

If this accident was due to the breaking of defendant's mail crane, it cannot be excused by showing that it was erected and approved by competent engineers.

Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 89 Am. Rep. 787; *Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22.

Whether the defendant was guilty of negligence toward plaintiff's decedent, must be determined by the jury.

Washington v. Baltimore & O. R. Co. 17 W. Va. 190; *Wells, Questions of Law and Fact*, §§ 261, 267.

Ordinarily the injury of a person at a railway highway crossing raises no presumption that the company has been negligent. But where there is some evidence from which a reasonable mind could fairly infer that there had been negligence on the part of the railroad company, the question becomes one of fact for the jury.

4 Am. & Eng. Encyclop. Law, 937.

Where the accident is unexpected and extraordinary, not happening in the ordinary course of things, a presumption of negligence does arise.

Rintoul v. New York Cent. & H. R. R. Co. 17 Fed. Rep. 905; *Whittaker's Smith, Neg.* pp. 419, 520; 16 Am. & Eng. Encyclop. Law, pp. 448-452.

The use by witness of a plat or diagram to illustrate or explain his testimony is every-day practice and has the sanction of high authority.

1 Wharton, Ev. §§ 676, 677; *Missouri, K. & T. R. Co. v. Moore (Tex.)* Feb. 14, 1891; *McVey v. Durkin*, 186 Pa. 418.

In the authorities referred to the maps and plates as well as the diagrams were permitted to go in evidence to the jury.

Brown v. Galesburg Pressed Brick & Tile Co. 132 Ill. 648; *Bowen v. Huntington*, 85 W. Va. 682; *Stewart v. Everts*, 76 Wis. 35.

Number 4 was instruction properly refused by the court because it assumes, in the main, to settle the very question in controversy by treating it as matter of law, thus drawing from the jury the determination of the facts constituting the negligence, if any, in this case; and further, because it seeks to create a distinction between active and passive negligence, a distinction, if it ever did obtain, that cannot be upheld upon sound principles of law or reason.

Beach, Contrib. Neg. § 25, note 2; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Pacific R. Co. v. Houts*, 12 Kan. 828; *Walsh v. Mississippi Valley Transp. Co.* 52 Mo. 434; *Whalen v. St. Louis, K. C. & N. R. Co.* 60 Mo. 828; *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191; *Needham v. San Francisco & S. J. R. Co.* 87 Cal. 417; *Nashville & O. R. Co. v. Smith*, 6 Helsk. 174; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655; *Trow v. Vermont Cent. R. Co.* 24 Vt. 487, 58 Am. Dec. 191.

State v. Manchester & L. R. Co. 52 N. H. 528; *Kershacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246.

It is not for the court to tell the jury what facts constitute negligence.

Beach, Contrib. Neg. § 444, note 2; *Pennsylvania Co. v. Frana*, 112 Ill. 898; *Andrews v. Runyon*, 65 Cal. 629; *Myers v. Indianapolis & St. L. R. Co.* 118 Ill. 886; *Olay v. Chicago & A. R. Co.* 17 Mo. App. 629; *Dexter v. McCready*, 54 Conn. 171.

Where a highway is shown to exist pursuant to law, the burden of showing discontinuance, vacation, or abandonment thereof is upon him who asserts that the public have lost their rights therein.

Elliott, Roads & Streets, 658.

Whether the surveyor accepted this road is wholly immaterial. It was the highway as restored by the railroad company, and it cannot be heard to say in an action like this that this left-hand road—the road offered by it as the restored highway—is not the public highway. If the defendant failed to do its whole duty in the matter of restoring this road to such state as required by law then it was indictable under section 45, chapter 43, of the Code.

State v. Monongahela River R. Co. 87 W. Va. 108.

Where the decedent was standing, whether there was a public road leading from the crossing, on the left, to the river, and whether he was in the line of this road, are properly questions for the determination of a jury.

Wells, Questions of Law and Fact, §§ 255, 261, 267; *Kelly Nail & Iron Co. v. Lawrence Furnace Co.* 5 L. R. A. 652, 46 Ohio St. 544.

Here the defendant built the left-hand road as and for the public road, and from the time of the construction of the railroad in 1886 until some time in 1887 it was the only road that could be used, and this highway never having been shut up, but kept open and used at all times by foot passengers and by persons traveling on horseback to the river, did not the defendant, under all these circumstances, impliedly extend an invitation to the public to make use of this road? If so, the defendant, when standing therein, was neither a trespasser nor a licensee in the proper sense of the term.

Missouri Pac. R. Co. v. Bridges, 74 Tex. 520; *Beeman v. Boston & A. R. Co.* 147 Mass. 495; *Stewart v. Pennsylvania R. Co.* (Ind.) 14 Am. & Eng. R. R. Cas. 679; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446; *Stewart v. Cincinnati, W. & M. R. Co.* 80 Mich. 166; *Philadelphia & R. R. Co. v. Troutman*, 11 W. N. C. 453; *Webb v. Portland & K. R. Co.* 57 Me. 118.

That the defendant had ample and full notice of this crane being dangerous by reason of its mal construction there cannot be a shadow of doubt.

If the defendant had notice, or what was equivalent thereto, then it is liable to the plaintiff's decedent, although he may have been on the defendant's premises as a licensee, and not in the public road.

Beach, Contrib. Neg. 2d ed. p. 71, note.

It is wholly immaterial what decedent was doing in the road. Even though he had been engaged in an illegal act the defendant could

not interpose this as a defense to its own negligence.

Beach, Contrib. Neg. p. 45, citing *Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274.

The company must so construct, repair, and improve the crossing as to meet the increasing wants of the public.

4 Am. & Eng. Encyclop. Law, p. 908.

Holt, J., delivered the opinion of the court:

This was an action of trespass on the case, brought in the circuit court of Jackson county on 22d March, 1892, by Poling, as administrator of C. Swain, against the Ohio River Railroad Company, for causing the death of his intestate, C. Swain, which resulted in a judgment for plaintiff for \$3,000, from which defendant has obtained this writ of error. The assignments of error will be considered somewhat in the order made.

1. The court erred in overruling defendant's demurrer to the declaration. The declaration contains three counts, and the demurrer is to the declaration and to each count. In *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825, it is held that a declaration against a railroad company for negligently and wrongfully killing the plaintiff's cattle on its track need not state the acts of omission or commission which constitute the negligence and wrong. It is neither usual nor necessary in this state to specify the acts or omissions of defendant which constitute the negligence. This is matter of proof, and need not be specified in the declaration. It was not specified in the declaration in the case of *Blaine v. Chesapeake & O. R. Co.* 9 W. Va. 253, nor in *Baylor v. Baltimore & O. R. Co.* Id. 270; and the declarations in these cases were held good on demurrer. It is good if it contains the substantial elements of a cause of action; and the demurrer must be overruled, unless there be omitted something so essential to the action that judgment according to law and the very right of the cause cannot be given. But the declaration must set forth the duty which has been neglected, and aver the neglect. *Flint & P. M. R. Co. v. Stark*, 38 Mich. 714. The essential ground or principal subject-matter of complaint, with such matter of inducement as may be necessary to lead up to or render it intelligible, introduced and averred with time and place in the technical modes of expression suited to the action, was all that was ever necessary under the strictest forms of common-law pleading. The first count avers that plaintiff's intestate lost his life by reason of the negligence of defendant in failing to keep its mail crane in safe condition, decedent being at the time a traveler on the highway, and without fault on his part; giving the circumstances with great particularity. Necessary implications of fact and matters of law need not be averred. It avers that it was defendant's duty to keep at all times a proper and safe mail crane at Douglas station, and that by the neglect of such duty defendant caused his intestate's death; that is, defendant's duty to decedent as a traveler on the highway. The second count avers the duty

of defendant to keep its said mail crane and appliances and railroad track safe and free from danger to the traveling public, and to all persons rightfully at or near said crane and railroad; that defendant neglected such duty; that in consequence thereof decedent lost his life while on and near the public road, and without fault on his part. The third count is substantially the same. The averments that the father Newman Swain, sustained damage by reason thereof, may be regarded as impertinent, and therefore may be disregarded as surplusage, as he is not the plaintiff. And the declaration concludes in the usual form: "And thereupon the said plaintiff says that by reason of the premises," etc., "and by force of the statute in such cases made and provided, an action hath accrued to him, as such administrator as aforesaid, to have and demand of and from the said defendant, for and by reason of the grievous wrongs and injuries in said three counts mentioned, damages to the amount of ten thousand dollars, for the uses and purposes in said several counts mentioned, and therefore he brings this suit."

By the statute of this state giving the right of action in such cases, the action is brought by and in the name of the personal representative of such deceased person, and the amount recovered in any such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate (Code, §§ 5, 6, chap. 103); damages given not to exceed \$10,000, and barred in two years. See Statute of Descents and Distributions, chap. 78. It will be seen by section 10 that to the state shall accrue all the personal estate of any decedent of which there may be no other distributee. It may be that the state would not take; in which event it would certainly not be improper to aver that there are distributees, but not necessary, because it must be assumed that kindred exist, and it need not be averred. Cooley, Torts (2d ed.) top p. 317. The demurrer was properly overruled.

In this case the court has certified all the evidence under section 9, chap. 131, Code, from which the material facts appear to be as follows: In 1886 the defendant company built its road along the Ohio river, through the county of Jackson, where the death of Charles Swain, the subject-matter of this suit, took place. There was an old county road of long standing leading from Douglas landing, in Grant district, on the Ohio river, back to Murrayville, on the turnpike. By order of 18th April, 1886, the county court of Jackson county "granted its consent to the said company to construct, maintain, and operate its railroad across any highway or public road in said districts of Ravenswood, Grant, or Union, in this county, when necessary to do so, but upon the following conditions: That if said railroad company shall, by the building of its said road or otherwise, obstruct any public road in this county, it shall put the road obstructed in as good condition at every crossing of said railroad as it was before the obstruction, and in all other respects according

to law." In the fall of 1886 the construction company building the railroad along the Ohio river, at the point called "Lone Cedar," or "Douglas Landing," changed to the old county road, moving it down about 100 feet, made a crossing over the track 16 feet wide, and graded the road from there to Douglas landing, at the river; but the road surveyor refused to receive that part of the road from the railroad to the river. In the winter of 1886-1887 the river washed away the new road next to the river. The road surveyor then had a new road made from the crossing into the old road, on the river side of the railroad, which has been used and worked as the public road, under the direction of the road surveyor, ever since. The land between the railroad and the river at Douglas landing is lying open, unfenced; and the road made by the construction company is also used as a foot path, and for horsemen, but is not worked or recognized as the highway, and, if it had ever been a part of the county road, it had in the spring of 1887 been abandoned, and thenceforward was a mere private path, used by tacit permission of Hall, the landowner. The road made by the construction company, turning to the left, and the new road, turning to the right, separate at the railroad crossing, and come together at the landing on the beach; the distance being only 75 yards. The crossing over the track is 15 feet wide. On the river side of the track, and 8 feet below the 16-foot crossing, the railway company erected a platform and mail "crane," but no other building, called "Douglas Station," where by means of a "mail catcher" on the car, mail pouches could be taken on without stopping or slackening the speed of the train. The mail pouches and the mail catchers attached to the postal cars for taking up mails without stopping the trains are furnished by the United States government mail-equipment division of the postoffice department; but the mail cranes are constructed, erected, and are to be kept in good order by the railroad companies, at their expense. The store where the Lone Cedar postoffice was kept was on the hill side from the railroad, about 180 or 190 feet distant. The deceased, Charles Swain, was an intelligent, sober, industrious, strong, healthy young man; twenty years old, lacking three months; living with his father, Newman Swain, about one and a half miles back in the country from the station in question. Father and son were at the station together on the morning of the accident. The mail train came in about noon, and, not wishing to return until they should get their mail, young Swain, with the consent of his father, went hunting with a young man named George Pickering, who sometimes acted as deputy postmaster at that place. They were hunting near by, on the land of Mr. Hall. Near noon they quit hunting; came down to the railroad, about 75 or 100 feet down the river, below the station; walked up the track to the platform; stayed there five or ten minutes; heard the coming south-bound mail train whistle when a half or three fourths of a mile away; saw the train come in sight about 600 yards off; young

Swain saying, "That is engine No. 16." The two young men then walked across the platform back of the crane, next the river, and stepped on a rise or bank 15 feet from the upright of the mail crane. The mail sack was hanging on the crane when they came up, and they knew that the mail clerk on the approaching train would attempt to catch the sack. The lower arm had been struck by the catcher, and knocked off, about two weeks before. When the mail car came up, the postal clerk caught the mail pouch hanging on the crane, the train running twenty or twenty-five miles per hour, but, on making the catch, struck the lower arm of the mail crane with the hook of the catcher, knocking off the upper part of the lower arm, and hurling it forward, and around against the left breast of young Swain with such force that he took a few steps, fell, and died in a few seconds. The piece of the lower arm broken off, and thrown around and back against young Swain, was large at one end, tapering to a feather edge at the other, which was the explanation given by a witness of the direction in which the blow by the catcher threw it. The decedent had no business with the train; was there simply as a looker-on at the passing mail train. He was not traveling on, or in any way using, the county road. But one of the questions of fact, about which a considerable part of the testimony was given, was whether the point, 15 feet behind the upright part of the crane, to which he walked as the train approached, and where he was standing by the side of Mr. Pickering when he (Swain) was struck and killed, was in the county road or not. It was within the railroad company's right of way. There is a diagram in evidence which shows with great precision where the decedent stood when killed, with reference to these two roads. He was not within the 80 feet of the road running from where the road crosses the rails to the right to the landing at the river, but was within the 80 feet of the road turning to the left, and running to the river at the same point, being 11 feet from the center of the 80-foot right of way, but was not within the 80-foot right of way of the road turning to the right. There is also a diagram showing the location of the mail crane, and also a great deal of evidence as to whether it was a safe and proper appliance. In the present attitude of the case, taking it most strongly for plaintiff, and confining it to plaintiff's evidence, after the verdict of the jury, we must regard it as not an appliance in complete and proper order, to the full measure of what was required on behalf of any one to whom the company owed the duty to see that such appliances under their own control were in full and complete and proper order; otherwise, it would not have been possible to strike the lower arm of the crane with the hook of the catcher. The thing itself speaks, and shows that if the distance between the arms had been greater, or the catcher had been shorter, it would have been impossible for the catcher, no matter at what angle raised, to have struck the lower arm; but it cannot in any proper sense be called a nuisance. It is also shown that if

the catcher on the mail car is raised to a horizontal position, or anything near that, it passes through without danger. This is also shown by the very many times it was successfully used without accident, although the lower arm had been struck about two weeks before. The mail agent who made the catch was a young man without experience, who commenced on October 8, 1888, eighteen days before the accident happened; and in the second week of his running on the train the accident occurred. The evidence also shows that the mail crane was on the concave side of a curve, and that there was a loose joint, and there had been a slight wash-out under the track at that point; both having a tendency to swing the train towards the crane.

But one instruction was asked by and given for plaintiff, and to this defendant excepted. For defendant the court gave instructions Nos. 1, 2, 3, 6, 7, and 8, but refused to give defendant's instructions Nos. 4 and 5, and defendant excepted. Plaintiff's instruction is in the words and figures following: "The jury are hereby instructed that if they believe, from the evidence in this case, that the decedent, C. Swain, at the time that he was struck by the piece of the arm of defendant's mail crane, was on the highway leading from a point called 'Douglas Landing' to another point on the Murrayville road, then at the time said Swain was so struck he cannot be considered or held to have been a trespasser on defendant's premises." Defendant's instructions given: "No. 1. The jury are instructed that it is the duty of the plaintiff to make out his case by a preponderance of the evidence. No. 2. The jury are further instructed that negligence is the doing of something which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty which, under the circumstances, a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damages to another. No. 3. The jury are further instructed that if they believe, from the evidence, that the deceased, C. Swain, was using the railroad track or its right of way as a foot path for his own convenience, and that he was not so using said track or right of way at a lawful crossing, and that the said C. Swain received his injury, while he was so using said track or right of way at a place other than a lawful crossing, by the breaking of a mail crane belonging to the Ohio River Railroad, that the plaintiff cannot recover in this case, unless they believe, from the evidence, that the defendant was guilty of wanton or gross negligence." "No. 6. The jury are further instructed that the defendant is not responsible for the negligence of the postal clerks on its postal cars on its road. No. 7. The jury are further instructed that if they believe, from the evidence, that the breaking of the lower arm of the defendant's crane was caused by the failure of the postal clerk to properly adjust the mail catcher on the postal cars for the purpose of catching the mail sack, then the defendant is not liable, and they should find

for the defendant. No. 8. The jury are further instructed that if they believe, from the evidence, that the deceased, C. Swain, was a person in the full possession of his senses of seeing and hearing, and also in the full possession of his mental faculties; and if they further believe, from the evidence, that at the time of the accident the said Swain knew that there was danger in standing about the mail crane; and if they further believe, from the evidence, that said mail crane, with the mail sack adjusted thereon, was in plain view, and seen by said Swain; and if they further believe, from the evidence, that the defendant knew that a train of cars was approaching, or would soon approach, the place where said crane was standing; and if they believe, from the evidence, said Swain knew the mail sack would be caught, or an attempt would be made to catch it, by the mail clerk on the train; and if they further believe, from the evidence, that said C. Swain visited the vicinity of said mail crane from curiosity, or for personal convenience, without any reasonable duty calling him there,—that in such case, even although they may believe, from the evidence, that at the time of the accident the deceased was standing in a public road, yet he was guilty of contributory negligence by so standing near a known place of danger, and the jury should find for the defendant." Defendant's instructions refused: "No. 4. The jury are further instructed that if they believe, from the evidence, that the death of C. Swain was caused by the breaking of the lower arm of the mail crane of the defendant; and that if they further believe, from the evidence, that the breaking of the crane was the result of the lower arm being too near to the upper arm,—that in such case the failure to construct such crane with the lower arm further from the upper arm, if it was a duty devolving upon the defendant to so construct, such failure to construct it is only an omission of duty, and, if it is such omission of duty, the plaintiff cannot recover, under the evidence in this case. No. 5. The jury are further instructed that if they believe, from the evidence, that the deceased, C. Swain, was at the time of his death on and about the defendant's platform and mail crane, not as a passenger, or upon any business connected with the railroad company, but merely there for his own convenience or curiosity, or for personal enjoyment, the defendant owed to him no active duty to look out for his protection; and hence, if he was killed by the breaking of a mail crane caused by a passing train, the plaintiff cannot recover on the theory that the defendant has been guilty of negligence by a failure to discharge towards him a legal duty."

The order of the county court of Jackson, as we have seen, permitted the railway company to construct, maintain, and operate the railroad across this public road on condition that, if they obstructed it, it should put the public road in as good condition at the crossing as it was before. But the road made by the company from the crossing down to the landing at the river was not accepted; but Mr. Peters, the road surveyor of the district,

notified the parties making it that he objected to it at that place, and would not receive it; nor was it ever received or assented to by him or the county authorities; and after it washed away next to the river, in a few months thereafter, the road from the crossing turning to the right, and going down to the landing, was made by Mr. Hall, the land owner, with the sanction of the road surveyor, and has been worked and used and kept in order by the county as the public road ever since, which includes the time of the accident. By section 21, chap. 48, Code, the surveyor may change any county road in his precinct with the consent of the owner of the land, and, "when any road is altered, the former road shall be discontinued to the extent of such alteration and no further, and the new one established." Code, § 82, chap. 48. So that, if the road turning to the left from the crossing, and running to the river, had ever been a part of the Murrayville and Douglas Landing road, it had been changed by the road surveyor, and thereby discontinued, by the alteration; and the road turning to the right had been thereby established, and was the public road at the time of the accident. Yet the left-hand road was still used by horsemen and footmen, and where the young man stood when struck was on it, giving it a width of 30 feet, and was only 11 feet from the edge of the true public road,—the one turning to the right. Under this state of the evidence, the court cannot say that plaintiff's instruction should have been refused as being abstract, and wholly without evidence on the point; for the two roads coincide at the crossing, and coincide in part opposite where the decedent was standing.

Second error assigned by plaintiff: In admitting the parol evidence of Dr. Davis and others to prove that deceased was in the public road at the time of the accident. It is true that mere user of a road will not make it a public road, under Code, § 81, chap. 48. The user must be accompanied either by an order of the county court recognizing it in some way as a road, or the road must be worked by the road surveyor as such. Still, there was an attempt in this case to show a recognition in both these ways; and I do not think it was error to permit witnesses to testify that it was made by the construction company as a substituted part of a public road, and was used by the public as such for some time.

Third error assigned by plaintiff: In permitting the witnesses D. R. King and others to testify from the plat, Exhibit A, with the record. This was a map or diagram of the place of the accident, showing the relative positions of the railway mail crane, roads, and crossing, and the place where the accident happened, where the young man stood. Though *ex parte*, it was shown to be correct by a witness who made it, and must have been useful for the understanding of the testimony, and almost indispensable to many of the witnesses in making their testimony readily intelligible to the court and jury. It was used by the witness who made it, in order to explain and apply his own testi-

mony, and make it capable of being understood. It was not offered or used as independent evidence, but for this purpose, and no other. Such use is common in practice, and clearly legitimate. *Curtiss v. Ayrault*, 3 Hun, 487; *Brown v. Galesburg Pressed Brick & Tile Co.* 132 Ill. 649. "It was received for the consideration of the jury, so far as it was shown to be correct, in connection with other evidence, and to enable them to understand and apply it, and not as independent evidence." See also *Hoge v. Ohio River R. Co.* 35 W. Va. 562-564. It is one of the appropriate methods of bringing before the eye of the jury a representation of the things and scenes in which the fact took place, and as an aid in understanding and applying the evidence. See 1 Greenl. Ev. 15th ed. § 82, note.

Fourth error assigned by plaintiff: In admitting illegal evidence, and excluding competent evidence, against the objections of defendant, "as noted in the transcript of the evidence." Under section 9, chapter 131, all the evidence, and not the facts, is certified. The transcript of the evidence is voluminous, and it shows many exceptions "noted" to evidence during the progress of the trial; but no bill of exceptions was taken to such rulings, and the exceptions are therefore taken as waived. It would involve great labor, indeed, to go over a verbatim report of all the evidence as given in, and pick out and consider all exceptions "noted" to questions asked and answers given, permitted, or overruled. The law does not contemplate so easy and compendious a mode of bringing up for review all such rulings of the lower court, nor one so general and indefinite in specification, and involving so much labor on the part of the appellate court. See *Gregory v. Ohio River R. Co.* 37 W. Va. 606. It must in some way be so set out as to be capable of being easily found and identified.

I have already given the main facts of the case with some fullness of detail, and, because the plaintiff comes to us with a verdict in his favor, from his evidence alone, except where the defendant's evidence is not contradicted. On one point,—a vital one, as the counsel regard it,—Where did decedent stand with reference to a public road when killed?—there is perhaps some evidence tending in a very slight degree to prove the plaintiff's claim in that respect. So, at least, I have regarded it. The principles and rules of law to be applied are involved in the question, Did the railway company owe to decedent any duty of which the violation by the company was the direct and immediate cause of his death, and what points of law, with reference to the rulings complained of, spring up out of the application to the facts of such principles and rules? The principles may be said to be few and simple (the common principles of right and wrong, public policy, and general convenience of that day); but the rules based upon them, and formed by generalizing, more or less, the points decided in the very many cases, are quite numerous and complex. These rulings relate to the instructions asked

by defendant, and refused; its motion for a verdict on plaintiff's evidence, and for a new trial, both overruled. These, as far as may be, will be considered together.

The postal clerk who made the catch from the running train was in the service of the United States government; was not in the employ of defendant. He was not the servant or agent of the company; not hired or paid by them, nor subject to their control. A postal clerk is not an employé of the railroad company (*Mellor v. Missouri Pac. R. Co.* 105 Mo. 455, 10 L. R. A. 36), and a railroad company is not responsible for the negligent acts of postal clerks or agents upon its trains (*Muster v. Chicago, M. & St. P. R. Co.* 61 Wis. 325, 50 Am. Rep. 141), except under circumstances which need not now be discussed (see *Snow v. Fitchburg R. Co.* 136 Mass. 552, 49 Am. Rep. 40), and the reason is, the postal clerk is neither the servant nor the agent of the railway company; they had nothing to do with his selection or employment, have over him no supervision or control, and have no power to discharge him; so in no sense could his act be said to be the act of the company. The decedent was a voluntary licensee, one without invitation standing on the side of the defendant's right of way as a trespasser or licensee, for some purpose of his own,—most likely to see the catch made by the passing mail train, or to wait for his companion to get the sack thrown off; evidently not as a servant of the company, for he was in no wise in their service; not as an expectant passenger, for the train did not stop; not to get the sack, for he had nothing to do with the postoffice or mail business; not as using the county road for any purpose, for he was not in it, and had not been using it there that day, and the place to get his mail for which he was waiting, and his direction of travel, was on the other side,—the postoffice, 180 feet away; not as a mere trespasser, unless in a technical sense, for it is fair to infer that he was there with the tacit consent of the company though it does not appear that it was with their knowledge. In *Woolwine v. Chesapeake & O. R. Co.*, 36 W. Va. 329, 16 L. R. A. 271, it was held that such a licensee subjects himself to the risks and perils incident to the place he is in as such licensee, and that no duty is imposed upon the owner or occupant to keep the premises in safe and suitable condition for such person; and the owner is only liable for such willful or wanton injury as may be done to the licensee by the gross negligence of the railroad company, its agents or employes. Was there gross negligence on the part of the company in this case? For such contention there is no foundation that I can see, unless the mail crane was of such a character as to be a common nuisance to those using, or waiting to use, the highway at the crossing. We have already seen that such was not his business there. He was not in the road at the time, had not used it, and the only evidence—that of his companion—shows that they stepped back there 15 feet from the mail crane, to what was evidently supposed to be a safe place, to see the mail train go by, and, we may reasonably infer, to

see the catch made of the mail pouch. But, from this evidence, can we fairly say that the mail crane, which it was the duty of the company to put up properly and keep in repair, was a common nuisance? Gross negligence having been branded as an unmeaning, vituperative epithet, the modern tendency is to discard its use, and treat everything under the head of ordinary care, and its correlative, simple negligence. But it would be remarkable to find a few simple and useful gradations in almost all things, and yet none in negligence. It may not be generally useful in practice in the present day; but that is because of the multiplicity of the degrees of negligence, and the unevenness of the grades and subdivisions, and not because there is no such thing as gross negligence. *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605. To say that it is but the violation of the duty of ordinary care required in the case is putting two things of different degrees in one class, by using "ordinary care" as a generic term; and the term "ordinary care" has still to be graded and divided by the jury by the conduct of the prudent man under the circumstances putting themselves in his place, and measuring what is required of him by such circumstances, before it can be applied. Thus supplemented by a sliding scale, and thus made adaptable to measuring in such practical, but indefinite, way, the care required, it is found, no doubt, to be more useful and convenient in the vast majority of modern cases. Nevertheless, this broad and simple classification is, with us, still regarded as useful and convenient in two or more classes of cases. The terms "utmost care" and "slightest negligence," "slight care" and "gross negligence," are still applied, especially in two classes of cases: The former, to common carriers of passengers, as in *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666 (decided in 1854, forty years ago); *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230,—both still leading authorities with us. In this class of cases the common carrier owes to the passenger the duty of exercising more than ordinary—the utmost—care. The latter, to voluntary licensees and trespassers. *Woolwine v. Chesapeake & O. R. Co.* 86 W. Va. 329, 16 L. R. A. 271; *Spicer v. Chesapeake & O. R. Co.* 84 W. Va. 514, 11 L. R. A. 385. In this class of cases the owner and occupant does not owe the duty of exercising ordinary care; but slight care, so as not to cause wanton injury, and thereby be guilty of gross negligence, discharges the only duty he owes. Where one is liable for the slightest negligence,—for example, to a passenger,—he must take the greatest care. He will be liable for such injury from negligence as the most thorough and conscientious diligence could not have foreseen and prevented. *Carrieco v. West Virginia Cent. & P. R. Co.* 85 W. Va. 389-390. When one inflicts upon a voluntary licensee a wanton, reckless, heedless injury, he is guilty of gross negligence, and is liable. See *Woolwine v. Chesapeake & O. R. Co.* above. A mere sightseer, on no other business, goes into any one of the large mod-

ern factories in operation throughout the civilized world. It requires great care and watchfulness on his part, unfamiliar as he is with such places and things, to avoid danger and escape injury, although the place is reasonably safe and fit, and everything is carried on with due ordinary care; but unless there is wanton injury, the result of gross negligence, the owner is not liable. Why? The owner has set no trap for him; he did not induce, but only permitted, him to come; he is not there on business; the place and appliances belong to the manufacturing company; it was fixed for them and their employees; it suits them; by their knowledge and skill they avoid danger, though to those unskilled and unfamiliar it may be dangerous,—dangerous to any one in fact; but it was not made for, and is not carried on for, any purpose with which the licensee has anything to do; if the injury is not wanton, the negligence is not gross, and the company is not liable, for it owed him no other duty, and that one has not been violated. As appears by the event, a step or two further to the right would have put this unfortunate young man in the highway, and, as it happened, out of harm's way. But I do not see how he can be charged with contributory negligence, except in a very technical or artificial sense. No one would have been likely to anticipate or foresee the danger. He merely assumed the risk, whatever it might be. The risk, perhaps, was not less of his being struck by lightning at that place during a thunder storm; so that I do not see how it can be said that he was guilty of contributory negligence in any proper, or at least natural, sense. If he had been a traveler at that place, just a step or two on the company's right of way, and off the public road, and perhaps a technical trespasser, but a traveler, waiting to cross the track at the crossing, I am not prepared to say that the company would not have been liable, because they would then have owed him the duty of ordinary care. See *Beach, Contrib. Neg.* § 254; *Sanders v. Reister*, 1 Dak. 151; *Murray v. McShane*, 53 Md. 217, 36 Am. Rep. 387. Or if he had been in the highway, where he had a right to be, without business, at a safe distance from the passing train, and the mail crane was so imperfect and dangerous as to be a common nuisance, being so close to the public road, then they would be guilty of gross negligence, and liable; but in our view this case is neither of these. Besides, it may be said that there was in this case an intermediate efficient cause of the injury between it and the having there the imperfect, and in some degree dangerous, mail crane.

Did this mail crane unlawfully obstruct or render dangerous this highway and crossing to the extent of making it a nuisance? The only description made of it, and criticism made upon it, on the part of plaintiff's witnesses, is made by Mr. Vosburg, evidently a correct and very intelligent man, a civil engineer by profession, who was on the ground, and examined and made his measurements thirteen months after the accident happened, who says, in constructing cranes:

"I have no experience at all." "What do you know about them?" "Not anything at all." He had observed others, but this was the only one he ever measured or directed his attention to particularly. That you could not change the distance between the arms, and keep them parallel, without changing the length of the mail pouch. The post-office department made the specifications for both sacks and arms, and furnished the pouches and the catcher. That if the sack is changed, and made longer, the outer end of the lower arm must be lowered, and the fastened end ought to be. In answer to the question, "Is it possible for the mail clerk to make these catches in the condition in which you found it?" answered, "Possibly; yes, sir; because the evidence is that he made them for a long time while in that condition." And the evidence on the side of defendant on this point is that, with ordinary skill,—and it took but little,—the catcher can be raised parallel with the floor of the car, with the rod that runs between the doors from side to side; that, when brought to about that position, there is no danger of striking either the lower or upper arm of the mail crane, but, if the mail clerk should delay elevating this catcher into proper position until he was too near the crane, then he would be liable to strike the lower arm in putting it into position. For diagram of mail crane, see Postal Laws and Regulations 1887. By change in length of mail pouches, we may infer the lower arm was dropped at the outer end about 18 inches out of a line parallel with the upper arm; and this made the striking of the lower arm with the catcher possible. I do not think this crane could be pronounced a nuisance; but, if it were such, the decedent was not in the highway, but on the defendant's right of way,—a place he selected with his eyes open, with all his faculties unimpaired and in full play, for the purpose of seeing the catch made, or for some purpose of like kind.

Defendant's Assignments of Error Nos. 5, 6, 7, 8, and 9. Exception No. 7, to the giving of plaintiff's one instruction, has already been considered. It cannot be said that there was absolutely no evidence tending in any appreciable degree to show that the decedent was not a trespasser or voluntary licensee on defendant's premises; for he was standing in a place that had once been dug and used as a road, though afterwards altered by the road surveyor, and thus discontinued. For a still stronger reason, defendant's motion to direct the jury to return a verdict for defendant was properly overruled. Where the party is guaranteed the right of trial by jury, especially in cases of negligence, which are, for the most part, peculiarly cases of fact, and therefore such cases are peculiarly within the province of the jury, such direction is only proper in a few cases so plain that there is no room for two opinions. It stands on ground wholly distinct from a motion for a new trial; though the latter, in one of its reasons, often comprehends the former,—as where the case is wholly without evidence as to some essential fact. It saves time, trouble, and expense, is sometimes all that can be said in this favor. But here the de-

fendant waived this exception by going on with his case. If he intends to save it, he must submit his case to court or jury without further evidence. He (the defendant) has appealed to the court to end the case, as matter of law, then and there, for defect of proof. He can go to the jury at that stage, his motion being overruled, or he can waive his exception, and go on with the case, take his chance before the jury, and, if losing, move for a new trial, which is more comprehensive; but is not permitted to take all these chances, and, in addition, skip his own evidence, which may have supplied the defect in plaintiff's case, put himself back where plaintiff rested, and he made his motion as if he had taken the hazard of submitting his case at that point. The six instructions given for defendant he cannot complain of, and they need not be considered, except as to any bearing they may have upon the question of the refusal of instructions Nos. 4 and 5. As a general rule, it may be affirmed that omissions, unless when involving the nonperformance or malperformance of a positive duty, are not the subject of suit. Wharton, Neg. § 83. But otherwise, when the omission is the defect in the discharge of a legal duty; for it is of the essence of negligence to omit to do something that ought to be done. Id. § 88. Instruction No. 4 was properly refused. If the negligence of the defendant in failing to construct a proper crane was the proximate cause of the injury to the plaintiff, and it owed the decedent the duty to see that it was a safe appliance, it is of no consequence whether it be omission or commission. See *Harriman v. Pittsburgh, O. & St. L. R. Co.*, 45 Ohio St. 11, and other cases cited; Bench Contrib. Neg. § 25, note 2. It depends on the question whether defendant owed decedent any duty or not, under the circumstances; and although the thing complained of may help to determine that question by reason of its nature, as that it was an omission, yet that does not furnish the true criterion of liability, and the plaintiff might still be entitled "to recover under the evidence in this case." No hypothetical state of facts being stated, this instruction treats the question of negligence as a question of law, to be determined by the court "under the evidence in the case," or as a question of law and fact, to be thus determined by the court, and for that reason also is bad. Plaintiff's instruction No. 5 was also properly refused. While apparently putting the fact of decedent being on or about defendant's platform and mail crane as the hypothetical fact, *inter alia*, out of which the court is to tell the jury the given legal point arises, such fact is really assumed; and the fact that he was not there as a passenger, etc., but for his own curiosity, etc., is the real hypothetical fact of the instruction. "About defendant's platform and mail crane?" Where is that? The counsel on both sides have made a difference of 10 or 12 feet in the location of the county road, near and about the platform and mail crane, the crucial point in the case; and both locations are equally comprehended in the fact assumed by the court, and may be said to be the one

controverted fact. In such a case, "around and about" is also too indefinite. If the instruction was intended to raise the point that it made no difference whether the place where the young man stood was on the company's right of way, and not in the county road, or in the county road, and not on the right of way, then it is obscure and confusing, and should have been framed differently. *Baltimore v. Poultney*, 25 Md. 84; *Bellevue v. R. Co. v. Snyder*, 24 Ohio St. 678. See also *Morse v. Gilman*, 18 Wis. 385; *Hughes v. Monty*, 24 Iowa, 501,—all cited to sections 466, 467, Wells, Questions of Law & Fact. And an indirect assumption of this fact, as in this case, is condemned on the same principle; for it also throws the weight of the case upon a part of the evidence or facts, instead of putting it upon all. See Wells, Questions of Law & Fact, § 477; *Roots v. Tynor*, 10 Ind. 87, cited.

These things being believed from the evidence, the jury is told the defendant owed decedent no active duty to look out for his protection. Then it adds, "And hence, if he was killed by the breaking of a mail crane caused by a passing train, the plaintiff cannot recover on the theory that the defendant has been guilty of negligence by a failure to discharge towards him a legal duty." I think the instruction, as a whole, calculated to confuse and mislead the jury, and, if not argumentative, it suggests the implication that plaintiff may be entitled to recover on some other ground than that of being guilty of negligence. It also involves the question of active duty, which has already been considered. The defendant might be liable for an injury to one traveling in a highway, directly caused by a nuisance close by, without reference to the character of the duty, whether active or passive. He may put up some structure so near as to render the lawful use of the public road dangerous. He, it may be said in the first place, owed the passive duty not to put it up, and when he put it up he violated that duty by an act of commission. Second. Being up, he owed the active duty to look out for and guard against the party's injury from such nuisance. Besides, instructions No. 8 and No. 8 covered the same state of facts in all material points, and were given, being based on the law as laid down in *Spicer v. Chesapeake & O. R. Co.* 84 W. Va. 514, 11 L. R. A. 385.

I regard this case as ruled by the law as laid down in the case of *Woodwain v. Chesapeake & O. R. Co.*, 36 W. Va. 329, 16 L. R. A. 271, and the case, just cited, of *Spicer v. Chesapeake & O. R. Co.*, and do not think it can be distinguished as to the controlling elements of law and fact, or withdrawn from their decisive influence.

I need scarcely add, from what has already been said, that the facts, taken at their strongest, according to the rules in such cases, do not justify the verdict. The evidence of plaintiff, taking it all as true, with all fair and reasonable inferences, together with the uncontradicted evidence of defendant, proves nothing from which the jury could reasonably infer that defendant had

violated any duty which it owed to plaintiff's intestate, or was guilty of any negligence for which plaintiff is entitled to recover, but is plainly insufficient to warrant such finding. The verdict is against the law of the case upon the facts proved, and must therefore be set aside. Judgment and verdict set aside, and new trial awarded.

Reversed and remanded.

On Rehearing.

This unfortunate young man, when so unexpectedly struck by the sliver from the lower arm of the mail crane, was standing 15 feet from and back of, the upright supporting the arms, and not in any road, but on the land or right of way of defendant. The left-hand road running from the railroad crossing to the landing on the Ohio river was made by the construction company, was not only not received or adopted as a part of the county road by the road surveyor, but on the contrary, was expressly refused and repudiated, and soon after was washed away at the river. The land owner, by the sanction and direction of the road surveyor, made what is called the "right-hand" road, which was adopted and worked as the only road leading from the crossing to the river in existence at the time of the accident; and in this he was not standing, but on the land of the defendant. He was not there on the invitation of defendant, or on business of any kind with it; not to become a passenger, for the train did not stop; and he was not in defendant's employ. He was there simply as a looker-on, to see the mail train go by, and the mail agent make the flying catch of the mail pouch. Therefore he was a mere trespasser, or, at best, a voluntary licensee. The company made no change to endanger him after he came. It owed him no duty that was violated. For although, in the present attitude of the case, I take for granted that the mail crane was not of the best construction, but must have been in some respect defective, yet it was not a public nuisance; for it had been frequently used with safety, and successfully, both before and immediately after this accident, without harm or danger to any one, unless it was dangerous to the one using it. It was a case in which the unexpected happened, and its liability to happen could not be foreseen, and is only proved by the actual happening (see *Richards v. Rough*, 53 Mich. 212; *Sjogren v. Hall*, 53 Mich. 274; *Cooley, Torts*, 92, note 1), and therefore a case of damage without injury; at least, so far as defendant is concerned. Moreover, the one who made the catch, knocking the sliver off the lower arm of the mail crane, was the mail agent of the United States government, not in the employ or subject to the orders or under the control of defendant, and, if there was any negligence at all, it was his intervening and breaking the usual connections; for, in law, it is not the remote, but the proximate, cause which is looked to and regarded as the real cause. See *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190.

That these are the facts as they indisputably appear in this record, there is, in my opinion,

no sort of doubt, and, from the application of the appropriate principles and well-settled rules of law, it is equally clear that the defendant did not appear to be liable, and a new trial should have been granted; for it has long been as much the duty of the court, in certain cases, to set verdicts aside, as it is the duty, in general, of juries to find them. Verdicts like this include legal propositions, as well as

propositions of fact, and the power must reside somewhere to grant new trials; for it is absolutely essential to justice that there should, on many occasions, be opportunities of reconsidering the cause by a new trial. See *Bright v. Eynon*, (1757), 1 Burr. 391, 394. Here the verdict is against the law of the case upon the facts proved, and is therefore set aside, and a new trial awarded.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Maggie RAINES, Admx., etc., of John D. Raines, Deceased, *Plff. in Err.*,

v.

OHESAPEAKE & OHIO R. CO.

(.....W. Va.....)

- *1. Each case must depend upon its own facts in determining what shall constitute ordinary care or reasonable prudence in the running of a railroad train.
2. When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury.
3. But, when the facts are such that all reasonable men must draw from them the same conclusion,—when there is no room for two reasonable opinions about it,—then it becomes a question of law for the court.
4. If an apparently capable person, and one apparently in the possession of his faculties, is seen walking on a railroad track, the servants of the company running the train, having given such signals as are required, have a right to act on the presumption that such person will step aside in time to remove himself from danger.
5. If those running a railroad train discover a trespasser in imminent danger on the track, they must use all reasonable exertions to avoid inflicting injury; otherwise, the company will be responsible.
6. But, if they omit no duty after becoming aware of his danger, the railroad company will not be responsible for such injury.

(*Dent, J., dissents.*)

(March 21, 1894.)

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate by reason of the negligence of defendant's servants. *Affirmed.*

The facts are stated in the opinion.

Mr. E. Willis Wilson, for plaintiff in error.

Messrs. Simms & Enslow and J. E. Chilton, for defendant in error.

Headnotes by Holt, J.

Holt, J., delivered the opinion of the court:

This is an action of trespass on the case, brought in the circuit court of Kanawha county in February, 1892, by Maggie Raines, administratrix, against the Chesapeake & Ohio Railway Company, for negligently causing the death of her husband and intestate, John B. Raines, which suit resulted in a judgment for defendant from which she has obtained this writ of error.

The declaration contains two counts, both good, and the demurrer of defendant was therefore properly overruled. The issue was joined on plea of not guilty. A jury was impaneled and sworn, and having heard the evidence of plaintiff in full, the court on motion of defendant, struck out plaintiff's evidence, and the jury, by direction of the court, returned a verdict for defendant. The plaintiff excepted to the ruling of the court excluding her evidence, and moved the court to set aside the verdict and grant her a new trial; but the court overruled the motion, and gave judgment and certified the evidence, as required by our present statute. Code 1891, p. 884, chap. 181, § 9.

Seven witnesses were examined on behalf of plaintiff, none for defendant, and the facts are in substance as follows: The town of Montgomery, where the accident happened, contains from 1,500 to 2,000 people; is about one mile long on each side of defendant's railway, where the company has a station, a yard for storing cars, and five tracks running from the station west to the lower end of the town, with spaces between wide enough to put a footman out of danger, and a county road running along near by on either side,—the one on the south side at a distance of about 150 yards. The one on the north side of the tracks is quite close, and is the main street of the town, being about 50 feet from the track where Raines was killed. The track is straight there, and a footman on it could be seen for a long distance by the train going east. No houses were along the track where Raines was killed. Adjoining the town above and below are the coal valley and the coal mines; and for some fifteen years or more footmen have been accustomed to use the track and travel along it without objection, it being often thus used in dry weather as well as when it is muddy. On September 25, 1891, about 5

NOTE.—For limitation of the rule that engineers may presume that persons on railroad track will get off in time to avoid injury, see *Clark v. Wilmington & W. R. Co.* (N. C.) 14 L. R. A. 749. See 24 L. R. A.

also *notes* to Cincinnati, I. St. L. & C. R. Co. v. Cooper (Ind.) 6 L. R. A. 241, and *Toomey v. Southern Pac. R. Co.* (Cal.) 10 L. R. A. 139.

o'clock in the evening, No. 2, the east-bound passenger mail train, with four or five cars, being on schedule time, and running at its usual speed,—at about twenty miles per hour at that point,—came in sight and hearing at the lower or west end of the town, blowing one prolonged whistle for the crossing, and one for the station. As it entered the railway yard at the west end, the steam was shut off, and it ran on at a speed of fifteen or twenty miles per hour by its previous momentum. Raines, the decedent, was walking slowly on the main track in the railway yard about 200 yards east of the lower or western limit of the town, and 400 to 500 yards west of the station, about 600 yards above Morris creek bridge, 200 yards above a crossing at the lower end of the town, with his back towards the coming train, and a paper in his hand, as though he were reading or looking at it. When the coming train got within 20 or 30 feet, or some other short distance, the engineer blew the alarm,—four or five quick whistles,—put on brakes and steam, reversed the engine, and at once did all he could to save him. "The engine checked considerably," but passed on about a length of the train before stopping, but struck and killed Raines, who was walking in front, towards the depot.

"The fact that pedestrians are accustomed to travel on a railroad track at a particular place makes it the duty of the servants of the company to exercise greater caution and prudence in the operation of its road at that place." *Nuzum v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 228. This point of law arose out of the following facts: The servants of a railway company having in charge of one of its engines and trains running within the corporate limits of Wheeling, to and over a public wharf therein, failed or neglected to give notice, at least sixty rods before its approach to the wharf, by ringing the bell or blowing the whistle of the locomotive for a sufficient time to give notice of its approach thereto. It was in fact what is called a "flying switch" of the freight train, which ran down and killed the deceased on the track. And the court in the same case further holds, "that if such company permit a train of its cars to be moved at that place without having some of its servants in position to give warning of its approach and to control its movements, these facts are of themselves acts of negligence." *Ibid.* "A person using a railway track as a footpath for his own convenience elsewhere than at a lawful crossing, and injured while so doing, cannot recover damages of the railway company unless it be guilty of wanton or gross negligence." *Spicer v. Chesapeake & O. R. Co.* 84 W. Va. 514, 11 L. R. A. 885. A railway company running its train is bound, for the safety of such train, to keep a reasonable lookout for trespassers on its track, and is bound to exercise such care as the circumstances require, to prevent injury to such trespasser; but having given the signal required by law, it has a right to presume that the trespasser, apparently a capable person, will exercise his senses, and seasonably remove himself from danger,—that he can, and will protect himself,—so it need not diminish its lawful speed, and, if they omit no duty after becoming aware of

his peril, the road will not be responsible for a resulting injury; but if they know him to be deaf or helplessly drunk, or otherwise specially in danger, or if the person be a child too young to appreciate or avoid the danger, and if they neglect a reasonable warning, but keep on and inflict damage, the road will be responsible for an injury to such trespasser if it be guilty of willful or wanton or gross negligence. See *Spicer v. Chesapeake & O. R. Co. supra*; *Bishop, Non-Cont. L. § 1087*; *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. 603-629; *Norfolk & W. R. Co. v. Harman*, 83 Va. 554, citing with approval 2 Wood, *Railway Law*, 1267. See 2 Wood, *Railway Law* (Minor's ed. 1894) § 320.

Trespassers on railroad tracks are of various kinds, differing in the character of the trespasser, as one having his full senses, one deaf or blind; differing in intent, as intentional or accidental; differing in place or in time or in other material circumstances, as being at a remote place where the trespass is not to be anticipated, or in cities or towns or at other thronged places, where they occur as of course, sometimes under allurements which the road itself has held out, or with its silence, amounting to a quasi consent, if the trespasser is willing to take the risks, but creating no right in the public to so use it, and creating thereby no obligation of special care or protection other than what the special circumstances may require. It has long been settled as a qualification of the general rule making contributory negligence a bar in defense that the contributory negligence of the party injured will not defeat the action if it appear that the defendant might, by the exercise of reasonable care and prudence on his part, have avoided injuring the plaintiff, notwithstanding the plaintiff's own contributory negligence, and, as a corollary, the same doctrine has been applied in cases of trespass. Both are but applications of the common-law doctrine that every one must so conduct himself, and so use his own, as not to injure another. Hence, "if those running a train discover a trespasser in danger, they must use all reasonable care, and all reasonable exertions, to avoid inflicting injury, and to avert from him the impending harm, or the road will be responsible for whatever injury follows." See *Bishop, Non-Cont. L. § 1036*, and cases cited. In *Butterfield v. Forrester* (1809) 11 East, 60, *Lord Ellenborough, Ch. J.*, says, delivering the opinion: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself,"—which is a statement of the rule by giving an illustration, and impliedly of the principle which underlies it. The railroad sounded the whistle for the crossing just at the lower end of the town, and for the station in the town 200 yards below where Raines was killed. It was on schedule time, running on the main track at the usual speed. Wheth. §

the engineer saw Raines on the track or not there is no direct evidence; but as this case is presented, we may presume that in such a place, the engineer and fireman being on the lookout for the safety of the train, if not for his safety, did see him, for the track was straight for three-fourths mile. But to all appearances he was an adult man, capable of using his senses, and they had a right to suppose that he would, in proper time, get off the track out of danger,—that he would reasonably step aside,—so that they are not called upon to and need not stop the train or diminish their speed. This seems to me to be the plain dictate of common sense. I do not see what other fair rule could be adopted, and it is supported by all the authorities without exception, as far as I have been able to examine them. That he had at same time a paper in his hand looking at it, or reading it, holding it in front of him, was not likely to be noticed by the engineer, or if noticed was of no special significance; and when they came near enough to see that the man might not be aware of his danger, then they did all that could be done to notify and alarm him, and to stop the train, but to no purpose; and this might readily happen under such circumstances without any want of proper care on their part. Witnesses of some distance speak of the quickly repeated alarm whistle being blown when the train was within a distance of 20 or 30 feet, the air brakes being put on, and the engine reversed, and the "engine considerably checked."

There is in every case a preliminary question for the judge to determine, and that is, assuming the truth of the testimony and all the inferences that can be fairly drawn from it, would the jury, as reasonable men, be justified in finding a verdict for the party on whom rests the burden of proof? Would the verdict be against the law? That is, would a verdict for plaintiff be against the law of the case on the facts proved? Would the verdict be wholly without proof of some essential fact? Or is the evidence plainly insufficient to warrant the finding of a verdict for the plaintiff? There are certain physical facts which are to my mind conclusive that the statement that Raines was only 20 or 30 feet ahead of the train when the engineer commenced to blow the alarm whistle and stop the train is only a mere conjecture, meaning only that the distance was very short. Five witnesses saw it. The first one was 800 yards away. The train could go 20 feet while the sound of the whistle was reaching him. They whistled three or four times. Witness No. 2 on this point was about 100 yards away. He saw the train running at its usual speed at that place—15 or 20 miles an hour—with four or five cars. When within 20 feet of Raines they sounded the alarm whistle four or five times, put on the brakes, reversed the engine, and checked it considerably before it struck the man. The engineer did all he could to save him, but Raines was too close. The train ran on 65 steps—195 feet—beyond the place where Raines was struck before it stopped. He blew the whistle, turned on the air brakes, and reversed the engine before it struck him, and then went sixty-five steps. Witness No. 3 was 120 feet

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away. Heard the whistling. Turned his head immediately, and looked towards the train, and saw the man going over about four times. He gives no distance except that measured by the time of turning his head after he heard the whistle. In all likelihood the air brake was put on and the engine reversed first. Witness No. 4 gives no distance except that it was short,—so short that he could not escape. She was but a short distance away. She is the one who speaks of Raines having a paper in his hand, but refused absolutely to say whether it was large or small. Witness No. 5 was about 100 yards away. Heard the whistle blow three or four times in quick succession, which attracted his attention to it. Raines was a very short distance from the train; cannot make it more definite. He saw nothing in his hand. His head was down. He looked something like a drunken man. He saw him walking on the track after the train whistled. All this means that he was too close for the train to be stopped before it would strike him. As to anything like the accurate distance, this evidence, as a whole, leaves it uncertain. The train was going 50 or 60 feet in three seconds. It is not at all probable that Raines was only 20 feet ahead of the train when they commenced applying the air brake, reversing the engine, and blowing the alarm. Raines had lived in that place at least three years. The train was on schedule time, running through the train yard at its usual rate of speed. There were safe walking ways on either side. He had but to step right or left to be out of danger. He was possessed of sight and hearing; nothing unusual in his appearance. The prolonged whistle had sounded twice a short distance below,—once for a crossing, and once for the depot. The engineer had a right to presume that he would seasonably step out of danger, and not until he got quite close did he become aware that the man was insensible of his peril. Then he did all he could to save him, but to no purpose; he was too close. I know of no rule, and can find no case, making it the duty of the engineer, under such circumstances, not to approach a man walking on the track nearer than the distance within which the train can be stopped,—say 200 feet in this case. See *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 279; 2 Wood, *Railway Law* (Minor's ed. 1894) § 320, p. 1465. Under such circumstances, to exact of the engineer nice estimates of distance, based on the supposition that the man walking on the track may not be sensible of his danger, and will not step off, seems to me to be unreasonable.

The action of the court in striking out the evidence has been held to be an indirect mode of directing the jury to return a verdict for the defendant, the plaintiff not being willing to suffer a nonsuit. Here it was accompanied by an express direction to return a verdict for defendant. I can discover but the one question involved. Does the evidence tend, in any fairly appreciable degree, to make out plaintiff's case? I am of opinion that it does not; that it was what is termed in law "an inevitable accident;" and although the question of negligence is generally one of fact for the jury, yet "when the facts are such that all reasonable men must draw the same conclusion from

them, then it becomes a question of law for the court." See *Grand Trunk R. Co. of Canada v. Ives*, 144 U. S. 408, 36 L. ed. 485, and cases cited. There is no room for two fair-minded, reasonable opinions about it. See *Corcoran v. St. Louis, I. M. & S. R. Co.* 105 Mo. 399. The evidence in this case is plainly insufficient to warrant the finding of a verdict for the plaintiff, and the court could not have hesitated to have set it aside. See *Gruysson's Case*, 6 Gratt. 712-724.

Judgment affirmed.

On rehearing.

The evidence in this case, explained and qualified, as it must be, by certain well-known physical laws, shows to a high degree of probability, at least, that the engineer commenced applying the air brakes, reversing the engine, and blowing the alarm before the train reached a point 20 or 30 feet distant from the footman on the track. As to anything like the accurate distance, this evidence, as a whole, leaves it uncertain, but it does show clearly that the train was then much too close to be stopped before striking him; but I take the distance to have been 20 or 30 feet, for they are the figures used by some of the witnesses. So, also, I take the fact to be that footmen at that place were accustomed, with the knowledge of defendant, to use the track as a walkway; and the rule of law (*pro hac vice*) to be that in such case it was the duty of the engineer or fireman to keep on the lookout along the track, and that the engineer was on the outlook, and did see decedent walking on the track towards the depot for a long distance. John B. Raines, the decedent, had lived in town about three years. About 5 o'clock in the evening of the 25th of September, 1891, he was walking eastward on the track, using it as a footpath for his own convenience, as many persons are in the habit of using it. He had in his hand a piece of paper, looking at it now and then. The size of the paper does not appear. He was in fact an adult, in the full possession of all his faculties, or so, on this occasion, he was in appearance. Defendant's east-bound passenger train, consisting of locomotive, tender, and five cars, running on schedule time at its usual rate of speed—of about 20 miles an hour—at that place, came in sight and hearing at the lower end of the town, and whistled for a crossing at that point, heard by the witnesses. Again, about 150 yards from decedent, it gave a prolonged whistle for the depot. The steam was turned off for it to run by momentum to the station. There was nothing at that time to indicate to the engineer that decedent was unaware of the approaching train, and would not in due time step off the track. This the engineer had a right to presume he would do. But, still making no motion to get off, the engineer sounded the alarm, put on the air brakes, and reversed the engine,—did all that could be then done to save him; but he was only 20 or 30 feet ahead, and, although the train was perceptibly checked, Raines was struck and instantly killed.

Common sense and common justice, applied to the practical affairs of managing railroads and running trains, require that there must be

left to engineers some margin for forming their judgment, which may still be discreet, and some latitude of conduct which may, in either event, be held to be prudent. He will not, on pain of conviction of negligence in a matter involving life and limb, be held to make, on the spur of the moment, a nicely accurate estimate of the probability that one walking on the track is insensible of his danger, from the mere fact that he is on the track within a distance within which the train cannot be stopped; for common observation shows that persons fully aware of the approach of the train cross the track, or fail to step off, although the train may be within such distance, for one second or a half second in time, and two steps or three in distance, will put him out of danger. In this case the footman was a grown man, apparently in the use of his faculties, physical and mental. He had a signal of danger beneath his feet. The train was on time. A signal had been sounded half a mile away. The depot was in plain view in front. A prolonged signal for the depot had just been sounded 500 feet in his rear. He is presumed to look back as well as forward, and that he will act on the instinct of self-preservation and step out of the way. Under such circumstances, negligence of the engineer cannot be reasonably inferred. It was a case of unavoidable accident, such as no degree of foresight and care on the part of the engineer could reasonably be expected to anticipate in time to avoid. How was he to know that the footman was unconscious of his approach? There was nothing to indicate it. On the contrary, he presumed, as he had a right to do, that the footman would step off in time. Nor was there anything as yet to require the engineer to change his opinion, and act thereon in time to stop the train before collision. These facts, as I read the evidence, are not doubtful, nor are the inferences of fact to be drawn from them. I concur in the opinion of the circuit court that they do not tend in any fairly appreciable degree to convict the engineer of want of ordinary care. The case therefore passed from the domain of fact, in the sense of a thing to be found by the jury, into the domain of law, to be determined by the court. A verdict for the plaintiff would have been against law; that is, against the law of the case upon the facts proved. Therefore the circuit court did not err in refusing to submit the case to the jury.

Dent, J., dissenting:

The facts in this case are as follows, to wit: The deceased was a trespasser on the track of the defendant within the corporate limits of the town of Montgomery (1500 population) at a place the people were in the habit of using as a walkway. It was about 5 o'clock P. M.—the time for the regular passenger train. An engine had but a few moments before passed over the track. Deceased was walking with his head down, apparently absorbed in studying some paper. He was going east with his back to the approaching train. The train whistled for the station from 100 to 200 yards from deceased. The engineer, if looking, could have seen deceased from the time he sounded the whistle for the station until the engine struck him, as the track was straight, the view unobstructed, and it was broad daylight.

The bell was not rung, nor the whistle sounded, from not less than 100 yards away until the engine was within less than 80 feet of deceased and about to strike him,—too late for him to step out of danger as the train was going at the rate of 20 miles per hour. Did the engineer see deceased? It was his duty to see him. Others saw him who were not bound to see him, and not occupying as good a position to see him as the engineer. The law will presume that the engineer discharged the duty to and did see him, unless the contrary appear. At least the jury, in the light of the evidence, from the facts and circumstances, would have the right to infer that he, being a man of ordinary intelligence, attentive to his duties, did see him. Such being the case, what was his duty,—to wait until it was too late, or sound the alarm whistle and ring the bell in time to arouse the deceased, and enable him to avoid the threatened danger? In *2 Rorer on Railroads*, 1027, the law is stated to be as follows, to wit: "The servants in charge of a train have a right to presume that a man on the track is of sound mind and good hearing, and will get off in time to avoid danger, . . . and that, therefore, the train is not obliged to stop, but is only bound to the ordinary care of warning by whistling and bell ringing, if the person is seen by persons in charge of it, which are due to all persons on general principles. This done in time for avoiding the danger, the company is not liable." And in *Finlayson v. Chicago, B. & Q. R. Co.* 1 Dill. 579, Fed. Cas. No. 4,798, the law is stated to be: "A railroad company whose train is approaching a man walking lengthwise upon its track, must ring its bell and sound its whistle in time to enable him to get off the track; otherwise it is liable." (The italics are mine.) "If they, being aware of his presence, delayed to ring the bell and sound the whistle until he could not have stepped aside and saved himself, in that case there was negligence on the part of these employes, for which the railroad company is liable." "If they rang the bell and blew the whistle in such time as any reasonable man of good hearing could have heard it, and got off instantly, then the defendants are not liable." "This man had no right to be there, and he should not have been there. It does not follow, however, because he was there unlawfully, that the other party could run him down." Numerous, nay all the cases examined by me, present the law in the same way, even including the fourth syllabus in this case, which is in these words, to wit: (4) "If an apparently capable person, and one apparently in the possession of his faculties, is seen walking on a railroad track, the servants of the company running the train having given such signals as may be required, have a right to act on the presumption that such person will step aside in time to secure himself from danger." What signals were required? The court does not state, but presumes they were given. The law quoted says the bell must be rung and

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whistle sounded in time to warn the deceased of his danger, and enable him to step aside to avoid it. That this was not done, the evidence plainly establishes; but the servants of the defendant, having the deceased in plain view for over 100 yards, bore down upon him until it was too late, and then, as a wild animal sure of its prey, rushed upon him with the whistle sounding, as if to make his death the more horrible when it was too late to save him. My conclusion, supported by reason, justice, and authority, is that it was the duty of the engineer, under the circumstances, on discovering the deceased on the track 100 yards away, to begin sounding the alarm whistle and ringing the bell, and continue the same until the attention of the deceased was attracted or he was struck. In not doing so he was guilty of wanton sacrifice of human life, amounting to gross negligence. He disregarded the ordinary rule of all railroad companies: "In all cases of doubt, take the side of safety." It may be a hardship on the company to impose damages on them in such cases; but there is no other way to reach its negligent employes, and enforce a due regard for the law and the lives of citizens, except through the company. The first, the highest, and most important duty of all law is the protection of human life from unnecessary destruction; and he who destroys it should be prepared and required to show that he used all available and lawful means at his command, and, after doing so, the destruction was unavoidable. While the law regards a railroad track to be the private property of the company, and the use thereof as dangerous and perilous, yet it lies open to the commons, and affords a dry, smooth, even, level, and convenient walkway for pedestrians, especially in populous communities, and is therefore a source of great temptation to the public. The law, in permitting railroad companies to rush their trains through the country at a great rate of speed, requires them to adopt the necessary means to warn trespassers out of their way in time for them to escape death. The ringing of the bell and sounding of the whistle are not matters of much exertion; neither do they in any way interfere with or impede the running of trains. In this case there is a powerful and wealthy corporation on the one hand, with numerous and influential friends, and a bereaved widow and fatherless children on the other, and my deep sympathies for the appeals of the helpless and needy may cause me to hold the scales of justice unequally between them; but it is my sincere judgment that the evidence should not only have been submitted to the jury, but, as it now stands, is plainly sufficient to warrant a verdict in favor of the plaintiff. My convictions may appear unreasonable to others; yet, while I highly esteem the more mature judgment of my associates, an approving conscience can be the only arbiter that a judicial officer can recognize in discharging his individual duties.

MISSISSIPPI SUPREME COURT.

W. P. TIMBERLAKE, *Appl.*,

v.

H. L. THAYER.

- (..... *Miss.*.....)**1. An entire contract for services cannot be apportioned so as to permit a recovery for part performance by one who is guilty of a breach of contract.****NOTE.—Effect of part performance of contract for services.***Discharge for cause.**Discharge without cause.*a. *Damages.*b. *Wages.*c. *Common count.*d. *Quantum meruit.*e. *Assumpsit.**Accord and satisfaction, and consent.**Forfeiture.**Infants.**Time for payment.**Slaves.**Abandonment by employé without cause.**Discharge for cause.*

Where the employé is discharged for sufficient cause before the end of the term, there is some conflict of authority as to the right to recover, some cases denying the right of the employé to recover for breach of contract. *Physloc v. Shea*, 75 Ga. 466; *Lacy v. Osbaldiston*, 8 Car. & P. 80; *Deane v. Cutler*, 45 N. Y. S. R. 404; *Waters v. Davies*, 23 Jones & S. 39; *Churchward v. Chambers*, 2 Fost. & F. 229; *Forsyth v. McKinney*, 56 Hun, 1; *Spotswood v. Barrow*, 5 Exch. 110, 19 L. J. Exch. 226; *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 98; *Lomax v. Ardning*, 10 Exch. 734, 24 L. J. Exch. 80; *Basas Furnace Co. v. Glasscock*, 82 Ala. 452, 60 Am. Rep. 748; *Bush v. Koll*, 2 Colo. App. 48; *Odeneal v. Henry*, 70 Miss. 172.

Some cases held that an employé discharged for cause cannot recover for wages unpaid. *Turner v. Robinson*, 6 Car. & P. 16, 5 Barn. & Ad. 789, 2 Nev. & M. 823.

As where he refused to obey orders. *Spain v. Mott*, 2 Stark. 256.

Or where he attempted to ravish his employer's maid. *Atkin v. Acton*, 4 Car. & P. 208.

Some cases hold that if properly discharged, he is not entitled to any wages since the last periodical payment. *Beach v. Mullin*, 34 N. J. L. 343; *Hidaway v. Hungerford Market Co.* 3 Ad. & El. 171, 4 Nev. & M. 797, 1 Harr. & W. 244; *Robinson v. Hindman*, 3 Esp. 235; *Hartman v. Rogers*, 69 Cal. 643.

Some cases hold that an employé discharged during the time for cause can only recover wages due up to the time of such discharge. *Du Quoin Star Coal Min. Co. v. Thorwell*, 3 Ill. App. 304; *Miller v. Gidiere*, 36 Ia. Ann. 201; *Hale v. Sheehan*, 36 Neb. 439; *Lawrence v. Gullifer*, 38 Me. 533; *Robinson v. Sanders*, 24 Miss. 391; *Hariston v. Sale*, 6 Smedes & M. 634; *Antsee v. Ober*, 26 Mo. App. 635; *McClure v. Pyatt*, 4 McCord. L. 26; *Massey v. Taylor*, 5 Coldw. 447, 98 Am. Dec. 429; *Newman v. Reagan*, 63 Ga. 755, 45 Ga. 512.

In none of these cases does the question appear to have been thoroughly discussed or considered, no cases outside of these being cited, it being generally conceded in these cases that a recovery could be had on quantum meruit subject to set-off for damages caused to employer. An employé dismissed during the term for cause cannot recover future wages. *Harrington v. First Nat. Bank of Chittanooga*, 1 Thomp. & C. 361; *Green v. Watson*, 38 N. Y. S. R. 799; *McRae v. Marshall*, 19 Can. Sup. Ct. Rep. 10; *Harner v. Cornelius*, 23 L. J. C. P. 85, 5 34 L. R. A.

ery for part performance by one who is guilty of a breach of contract.

2. The suspension, even for a day, of a right of action on a promissory note against the maker by an arrangement with him irrevocably discharges an indorser, although the maker may break his contract, by which the right of action against him was suspended.

C. B. N. S. 236, 4 Jur. N. S. 1110; *Hotchkiss v. Greta*, *Ginnery & Compress Co.* 36 Ia. Ann. 517; *Armour Cudahay Pkg. Co. v. Hart*, 36 Neb. 166; *Newman v. Reagan*, 65 Ga. 512; *Johnson v. Walker*, 155 Mass. 283.

*Discharge without cause.*a. *Damages.*

Where employé is wrongfully discharged during the term of service, the employer is liable in an action of damages for breach of contract. *Levin v. Standard Fashion Co.* 34 N. Y. S. R. 299; *Nations v. Cudd*, 23 Tex. 550; *Bond v. Carpenter*, 15 B. L. 440; *Stewart v. Walker*, 14 Pa. 298; *Clancey v. Robertson*, 2 Mill. Const. 404; *Brinkley v. Swicegood*, 65 N. C. 626; *Ehrlich v. Ethna L. Ins. Co.* 86 Mo. 249; *Evans v. St. Louis, I. M. & S. R. Co.* 24 Mo. App. 114; *Harrington v. Gies*, 45 Mich. 374; *Whitaker v. Sandifer*, 1 Duv. 261; *Baron v. Placide*, 7 Ia. Ann. 229; *Richardson v. Eagle Mach. Works*, 73 Ind. 422, 41 Am. Rep. 584; *Rogers v. Parham*, 8 Ga. 190; *Alexander v. Amerious*, 61 Ga. 36; *Paganl v. Gandolfi*, 2 Car. & P. 370; *Cameron v. Fletcher*, 10 Sess. (S. C.) 3d Ser. 301; *Wise v. Wilson*, 1 Car. & K. 632; *Smith v. Thompson*, 8 C. R. 44, 18 L. J. C. P. 814; *Cussons v. Skinner*, 11 Mees. & W. 161, 12 L. J. Exch. 347; *Cloesman v. Lacoste*, 23 Eng. L. & Eq. 140; *Hartley v. Harman*, 11 Ad. & El. 796, 3 Perry & D. 587; *Planche v. Colburn*, 8 Bing. 14, 1 Moore & S. 51, 5 Car. & P. 58; *Fawcett v. Cash*, 5 Barn. & Ad. 904, 3 Nev. & M. 177; *Emmens v. Elderton*, 4 H. L. Cas. 624, 13 C. B. 496, 18 Jur. 21; *Moody v. Leverich*, 4 Daly, 401, 14 Abb. Pr. N. S. 145; *DeLeon v. Echeverria*, 13 Jones & S. 610; *Wiesman v. Panama R. Co.* 1 Hilt. 300; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 235; *Weed v. Burt*, 78 N. Y. 191; *Phillips v. Clift*, 4 Hurlst. & N. 168, 28 L. J. Exch. 153, 5 Jur. N. S. 74; *Stubbs v. Waldeck*, 78 Wis. 437; *Larkin v. Hecksher*, 3 L. R. A. 137, 61 N. J. L. 133.

His remedy is for compensation in part performance and indemnity for the loss occasioned. *Clark v. Marsiglia*, 1 Denio. 317, 43 Am. Dec. 670.

But an employé discharged before end of term without cause cannot recover damages for wrongful discharge, where he avers performance and fails to prove it in a suit for services rendered. *Bennett v. St. Louis Car Roofing Co.* 23 Mo. App. 587.

The damages recovered in such an action for wrongful discharge are subject to a credit for that which he might have earned elsewhere at a similar kind of work. *Sutherland v. Weyer*, 67 Me. 64; *Stevens v. Crane*, 37 Mo. App. 487; *Polk v. Daly*, 14 Abb. Pr. N. S. 156; *Koenigkraemer v. Missouri Glass Co.* 24 Mo. App. 124; *Hand v. Clearfield Coal Co.* 143 Pa. 408; *Cumberland & P. R. Co. v. Slack*, 45 Md. 161; *Hamill v. Foute*, 51 Md. 420; *Hinoholiffe v. Koonta*, 121 Ind. 422; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109; *Everson v. Powers*, 89 N. Y. 527, 43 Am. Rep. 319; *Fuchs v. Koerner*, 107 N. Y. 529; *Williams v. Anderson*, 9 Minn. 50; *Bigelow v. American Forcite Powder Mfg. Co.* 39 Hun, 569.

The damages to the employé are prima facie the stipulated wages. *Howard v. Daly*, *Smith v. Thompson*, *Hinoholiffe v. Koonta*, and *Pennsylvania Co. v. Dolan*, *supra*.

Employé may wait till his wages are due but he

(January 15, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Monroe County in favor of plaintiff in an action brought to en-

recover damages for violation of contract. *Heim v. Wolf*, 1 E. D. Smith, 70.

b. Wages.

And an employé dismissed during the term without cause is prima facie entitled to recover the stipulated compensation for the whole term. *King v. Stearns*, 44 Pa. 90, 84 Am. Dec. 418; *Thompson v. Detroit & L. S. Copper Co.* 50 Mich. 422; *Alba v. Moriarty*, 35 La. Ann. 680; *Norton v. Cowell*, 65 Md. 859; *Murdock v. Phillips Academy Trustees*, 12 Pick. 244; *Webster v. Wade*, 19 Cal. 291, 79 Am. Dec. 218; *Chiles v. Belleville Nail Mill Co.* 68 Ill. 123; *Britt v. Hays*, 21 Ga. 157; *Wiley v. California Hosiery Co.* (Cal.) March 6, 1893; *Moss v. Decatur Land Imp. Co.* 93 Ala. 269; *Walworth v. Pool*, 9 Ark. 394; *McDaniel v. Parks*, 19 Ark. 671; *Avery v. Tyringham*, 3 Mass. 160, 3 Am. Dec. 106; *Gandell v. Pontigny*, 4 Campb. 375, 1 Stark. 186; *Collins v. Price*, 5 Bing. 183, 2 Moore & P. 233; *Beeston v. Collyer*, 4 Bing. 309, 2 Car. & P. 607, 12 J. B. Moore, 552; *Callo v. Brouncher*, 4 Car. & P. 612; *Decker v. Hassel*, 26 How. Pr. 523; *Klingenberg v. Werner*, 42 N. Y. S. R. 133; *Wood v. Moyes*, 1 Week. Rep. 166; *Harris v. Liggett*, 1 Watts & S. 301; *Dyrd v. Boyd*, 4 McCord, L. 246, 17 Am. Dec. 740; *Dunn v. Hereford*, 1 Wyo. 203; *Cox v. Adams*, 1 Nutt & McC. 284; *Allentown Iron Co. v. McLaughlin* (Pa.) Feb. 18, 1890; *Smith v. Hayward*, 7 Ad. & El. 544, 2 Nev. & P. 422, W. W. & D. 635, 2 Jur. 232.

So a teacher may recover for the whole term where the schoolhouse burns down and the officers fail to furnish a place to teach. *Charlestown School Twp. v. Hay*, 74 Ind. 127. See *Hill v. Balkcom*, *infra*.

Or the employé may wait till the end of the year and recover the whole wages. *Brinkley v. Swicegood*, 85 N. C. 626; *Rogers v. Parham*, 8 Ga. 190. See *Heim v. Wolf*, 1 E. D. Smith, 70.

And wages for time he labored at contract price may be recovered. *Moulton v. Trask*, 9 Met. 577; *Madden v. Porterfield*, 58 N. C. 166; *Kessee v. Mayfield*, 14 La. Ann. 90; *Taylor v. Carr*, 30 L. J. M. O. 301, 4 L. T. N. S. 414, 9 Week. Rep. 669.

Or wages to the time of suit. *Fowler v. Armour*, 24 Ala. 194.

Employers wrongfully discharging an employé during the term cannot withhold part of wages. *Sloan v. Hayden*, 110 Mass. 141.

The recovery of wages for the whole term by an employé discharged without cause is subject to the deductions for wages earned elsewhere. *Huntington v. Ogdensburgh & L. C. R. Co.* 33 How. Pr. 416; *Hartland v. General Exch. Bank*, 14 L. T. N. S. 863; *Willoughby v. Thomas*, 24 Gratt. 521; *Jones v. Jones*, 2 Swan. 605; *Simon v. Allen*, 76 Tex. 633; *Costigan v. Mohawk & H. B. R. Co.* 2 Denio, 609, 43 Am. Dec. 758; *Saxonia Min. & Reduction Co. v. Cook*, 7 Colo. 569; *Holloway v. Talbot*, 70 Ala. 323.

But he need not accept offer of employer at reduced price. *Whitmarsh v. Littlefield*, 46 Hun, 418; *People's Co-Op. Asso. v. Lloyd*, 77 Ala. 387.

Some courts hold that the remedy for wrongful discharge is not by an action for wages but for damages for breach of contract. *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821; *Stone v. Vimont*, 7 Mo. App. 377; *Jones v. Dunton*, 7 Ill. App. 580; *Cameron v. Fletcher*, 10 Sess. (S. C.) 3d Series, 301; *Weed v. Burt*, 73 N. Y. 191.

And the employé may sue for the wages as they fall due. *Arpdin v. Austin*, 5 Q. B. 671, Dav. & M. 513, 13 L. J. Q. B. 155; *Isaacs v. Davies*, 68 Ga. 169.

A recovery for wages due at the time of bringing an action after a wrongful discharge will not bar a subsequent action for future wages or damages. *Thompson v. Wood*, 1 Hilt. 43.

force defendant's alleged liability as indorser of a promissory note. *Reversed*.

The facts sufficiently appear in the opinion. *Messrs. Clifton & Eckford* for appellant. *Messrs. Houston & Sykes* for appellee.

ing an action after a wrongful discharge will not bar a subsequent action for future wages or damages. *Thompson v. Wood*, 1 Hilt. 43.

But a recovery for damages would bar another action. *Ibid.*; *Parry v. American Opera Co.* 19 Abb. N. C. 269; *Booge v. Pacific Railroad*, 33 Mo. 212, 33 Am. Dec. 160; *Moody v. Leverich*, 4 Daly, 401, 14 Abb. Pr. N. S. 145.

If a year's service is to be paid in gross a judgment for part is a bar to an action for another part, but if the wages are due at the end of each month then the recovery of one installment is an answer to all defenses to the merit pleader in a second suit. *Liddell v. Childester*, 84 Ala. 503.

An employé dismissed without cause may recover salary for such time as the contract provided that notice should be given for prior to discharge. *French v. Brookes*, 6 Bing. 354, 4 Moore & P. 11; *Fewings v. Tisdal*, 1 Exch. 293, 5 Dowl. & L. 193, 17 L. J. Exch. 18, 11 Jur. 977; *Fisher v. Monroe*, 51 N. Y. S. R. 535, reversing 48 N. Y. S. R. 510.

A cashier discharged during the year cannot retain his year's salary out of moneys on hand as his claim for services might never become due. *Union Bank of South Carolina v. Heyward*, 15 S. C. 226.

Where the plaintiff was engaged for one hundred pounds to write an article for publication and the periodical was abandoned, the plaintiff might sue for compensation without delivering the treatise. *Planoche v. Colburn*, 8 Bing. 14, 1 Moore & S. 51, 5 Car. & P. 58.

c. Common counts.

Where the employer without cause prevents full performance, the employé may recover upon the common counts for the work and labor performed. *Udpike v. Ten Broeck*, 33 N. J. L. 105; *Mitchell v. Scott*, 41 Mich. 103; *McQueen v. Gamble*, 33 Mich. 344; *Raken v. Harrison*, 4 McCord, L. 249; *Canada v. Canada*, 6 Cush. 15; *Wilhelm v. Caul*, 3 Watts & S. 26; *Preston v. Finney*, Id. 53; *Blood v. Enos*, 12 Vt. 625, 36 Am. Dec. 363.

But an employé discharged for cause cannot recover for the time of his actual service on the *indebitatus* count, where he was bound to give a whole year's service before earning any wages and broke his contract by leaving service before the year's end. *Lilley v. Elwin*, 11 Q. B. 742, 17 L. J. Q. B. 123, 12 Jur. 622.

On a contract for a year determinable at a month's notice, a servant improperly discharged cannot recover on a count for entire year, but must declare on the contract and not declare as for a year absolute. *Archard v. Horner*, 3 Car. & P. 349.

Where a clerk is wrongfully dismissed, he may treat the contract as rescinded and sue for actual service, or sue on the contract for wrongful dismissal, but if he sues for broken contract he cannot then sue on the contract. *Goodman v. Pocock*, 15 Q. B. 575, 19 L. J. Q. B. 410, 14 Jur. 1042.

d. Quantum meruit.

Where the employer without cause prevents full performance, the employé may recover upon a quantum meruit for the value of his services. *Clark v. Manchester*, 51 N. H. 394; *Wilkinson v. Black*, 30 Ala. 329; *Caldwell v. Meyers* (S. Dak.) Feb. 17, 1892; *Gardenhire v. Smith*, 39 Ark. 280; *Sugg v. Blow*, 17 Mo. 359; *Brent v. Shelley*, 5 Mo. App. 580; *Colburn v. Woodworth*, 31 Barb. 381; *Green v. Hulet*, 23 Vt. 133; *Hill v. Green*, 4 Pick. 114; *Sher-*

Cooper, J., delivered the opinion of the court:

If we were authorized to make the law, instead of announcing it as it is already made, we would unhesitatingly hold that one contracting

to render personal service to another for a specified time could, upon breach of the contract by himself, recover from that other for the value of the service rendered by him, and received by that other, subject to a diminution

man v. Champlain Transp. Co. 31 Vt. 162; Dover v. Piemmons, 38 N. C. 23.

But the mere failure to pay money before completion is not such a prevention that the contractor could recover on a quantum meruit. Cox v. McLaughlin, 54 Cal. 605.

Where employé is ordered by employer not to complete the contract but does, he can only recover on quantum meruit for work done prior to notice. Goodwin v. Kierke, 3 Hilt. 401.

A suit by a servant on quantum meruit for wrongful discharge is a bar to an action on the breach of contract. Keedy v. Long, 5 L. R. A. 759, 71 Md. 383.

e. Assumpsit.

An employé discharged without cause during term may recover in assumpsit. Williams v. Byrne, 7 Ad. & El. 177 & Nev. & P. 139, 1 Jur. 573, W. W. & D. 535; Jacquot v. Bourra, 7 Dowl. P. C. 343, 3 Jur. 773; Millieu v. Armstrong, 7 Ad. & El. 557, 3 Nev. & P. 406, 1 Jur. 921, W. W. & D. 616.

And an action of covenant may be maintained by an apprentice against his master for wrongful discharge during the term. Winstone v. Linn, 1 Barn. & C. 460, 2 Dowl. & R. 465.

But a servant discharged during the term for cause cannot recover in assumpsit for wrongful dismissal. Turner v. Mason, 14 Mees. & W. 113, 3 Dowl. & L. 393, 14 L. J. Exch. 311.

Accord and satisfaction, and consent.

In Mortlock v. Williams, 76 Mich. 558, it was held error to direct the jury that the acceptance of a check sent in full settlement is a discharge of all indebtedness, where the employé was discharged without cause during the term, as this was a question for the jury—as to whether it was intended to be accepted as full satisfaction.

But in Hutton v. Stoddart, 33 Ind. 539, it was held that an employé discharged before the end of the term accepting a check in payment as settlement cannot recover for the balance of the term, on the ground of compromise of doubtful claim.

Neither of the above cases refers to any authorities.

And where the contract of service is dissolved by mutual consent, no recovery can be had, although on a prior suit default had been taken for two months' salary. This default does not preclude defendants from showing discharge by consent. Van Alstyne v. Indiana, P. & C. R. Co. 34 Barb. 23.

An employé quitting by mutual consent cannot recover thereafter. Southmayd v. Watertown F. Ins. Co. 47 Wis. 517; McGehee v. Roberts, 30 Ala. 534.

So where a note is given in settlement, where an employé leaves service, the employer cannot thereafter claim that the employé left before the term of service had expired. Thorpe v. White, 13 Johns. 53.

Where an employé quits before expiration of the term, a tender by the employer will be held to be an acquiescence, but the laborer cannot recover more than the contract price. Patenote v. Sanders, 41 Vt. 66, 36 Am. Dec. 564.

Forfeiture.

On a question of forfeiture of wages on a part performance there is a slight conflict of authority. The most of the cases hold, however, that forfeiture clauses in contracts must be strictly construed and that the employé may recover for wages earned notwithstanding the forfeiture clause. Heber v. United States Plax Mfg. Co. 13 R. 1. 303; Chicago 24 L. R. A.

City R. Co. v. Blanchard, 35 Ill. App. 451; Schletenger v. Bridgeport Knife Co. 54 Conn. 64; Schriumpf v. Tennessee Mfg. Co. 68 Tenn. 219.

But in Naylor v. Fall River Iron Works Co. 119 Mass. 317, and Preston v. American Linen Co. 119 Mass. 400, it was held that an employé quitting service without giving the required notice, forfeits the previous wages where the contract so provides.

Infants.

An infant quitting before the end of the term may recover from his employer the value of his services. This is based upon a theory largely that an infant may at any time disaffirm his contracts. Judkins v. Walker, 17 Me. 33, 35 Am. Dec. 229; De-rocher v. Continental Mills, 58 Me. 317, 4 Am. Rep. 236; Moses v. Stevens, 3 Pick. 333; Whitmarsh v. Hall, 3 Denio, 373; Thomas v. Dika, 11 Vt. 273, 34 Am. Dec. 690; Wheatly v. Mical, 5 Ind. 142.

A contrary doctrine was stated in Weeks v. Leighton, 5 N. H. 343, but this was overruled in Luffkin v. Mayall, 25 N. H. 52, and a contrary doctrine was also stated in McCoy v. Huffman, 8 Cow. 84, and overruled in Medbury v. Watrous, 7 Hill. 110; but in Harney v. Owen, 4 Blackf. 337, 30 Am. Dec. 663, it was stated if a minor rescinds a contract which is fair, he cannot sue for labor performed under that contract, but this is overruled in Wheatly v. Mical, *supra*.

In an action for services by an infant a defense that the defendant had taken plaintiff from the managers of the state industrial school under an agreement and that the plaintiff left defendant's service without just cause, was a defense to the action. Patterson v. Kelly, 37 N. Y. S. R. 463.

Where an infant contracted to work for a year and worked until he reached his majority and quit before the end of his term, he could not recover for his services as remaining after he became of age was a ratification. Forsyth v. Hastings, 37 Vt. 646.

In Shurtleff v. Millard, 13 R. L. 273, 34 Am. Rep. 640, it was stated that a minor quitting work before the expiration of the term may recover what his services are reasonably worth, taking in consideration the injury of the other party; but that was not the question involved in this case.

Time for payment.

On partial performance an action cannot be maintained until the time for payment has expired. Hartwell v. Jewett, 9 N. H. 249; Diefenback v. Stark, 56 Wis. 463, 43 Am. Rep. 719; Powers v. Wilson, 47 Iowa, 666; Bradshaw v. Branan, 5 Rich. L. 465.

No recovery can be had on a contract for service during the whole season if brought before the season expired. Blodgett v. Berlin Mills Co. 52 N. H. 215.

Slaves.

The owner of a slave cannot recover for his services, if he is hired for a fixed period to be paid at the end of that time and he is taken away before the contract of service is ended. Caldwell v. Dickson, 26 Mo. 60, 17 Mo. 575.

Where slaves are hired in pairs as sawyers and the time in which they are to commence work is several and at a rate of so much per pair although the whole price is payable at the end of the year, if there is a failure to deliver one pair, the hirer may recover for the services of those tendered and used. Johnson v. Dunn, 51 N. C. 123.

A hirer of a slave is entitled to abatement of the

of his demand to the extent of the damage flowing from his breach of contract. In *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 718, Judge Parker demonstrates, in an admirable and powerful opinion, the equity of such a rule;

and it was held in that case that such was the rule of the common law. The courts of some of the states have followed or been influenced by that opinion, and have overturned or mitigated the vigorous rule of the common law.

hire where the slave is hired for a year and dies before the end of the year without fault on the part of the hirer. *Townsend v. Hill*, 18 Tex. 422; *George v. Elliott*, 2 Hen. & M. 5.

In *Lennard v. Boynton*, 11 Ga. 109, it was held that a party hiring a slave for a year, the price of hire is not abated by death of slave before year is terminated, not following the decision of Virginia but adopting the law of liability of landlord and tenant.

"Abandonment by employé" without cause.

Upon the question of abandonment by the employé without full performance and without cause for abandonment, there is much conflict as to the right to recover. The tendency of the latter cases is toward allowing an employé to recover the value of services rendered. The leading case upon the subject being *Britton v. Turner*, 6 N. H. 482, 26 Am. Dec. 718, which holds that where an employer actually receives benefit from the labor performed on a contract for a term over and above the damages occasioned by failure to complete, he should pay the reasonable worth for what has been done for his benefit.

And this has been followed in many other cases. *Elliott v. Heath*, 14 N. H. 181; *Clough v. Clough*, 26 N. H. 24; *Parcell v. McComber*, 11 Neb. 200; *McMillan v. Malloy*, 10 Neb. 223, 35 Am. Rep. 471; *Duncan v. Baker*, 21 Kan. 99; *Bjerlee v. Mendel*, 39 Iowa, 383; *Pixler v. Nichols*, 8 Iowa, 106, 74 Am. Dec. 238; *Bleeh v. Bolch*, 68 Iowa, 523; *Riggs v. Horde*, 25 Tex. Supp. 456, 73 Am. Dec. 384.

Other cases hold the same on the ground of benefit received by the employer. *Byrd v. Boyd*, 4 McCord, L. 246, 17 Am. Dec. 740; *McCline v. Pyatt*, 4 McCord, L. 23; *White v. Gray*, 4 Ill. App. 223.

Others on the ground that the wages are payable on installments. *Matthews v. Jenkins*, 80 Va. 463; *Chamblee v. Baker*, 95 N. C. 98; *Davis v. Preston*, 6 Ala. 83; *Taylor v. Laird*, 1 Hurst. & N. 206, 26 L. J. Exch. 329.

And in *Ricks v. Yates*, 5 Ind. 115, the same was held which seems to squarely overrule *DeCamp v. Stevens*, 4 Blackf. 24, which holds that a party contracting to work a year at so much a month, and quitting at the end of three months, cannot recover for work done.

And a recovery may be had where the contract makes no stipulation that a full performance shall be a condition precedent to recovery and it does not appear that the employé refused to perform it. *Scotfield v. Grow*, 63 Vt. 233.

So where a dispute arose as to the contract before completion. *Beader v. Carnie*, 44 N. J. L. 208.

So where an army substitute was prevented by the close of the war from fully performing the service. *Leas v. Patterson*, 38 Ind. 466.

So where a shipwright had agreed to put a ship in thorough repair and demanded his pay before completion, a recovery was had on the ground that the contract was of general employment. *Roberts v. Havelock*, 3 Barn. & Ad. 404.

On the other hand, many cases, like *TIMBERLAKE v. THAYER*, refuse to allow a recovery on part performance of an entire contract where the employé quits without cause, some on the ground of entirety of contract, some on the ground that a recovery cannot be had on a contract where the condition precedent is unperformed. *Mather v. Brokaw*, 43 N. J. L. 537; *Morgan v. Shelton*, 28 La. Ann. 322; *Badgley v. Heald*, 9 Ill. 64; *Hansell v. Erickson*, 23 24 L. R. A.

Ill. 257; *Eldridge v. Rowe*, 7 Ill. 91, 43 Am. Dec. 41; *Kopflits v. Powell*, 56 Wis. 671; *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57; *Denmead v. Coburn*, 15 Md. 22; *Davis v. Maxwell*, 13 Met. 286; *Stark v. Parker*, 3 Pick. 267, 13 Am. Dec. 425; *Olmstead v. Beale*, 19 Pick. 523; *Nelichka v. Esterly*, 29 Minn. 146; *Kohn v. Fandel*, 29 Minn. 470; *Posey v. Garth*, 7 Mo. 96, 37 Am. Dec. 183; *Sehnerr v. Lemp*, 19 Mo. 40; *Aaron v. Moore*, 34 Mo. 79; *Barp v. Tyler*, 73 Mo. 617; *Erving v. Ingram*, 24 N. J. L. 520; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Lantry v. Parks*, 8 Cow. 63; *Monell v. Burns*, 4 Denio, 121; *Clark v. Smith*, 14 Johns. 326; *Reab v. Moor*, 19 Johns. 337; *Sickles v. Pattison*, 14 Wend. 237, 23 Am. Dec. 527; *Hair v. Bell*, 6 Vt. 35; *Philbrook v. Belknap*, Id. 833; *Brown v. Kimball*, 12 Vt. 617; *Ripley v. Chipman*, 13 Vt. 266; *Winn v. Southgate*, 17 Vt. 358; *Mullen v. Gilkinson*, 19 Vt. 503; *Kettle v. Harvey*, 21 Vt. 301; *Miller v. Goddard*, 34 Me. 102, 56 Am. Dec. 638; *Congregation of Children of Israel v. Peres*, 2 Coldw. 620.

The main case of *TIMBERLAKE v. THAYER* denies the authority of *Britton v. Turner*, 6 N. H. 482, 26 Am. Dec. 718, and refuses to follow it, holding that no recovery could be had by the party guilty of a breach of contract; that he could not recover on the special contract, because he himself had not performed it, nor upon a quantum meruit because of the existence of the special contract. This is supported by the cases *supra*, but hardly any of them define it so squarely or emphatically as the main case.

So where the contract which the plaintiff had partly performed was not valid. *Peck v. Burr*, 10 N. Y. 297; *Kruger v. Leppel*, 42 Minn. 6; *Swansey v. Moore*, 22 Ill. 63, 74 Am. Dec. 134.

In *Peck v. Burr*, *supra*, the contract was rescinded as illegal by the party who attempted to recover for his part performance.

In *Kruger v. Leppel*, *supra*, the contract was an oral one and within the statute of frauds, but full performance was nevertheless held to be a condition of a recovery.

It was stated in *Lowe v. Sinklear*, 27 Mo. 309, that the employer of a servant employed for a certain period at a fixed sum was not liable on a quantum meruit where the service was incomplete though of value, but this was not the question involved in the case.

A teacher contracting for nine months teaching for \$45 in full, teaching only eight and a half months, cannot recover on the contract; as to whether he could on quantum meruit is not decided. *Hill v. Balkcom*, 79 Ga. 444. See *Charlestown School Twp. v. Hay*, 74 Ind. 137.

Where an employé sues and says he worked part of the time and was willing to work the remainder of his term, but that the defendant failed on his part to pay plaintiff, it does not show such a performance as will authorize a recovery for work done. *Weber v. Union Mut. L. Ins. Co. of Maine*, 5 Mo. App. 51.

And in *Steeles v. Newton*, 7 Or. 110, 33 Am. Rep. 705, it was held that a party who abandons a contract of work and labor before completion, except voluntarily, may recover on quantum meruit less damages.

In an action of covenant for two shillings for copying every quire of paper, and that he copied four quires and three sheets for which 8s and 3d was due him, there could be no apportionment or pro rata, but if he had averred 3d to be the usual fees for copying three sheets, it was said that he

Paxler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Riggs v. Horde*, 25 Tex. Supp. 456, 78 Am. Dec. 584; *Chambles v. Baker*, 95 N. C. 98; *Parcell v. McComber*, 11 Neb. 209. But the decided weight of authority is to the contrary. *Lawson*, Cont. Carr. § 470, note 4, and authorities there cited. And it was decided at an early day in this state that an entire contract of this character could not be apportioned, and that, under the circumstances named, no recovery could be had by the party guilty of the breach of contract; that he could not recover on the special contract, because he himself had not performed it, nor upon a quantum meruit, because of the existence of the special contract. *Wooten v. Read*, 2 Smedes & M. 585. In *Hariston v. Sale*, 6 Smedes & M. 684, and *Robinson v. Sanders*, 24 Miss. 891, it was held that an overseer's contract with his employer, though made for a definite time, was not an entire contract, and recoveries were allowed on the common counts. The cases relied on to support the rule announced in these decisions were *Byrd v. Boyd*, 4 McCord, L. 240, 17 Am. Dec. 740; *Eaken v. Harrison*, 4 McCord, L. 249; *McClure v. Pyatt*, Id. 26. Of these the leading case is *Byrd v. Boyd*; the others simply follow it. In *Byrd v. Boyd* the court evidently legislate the exception into the law, and so, in effect, declared; for, after referring to the rule of the common law, the court proceeds to say, "There is, however, a third class of cases for which it is necessary to provide," and then declares that these cases for which it is necessary for the court "to provide" are "those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable; and that, perhaps, not immediately connected with the contract, as in the present case." The South Carolina court put its decision expressly upon the ground of expediting, and confined its effect, by necessary implication, to the particular sort of contract under consideration. Since the abolition of slavery we have no such contracts strictly as those which formerly existed between employer and overseer; and the decisions in *Wooten v. Read*

and *Hariston v. Sale*, *supra*, have no field of operation. The instructions for the plaintiff were properly given.

The defendant, who was the indorser of a promissory note executed by one Vandiver, introduced evidence to prove that, by an arrangement between Vandiver and Thayer Thayer was to take up the note (which was then in the hands of a third person) for Vandiver, and Vandiver was to render service to him, by supervising his farm until the crop should be gathered, in payment of the note. On this evidence the defendant asked the court to instruct the jury that if such was the contract of the parties, and Vandiver failed to perform his contract, Thayer had a right of action against him for breach of contract but could not recover against the defendant, the indorser, on the note. The court refused the instruction as asked, but modified it by inserting therein the words, "and that Vandiver rendered the service as he contracted to do." The instruction as asked was correct, and should have been given; and the modification inserted by the court robbed it of all beneficial operation for the defendant. The defendant was only liable secondarily on the note; and if, by the arrangement between Thayer and Vandiver, Thayer's right of action against Vandiver, the maker, was suspended, if but for a day, the indorser was forever discharged, and the mere breach of the contract by which it was suspended could not revive the obligation of the indorser. *Randolph*, Com. Paper, §§ 707, 708; *Case v. Hawkins*, 53 Miss. 702.

There is no evidence that the maker of the note was a resident of this state, where the suit was brought. The question whether it was necessary for the plaintiff to have brought this action as prescribed by section 3516 of the Code is not presented. The defendant was so clearly a nonresident of the state, and therefore subject to attachment, that we decline to consider whether the instructions of the court given on the trial of the issue made on the attachment were or were not correct. No error of law would warrant the setting aside of the verdict on that issue, in the light of the testimony.

Judgment reversed.

might have helped himself. *Needler v. Guest*, *Aleyn*, 9.

In *Huttman v. Boulnot*, 2 Car. & P. 510, it was said that a clerk quitting without cause is liable to a cross-action, but that was not the question involved in this case, as the plaintiff consented to receive fifteen pounds on the understanding that no cross-action should be brought.

In *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58, it was held that an implied promise to pay for part

performance for services can arise only when the party sought to be charged has had the benefit of part performance or has prevented full performance, but the question involved in this case was whether a void contract was *prima facie* evidence of the value of the services.

In this note cases in regard to impossibility of performance by reason of death are not included. See note to *Parker v. Macomber* (R. L.) 16 L. R. A. 868. L. T.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.

James A. TREFETHEN *et al.*

(187 Mass. 180.)

1. Direct evidence of suicide is not

NOTE.—The present case is a notable one on the subject of evidence of declarations of intention when not a part of the *res gestæ*. As an authority in favor of such evidence, and especially as 24 L. R. A.

necessary to require the consideration of the correctness of the exclusion of evidence of intention to commit it, since that theory must be considered by the jury if the circumstances of the case afford evidence to support it.

2. Evidence locating the presence of

very clearly separating this kind of declarations from the class of declarations as *res gestæ*, the case is probably the most valuable one upon the subject.

deceased at another place at the time of an alleged interview at which she is alleged to have declared an intention to commit suicide is not of itself sufficient to exclude evidence of the alleged declarations from the jury, in a murder case.

3. The trial judge cannot in his discretion exclude evidence of the alleged declaration of intention to commit suicide because of illegitimate pregnancy made the day before the death of the one making them, whose condition continued until her death, because of lapse of time between the declaration and the death.
4. Evidence of an intention to commit suicide is not immaterial in a murder case where deceased was found dead under circumstances not inconsistent with the theory of suicide.
5. Evidence of declarations by deceased of intention to commit suicide is admissible in a murder case if introduced solely to show the state of mind or intention of the one making them at the time they were made.
6. That deceased is a stranger to the proceeding will not exclude evidence of his declarations of intention to commit suicide, upon trial of an indictment charging one with murdering him.
7. Refusal to permit defendant's counsel to ask a juror on his voir dire to what extent he had read about the case in the newspapers after the statutory questions had been exhausted is not an abuse of discretion requiring reversal, if there is nothing to show what counsel had any reasonable expectation of proving.
8. It is not prejudicial error to admit against one on trial for murder the whole of a conversation in which some of his replies had a tendency to show guilt while others were explicit denials of guilt.

(October 20, 1902.)

EXCEPTIONS by defendant Trefethen to rulings of the Superior Court for Middlesex County made during the trial of himself and William H. Smith upon an indictment for the murder of Delena H. Davis, which resulted in a verdict of guilty as to him. *Verdict set aside.*

The facts are stated in the opinion.

Messrs. John D. Long and William Schofield, for defendant:

The court erred in excluding the testimony of the witness Hubert.

There was other evidence to show that Tena Davis did drown herself, and this intention as an additional fact, might properly influence the jury in determining the question of suicide or murder. If so, it was a material fact. The test is whether the fact is, according to the general experience of mankind, capable of affording a reasonable presumption or inference as to the issue in dispute.

Com. v. Barnacle, 184 Mass. 215, 45 Am. Rep. 319; *Lewis v. Mason*, 109 Mass. 169; *Higgins v. Andrews*, 121 Mass. 298; *Maggi v. Cutts*, 123 Mass. 535; *Com. v. Abbott*, 180 Mass. 472; *Com. v. Felch*, 182 Mass. 22; *Com. v. Fanno*, 184 Mass. 217. See also *Woodbury v. Obeur*, 7 Gray, 467; *Camp v. Camp*, 59 Vt. 667. 24 L. R. A.

The question of materiality is not in this case a matter of discretion, but of law.

Maggi v. Cutts, *supra*. See also *Lane v. Moore*, 151 Mass. 87.

No special reason being assigned for the exclusion of the evidence, and there being other evidence in the case to support the theory of suicide, the proper construction of the bill of exceptions is, that the evidence was excluded as "incompetent in its nature and not admissible in any aspect of the case."

Howe v. Howe, 99 Mass. 88.

From the existence of the intention as a fact or circumstance, to be considered with the other evidence, the defendant argues that the theory of suicide is made more probable than if such intention did not exist. The state of mind or intention is therefore of itself the material fact. It cannot from its nature be proved by direct testimony of witnesses, but may be proved by the contemporaneous declarations of the party.

Whart. Crim. Ev. 9th ed. §§ 271, 756; *Best, Ev.* § 12; 1 *Greenl. Ev.* §§ 103, 123; 1 *Taylor, Ev.* 8th ed. § 580; 1 *Phillips, Ev.* 4th Am. ed. 181; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 286, 36 L. ed. 706; *Smith v. National Ben. Soc.* 9 L. R. A. 616, 128 N. Y. 85.

In petitions for the probate of wills, when the validity of the will is questioned on the ground of want of mental capacity, or of fraud and undue influence, declarations of the testator, oral and written, made before or after the execution of the will, are admissible to show the condition of his mind and his intention as to the disposition of his property.

Gardner v. Frieze, 16 R. I. 640; *Omstock v. Hadlyme Real. Soc.* 8 Conn. 254, 20 Am. Dec. 100; *Waterman v. Whitney*, 11 N. Y. 157, 68 Am. Dec. 71; *Marz v. McGlynn*, 88 N. Y. 357; *Herster v. Herster*, 123 Pa. 239; *Griffith v. Diffenderfer*, 50 Md. 466; *Mooney v. Olsen*, 23 Kan. 69. See also *Doe v. Palmer*, 16 Q. B. 747.

So where a will has been lost, or destroyed, similar declarations of the testator are competent for the purpose of proving its contents, and of showing whether there was or was not a revocation.

Sugden v. St. Leonards, L. R. 1 Prob. Div. 154; *Woodward v. Goulston*, 11 App. Cas. 469; *Keen v. Keen*, L. R. 3 Prob. & Div. 105; *Behrens v. Behrens*, 47 Ohio St. 323; *Johnson's Will*, 40 Conn. 587.

If the language of a will or other written instrument, though plain in itself, applies equally well to more objects or persons than one, declarations of the testator's or maker's intention are competent, for the purpose of showing his intention, as a means of ascertaining the true meaning of the words of the will or other document.

Stephen, Dig. Ev. art. 91 (8); *Doe v. Hiscocks*, 5 Mees. & W. 368; *Doe v. Needs*, 2 Mees. & W. 129; *Grant v. Grant*, L. R. 5 C. P. 727; *Phelan v. Slaterry*, L. R. 19 Ir. 177.

Declarations as to existing bodily sensations, made at a time when the health or bodily condition of the party making them is a material fact, are competent evidence to prove them.

Kennard v. Burton, 25 Me. 89, 43 Am. Dec. 249; *Howe v. Plainfield*, 41 N. H. 185; *Wilson v. Granby*, 47 Conn. 89, 86 Am. Rep. 51;

Travelers Ins. Co. of Chicago v. Mosley, 75 U. S. 8 Wall. 397, 19 L. ed. 437; *Aveson v. Kinnaid*, 6 East, 188.

In actions for criminal conversation, the state of affection existing between husband and wife being a material question, letters and oral declarations of the wife are competent to show her feelings towards her husband, when made or written before any misconduct on her part.

Tredaway v. Coleman, 2 Stark. 191, 1 Barn. & Ald. 90; *Willis v. Bernard*, 5 Car. & P. 842, 8 Bing. 376; *Winter v. Wroot*, 1 Moody & R. 404; *Perry v. Lovejoy*, 49 Mich. 529; *Gilchrist v. Bule*, 8 Watts, 855, 84 Am. Dec. 469.

The same rule is applied in criminal cases.

Hunter v. State, 40 N. J. L. 495; *Schlemmer v. State*, 51 N. J. L. 23; *Oliverius v. Com.* 81 Va. 787; *State v. Howard*, 32 Vt. 880; *State v. Dickinson*, 41 Wis. 299; *Kirby v. State*, 7 Yerg. 259; but see 9 Yerg. 353, 30 Am. Dec. 420.

In cases of homicide, threats of violence against the defendant, made by the person killed, even when not communicated to the defendant, may be proved as a fact tending to show that the defendant was assaulted, and was acting in self-defense, the question on the other evidence being left in doubt.

Whart. Crim. Ev. § 757; *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941; *Stokes v. People*, 53 N. Y. 164, 18 Am. Rep. 493; *Mize v. State*, 36 Ark. 653.

Declarations of a bankrupt, made at or before leaving, or while staying away from home, are competent evidence of his intention for the purpose of proving an act of bankruptcy in actions by the assignee against a creditor.

Bateman v. Bailey, 5 T. R. 512; *Rawson v. Haigh*, 9 J. B. Moore, 217, 2 Bing. 99; *Smith v. Cramer*, 1 Scott, 541, 1 Bing. N. C. 585.

In an action for enticing a servant to leave his employment, declarations of the servant made at the time of leaving are held to be competent evidence of his reasons for doing so.

Hadley v. Carter, 8 N. H. 40.

Statements of a person made when leaving his home are held admissible for the purpose of proving that he was intending to take passage on a train.

Lake Shore & M. S. R. Co. v. Herrick, 49 Ohio St. 25; *Cincinnati, I. St. L. & O. R. Co. v. Howard*, 8 L. R. A. 593, 124 Ind. 280.

Declarations showing a state of mind or intention are not to be treated as hearsay, but as original evidence of the mental facts which they indicate.

Travelers Ins. Co. of Chicago v. Mosley, 75 U. S. 8 Wall. 405, 19 L. ed. 440; 3 Benthams, Jud. Ev. 70; *Woodbury v. Obeare*, 7 Gray, 407.

Declarations made by persons not competent as witnesses, *e. g.* slaves, are competent to prove bodily feelings or a state of mind, and are regarded merely as circumstantial evidence of those facts.

Roseland v. Walker, 18 Ala. 749; *Clancy v. Overman*, 18 N. C. 403; *Biles v. Holmes*, 33 N. C. 16; *Rogers v. Orain*, 30 Tex. 234.

The Massachusetts decisions upon the admissibility of contemporaneous declarations to prove a state of mind or an intention, are submitted in a separate group.

In cases arising upon wills, involving the issues of mental capacity of the testator, fraud, 24 L. R. A.

undue influence, and revival of a former will by revocation of a subsequent will, declarations of the testator both before and after the execution of the will or act of revocation are competent to prove his intention with regard to his property or the condition of his mind.

Shastler v. Bumstead, 99 Mass. 112; *Lewis v. Mason*, 109 Mass. 169; *May v. Bradlee*, 127 Mass. 414; *Potter v. Baldwin*, 133 Mass. 427; *Woodward v. Sullivan*, 152 Mass. 470; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Converse v. Wales*, 4 Allen, 512.

In actions of tort for conversion, upon the issue whether a gift of property had been made to defendant, declarations of the alleged donor as to his intention in regard to the property, whether made prior or subsequent to the alleged gifts, were held competent evidence to show his intention.

Whitney v. Wheeler, 116 Mass. 490; *Whitwell v. Winslow*, 132 Mass. 307; *Lane v. Moore*, 151 Mass. 87.

On an indictment for murder, the defense being that the defendant acted under an insane delusion, expressions of hostile feelings towards the defendant, by the man killed, were held admissible to show his state of mind toward the defendant at that time, as having a tendency to negative the defense.

Com. v. Wilson, 1 Gray, 387.

The following criminal cases, upon various issues, either recognize or apply the same general rule.

Com. v. Austin, 97 Mass. 595; *Com. v. Rowe*, 105 Mass. 590; *Com. v. Abbott*, 180 Mass. 472; *Com. v. Damon*, 136 Mass. 441; *Com. v. Cotton*, 138 Mass. 500.

Upon the issue of the validity of a deed, impeached upon the ground of fraud and undue influence, and of the validity of a lease impeached upon the ground that it was made with the intention that the demised premises should be used for an unlawful purpose, declarations of the grantor prior to the execution of the deed, and of the lessor both before and after the giving of the lease, were held competent.

Howe v. Howe, 99 Mass. 88; *Sherman v. Wilder*, 106 Mass. 587.

When bodily condition is a material fact, exclamations and expressions indicating present pain or illness, made by the suffering party to any person, are competent evidence.

Bacon v. Chariton, 7 Cush. 581; *Hatch v. Fuller*, 131 Mass. 574; *Com. v. Leach*, 155 Mass. 99.

Narrative statements of present bodily conditions and symptoms, made by a patient to a medical man for the purpose of treatment, are competent to prove such condition and symptoms.

Barber v. Merriam, 11 Allen, 322; *Ashland v. Marlborough*, 99 Mass. 47; *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372; *Roosa v. Boston Loan Co.* 132 Mass. 439.

In an action for seduction and alienating the affections of plaintiff's wife, statements of the wife prior to the alleged seduction, showing the state of her feelings towards her husband, were held to be competent evidence.

Palmer v. Crook, 7 Gray, 418. See also *Jacobs v. Whitcomb*, 10 Cush. 253.

The following cases are examples of admissible declarations of intention, where the intention was connected with an act:

Butts v. Tiffany, 21 Pick. 95; *Com. v. O'Connor*, 11 Gray, 94; *Thorndike v. Boston*, 1 Met. 242; *Kilburn v. Bennett*, 8 Met. 199; *Reeder v. Holcomb*, 105 Mass. 93; *Elmer v. Fessenden*, 5 L. R. A. 724, 151 Mass. 859. See also *Earle v. Earle*, 11 Allen, 1; *Chase v. Lowell*, 151 Mass. 422; *Com. v. Felch*, 182 Mass. 22.

The declaration is apparently sincere, and made without any motive to deceive. If there were any doubt whether it was honest or feigned the question would be for the jury.

Bacon v. Charlton, 61 Mass. 581; *Com. v. Robinson*, 146 Mass. 571; *Collagan v. Burns*, 57 Me. 449; *Reel v. Reel*, 8 N. C. 248, 9 Am. Dec. 632.

Mr. A. E. Pillsbury, Atty-Gen., for the Commonwealth.

Field, Ch. J., delivered the opinion of the court:

The principal exception is to the refusal of the court to admit the testimony of Sarah L. Hubert. The exceptions recite that: "Sarah L. Hubert, a witness called in behalf of the defendant, testified that her business, which she advertised in the newspapers, was that of a trance medium; that on December 22, 1891, in the forenoon, after 10 o'clock, a young woman called at her place of business in Boston for consultation. There was sufficient evidence to go to the jury of her identification as Delena J. Davis. Upon objection being made to the testimony of this witness, counsel for the defendants stated to the court, aside from the jury, that they offered to prove by this witness that at the interview on December 22, the young woman aforesaid stated to the witness that she was five months pregnant with child, and had come to consult as to what to do, and added later in the interview that she was going to drown herself. The court refused to admit the testimony, and the defendants duly excepted." The exceptions also recite that "the evidence offered in behalf of the commonwealth was wholly circumstantial, and tended to show that on December 23, 1891, Delena J. Davis left her home in Everett at about 7 o'clock in the evening, and was last seen on the corner of Ferry street and Broadway, which is near her home in said Everett, at about 25 minutes of 8, the same evening. On the 10th day of January, 1892, her dead body was found in the Mystic river, a short distance below the Wellington bridge, about three miles from her home. There were no marks of violence on the body when found, nor was there any evidence that poison had been administered, nor did her clothing show any signs of violence. . . . The physicians called in behalf of the commonwealth testified that the cause of death was drowning, and that, from the stage which digestion had reached, death occurred between two and one half and three and one half hours after the deceased had eaten her last meal. There was evidence that the deceased ate her supper about 5 o'clock on the evening of December 23, and that the partly digested food found in her stomach corresponded with that which it was testified she ate at that meal. The deceased was unmarried, and at the time

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of her death was pregnant with a male child, and was about five months advanced in the state of pregnancy. The defendants contended and argued, without objection, that all the evidence introduced in behalf of the commonwealth was reasonably consistent with the theory that the deceased came to her death by suicide. There was evidence in the case tending to negative the circumstances relied upon by the commonwealth, and to support the theory of suicide."

At the argument in this court the attorney-general asked that if the kind and amount of evidence tending to support the theory of suicide should be thought by the court to be important, the exceptions might be amended so as to show exactly what this evidence was; and he intimated that, in his opinion, this evidence was so slight as to be unworthy of serious consideration. We understand that by "evidence" the attorney-general meant direct evidence tending to prove suicide. Without considering what remedy, if any, is open to the attorney-general in a criminal case where there is a reason to suppose that the exceptions taken by the defendant and allowed by the court are not sufficiently full, we are of opinion that in the present case the facts are such that suicide would naturally suggest itself, as a possible explanation of the cause of death, and that, if it be true that the direct evidence tending to prove suicide is inconsiderable, yet the circumstances afforded evidence in support of the theory of suicide which must be considered by the jury. The amendment, therefore, if it were made, and were of the character suggested, would afford no aid to the court in determining the questions of law raised by the exceptions.

A few minor suggestions of the attorney-general may be briefly disposed of. There was evidence on the part of the commonwealth that the deceased did not leave her home on the 22d of December until 8 o'clock in the afternoon, and that she returned home between 8 and 9 o'clock, and the attorney-general argues that "this furnishes sufficient reason for the exclusion of the evidence" offered "in the discretion of the court." But the jury might have disbelieved this evidence of the commonwealth, or, if they believed it, might also have believed that the deceased had the interview with Sarah L. Hubert in the afternoon, rather than in the forenoon, of December 22. The attorney-general also argues "that the statement was so remote in point of time from the disappearance and death of Tena Davis that it was within the discretion of the court to exclude it for this reason." When evidence of declarations of any person is offered for the purpose of showing the state of mind or intention of that person at the time the declarations were made, the declarations undoubtedly "may be so remote in point of time, or so altered in import by subsequent change in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge." It has been many times said that "some limit must, of course, be had in applying practically the rules which govern the admission of this evidence." This subject is considered in *Com. v. Abbott*, 130 Mass. 472, and in the cases there cited. There is un-

doubtedly a discretion to be exercised by the judge or judges presiding at the trial in the admission or rejection of this kind of evidence; but it is not an absolute discretion, and the exercise of it, when the facts appear, may be reversed by this court. If the declaration, evidence of which was offered in the present case, had been made by the deceased two or three years before her death, when she was not pregnant with child, and did not know the defendant, it might well have been held by the presiding judges to have been of no significance in the case.

In the case at bar the evidence offered was that the declaration of the deceased was made the day before her death, and was made in a conversation concerning her pregnancy, which continued until her death. The declaration, therefore, was not made at a time remote from the time of her death, and there had been no change of circumstances which made it inapplicable to the condition of the deceased at the time of her death. It was clearly competent for the jury to find from the evidence recited in the exceptions that, if Deltena J. Davis had an intention to commit suicide on December 22 she continued to have the same intention on December 23. If the evidence, in its nature, was admissible, the court, on the facts stated, could not exclude it on the ground that from the lapse of time or change of circumstance it had ceased to be material. It ought to be said that there is nothing in the exceptions indicating that the presiding judges refused to admit the evidence on the ground that it was in their discretion to admit or reject it. They probably considered the question presented as settled by the decision of this court in *Com. v. Felch*, 132 Mass. 22.

The main argument of the attorney-general is: *First*, that it is immaterial whether the deceased, at or before the time of her death, had or had not an intention to commit suicide; and, *secondly*, that, if she had such an intention, it could not be proved by evidence of her declarations that she was going to drown herself. The burden was on the commonwealth to prove beyond a reasonable doubt that the defendant killed the deceased, and to do this the jury must be satisfied beyond a reasonable doubt that she did not kill herself. The nature of the case proved by the commonwealth was such that it was not impossible that she had committed suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had no such intention. If it could be shown that during the week before her death she had actually attempted to drown herself, and had been prevented from doing it, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt, and accomplished her purpose. It may be true that an unmarried woman, pregnant with child, may sometime say that she will commit suicide when she has no serious intention of doing it; or, if she has such an intention, she may not carry it into effect, although she may have an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to

throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide. It is a question of more difficulty whether evidence of the declarations of the deceased can be admitted to show such an intention. The argument, in short, is that such evidence is hearsay. It is argued that such declarations are not made under the sanction of an oath, and that there is no opportunity to examine and cross-examine the person making them, so as to test his sincerity and truthfulness, or the accuracy and completeness with which the declarations describe his intention or state of mind; and that, even if such declarations would have some moral weight in the determination of the issue before the court, they are not within any of the exceptions, to the exclusion of hearsay, which the common law recognizes.

The counsel for the defendant concede that the declaration in this case is not, under our decisions, admissible as a part of what has been called the "*res gesta*," although they contend that some courts have admitted similar declarations on that ground. They concede that to make a declaration admissible on that ground it must accompany an act which, directly or indirectly, is relevant to the issue to be tried, and must in some way qualify, explain, or characterize that act, and be, in a legal sense, a part of it. They concede that if this declaration is a part of the act of visiting Sarah L. Hubert, and tends to show the nature or purpose of that visit, the fact of the visit is not relevant to the issue. It does not tend to show, directly or indirectly, that the defendant killed the deceased, or that she killed herself. They concede that if the evidence of this declaration is admissible, it is on account of the nature of the declaration, and not because it was made at this interview; and that, if made to anybody else under the same circumstances, it would have the same significance. They contend that the declaration is some evidence of the state of mind or intention of the deceased at the time she made it, and that the intention which it tends to prove is a material fact, which, in connection with other facts proved, tends to support the theory of suicide. They contend that the state of mind or intention in the mind of a person, when material, can be proved by evidence of his declaration as well as of his acts, particularly when that person has deceased, and cannot be called as witness, and the declarations were made before the controversy arose which is the subject of the trial.

The evidence that declarations were made must, of course, be of the same character as the evidence that the acts were done; that is, both must be proved by the testimony of witnesses under oath, and subject to cross-examination and in either case the examination may extend to all the circumstances which tend to show the significance of the declaration or of the acts as indications of the existing state of mind or intention of the speaker or actor. The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and

that proof of either or all of these, for the sole purpose of showing the existing state of mind or intention, may be inferred. For example, the exceptions recite that on the day when the deceased disappeared Trefethen called at the house of her mother "about 10 in the forenoon, and was there some time with Tena, and that Tena that day appeared bright and cheerful, and 'full of smiles,' but at times during the month prior thereto had been depressed in spirits." The only apparent object of this testimony was to show on the day she disappeared she was happy and, therefore, could not have contemplated suicide. Her bright and cheerful appearance might have been real or feigned, but this was for the jury. If the deceased at the same interview had said, "I was never so happy in my life as I am to-day," it is contended this declaration might be as significant of her state of mind as her cheerful appearance, and that speaking, as an indication of what is in the mind of the speaker, is as much an act as smiling or conduct generally. The only obvious distinction between speech and conduct is that speech is often not only an indication of the existing state of mind of the speaker, but a statement of a fact external to the mind, and as evidence of that it is clearly hearsay. There is, of course, danger that a jury may not always observe this distinction, but that has not availed to exclude testimony which is admissible for one purpose and not admissible for another, to which there is danger the jury may apply it. A common instance of this is when it is a material fact in the case whether a person at a certain time said a certain thing. The testimony of a witness who heard him say it is always admitted, although this is not evidence that what that person said was true. The present case discloses another instance. Many witnesses testified to conversations with the defendant about the disappearance of Tena Davis, and his connection with it. What they said to him, and his silence or his replies, were only admissible so far as his failure to make reply, or his replies to what was said to him, under the circumstances, tending to show that he was guilty, but the testimony of what was said to him was not, in and of itself, evidence that the statements made to him were true. Suppose that at the interview between the deceased and the witness Hubert, if there was such an interview, the deceased had said that Trefethen was the father of her child; evidence that the deceased said this is clearly hearsay, and is not admissible to prove that he was the father. But suppose that it had been denied at the trial that the deceased knew that she was pregnant, testimony that she had said that she was pregnant would be some evidence that she knew it. If, the day before her death, she had written a note, addressed to her mother, stating her condition, and declaring her intention to drown herself, and had left it in her desk when she went from home the following day, the admissibility of such a letter in evidence, after proof that she had written it, depends upon the same considerations as the admissibility of evidence of similar oral declarations. Such a written declaration differs from an oral declaration only in this: that writing is often a more de-

liberate act than speaking; but this affects only the weight of the evidence. It may also be thought that speech is a less trustworthy indication of what is really in the mind of the speaker than acts or appearance, but this, if it be so, also affects the weight of the evidence. Certainly, to confine the evidence to acts, appearance, or speech which is wholly involuntary, would be impracticable and unreasonable, for almost every expression of thought or feeling can be simulated; and although evidence of the conscious declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expressions of feeling, which has always been regarded in the law not as hearsay, but as original evidence,—1 Greenl. Ev. § 102, 5th ed.; and when the person making the declarations is dead, such evidence is often not only the best, but the only, evidence of what was in his mind at the time. On principle, therefore, we think it clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are to be regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. In the present case the declaration, evidence of which was offered, contained nothing in the nature of narrative, and was significant only as showing the state of mind or intention of the deceased.

But it is argued that this is not the law, and that it is not competent for this court to change the established rules of evidence. We have been shown no case exactly like the present, but there are decisions closely analogous, and while they are not uniform, yet we think the weight of modern authority is in favor of admitting evidence like that offered in the present case for the purpose stated. The latest decision on the subject is *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 38 L. ed. 706, and many of the cases are cited in the opinion. See also *Furyear v. Com.* 88 Va. 51; *Blackburn v. State*, 23 Ohio St. 146; *Boyd v. State*, 14 Lea, 162; *Goeracn v. Com.* 99 Pa. 388; *Jumperts v. People*, 21 Ill. 375; *Reg. v. Jessop*, 16 Cox, C. C. 204; *Com v. Fenna*, 124 Mass. 217.

It is argued that the decision of the Supreme Court of the United States in *Travelers Ins. Co. of Chicago v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437, shows that that court is somewhat more liberal than our decisions warrant in admitting declarations as a part of the *res gesta*, and that, therefore, this court will not follow the decision in *Mutual L. Ins. Co. v. Hillmon*, *supra*. But, without considering whether we should follow *Travelers Ins. Co. of Chicago v. Mosley* on the subject of *res gesta*, we are aware of no difference in the decisions of the two courts on the admission of declarations to show the existing condition of the mind of the declarant, if we except our decision in *Com. v. Felch*, *supra*, which we will consider hereafter. This court admits exclamations and declarations as evidence of existing pain in case of injuries. In the case of wills, upon the issue

of sanity or undue influence, this court has always admitted evidence of declarations which tend to show the condition of the mind of the testator, his intention with regard to the disposition of his property, or his fear of the person alleged to have exercised undue influence. *Shailer v. Bumstead*, 99 Mass. 112; *Lewis v. Mason*, 109 Mass. 169; *May v. Bradlee*, 127 Mass. 414; *Potter v. Baldwin*, 138 Mass. 427; *Woodward v. Sullivan*, 152 Mass. 470; *Pickens v. Davis*, 184 Mass. 252, 45 Am. Rep. 822. Upon an issue whether there was an intentional gift or gift *causa mortis* the same rule prevails. *Whitney v. Wheeler*, 116 Mass. 490; *Whitwell v. Winslow*, 132 Mass. 307; *Lane v. Moore*, 151 Mass. 87. In *Lane v. Moore* this court says: "Where the mental condition of a person at a particular time is in issue, his appearance, conduct, acts, and declarations, after as well as before the time in question, have been held admissible in evidence if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was. The question has usually arisen in cases involving the validity of wills, but the principle is the same where the validity of a gift is questioned, and where responsibility for crime is to be determined." See also *Hove v. Hove*, 99 Mass. 88. It is to be noticed that in all these cases the person, evidence of whose declarations was admitted, was dead at the time of the trial. In actions by the husband for seducing his wife and alienating her affections from him the declarations and statements of the wife, made before the alleged seduction, indicating the state of her affections towards her husband, have uniformly been admitted upon the question of damages. *Palmer v. Crook*, 7 Gray, 418; *Jacob v. Whitcomb*, 10 Cusb. 255. In the last case the court says: "Whenever the mental feelings of an individual are to be proved, the usual expressions of such feelings are original evidence, and often the only proof of them which can be had." At common law the wife could not be a witness in such a case. In *Com. v. Abbott*, *supra*, the defendant, who was not the husband, being on trial for the murder of a married woman, for the purpose of showing "the existence of motive on the part of the husband of the deceased to commit the crime," offered evidence that the husband and wife quarreled some years before the homicide; that about six years before the homicide the husband was seen entering his own house with an axe in his hand, and that he then uttered threats against his wife and a man not named; and also offered to show the ill-feeling of the husband towards the wife, by statements not in the nature of threats, made by the husband to a witness. The evidence offered was confined to acts done or statements made on or before the year 1877. The homicide was in January, 1880. The reputation of the wife for chastity between the years 1878 and 1877 had been bad. There was uncontroverted evidence that from May, 1879, the reputation of the deceased was not questioned, and that the husband and wife continued to live together until her death. The justices trying the case excluded the evidence, and the defendant excepted. In that case this court says: "The existence of a criminal motive is an element

which it is often necessary to establish in order to give character to the acts and conduct of a party charged with or suspected of crime. In such case the conduct or declarations of a party, both before and after the principal fact in issue, are admissible, provided they are sufficiently near in point of time, and sufficiently significant of the motive or intent to be proved. The rules which govern human conduct are to be reasonably applied in these cases, as in all other investigations of fact. They are to be so applied in all cases where the inquiry is as to the mental or moral condition of a person at the time a particular act was done. The intent or disposition, when it constitutes an element of crime, can only be ascertained, as all moral qualities are, from the acts and declarations of the party." This court, after saying that a certain discretion must be left to the justices trying the case, held that it did not appear that the court erred in excluding the evidence offered because of its remoteness, and of a subsequent change in the relations of the husband and wife. The court also says, what has been said many times in criminal cases where it was contended that some other person than the defendant committed the crime, that "the existence of ill-feeling as a motive for the commission of crime will not alone justify submitting to a jury the question of the guilt of a person entertaining such feeling. It becomes material only when offered in connection with other evidence proper to be submitted, showing that the person charged with such ill-feeling was in fact implicated in the commission of the crime." There is no intimation anywhere in the opinion that if the evidence had related to a time very near the homicide, and if there had been evidence implicating the husband in the commission of the crime, evidence of his threats against the wife, and of his statements showing ill-feeling towards her, would not have been admitted; and the language of the opinion implies that they would have been. The admission of evidence of declarations in *Elmer v. Fessenden*, 151 Mass. 859, 5 L. R. A. 724, and in actions involving the question of domicile, — *Kilburn v. Bennett*, 3 Met. 199, — and in bankruptcy cases, — *Bateman v. Bailey*, 5 T. R. 512, — may perhaps be supported on the ground that the declarations were a part of the *res gestæ*; but, if these cases were not decided on this ground, they must be considered as applicable to the present case.

It is also argued that the deceased, with reference to the indictment, is not a party; and the question whether her declarations should be received as evidence is the same as if they were the declarations of any other person than the defendant, and that evidence of a confession by a third person that he killed the deceased, or threats to injure the deceased, made by him, cannot be received. The decisions appear to be uniform that confessions of third persons cannot be received as evidence that they committed the crime, and that the defendant did not; and this for the plain reason that they are hearsay. They are strictly narratives of past transactions, not made under oath, and are only competent as admissions against the persons making them. The decisions are not uniform whether evidence of threats made by

third persons to injure the deceased should be admitted or not as evidence for the defendant. In most of the cases where the evidence of such threats by third persons have been rejected in trials for murder, the threats were made too long before the homicide to be significant, or they were made under very different circumstances than those existing when the deceased was killed, or there was no other evidence tending to implicate these persons in the commission of the crime, and the evidence was rejected on one or all of these grounds. Evidence of threats of the deceased against the defendant have been admitted when the question was whether the defendant or the deceased made the first assault, and whether the defendant acted in self-defense. *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941. If, on a trial for murder, the defendant proved that another person had ill will towards the deceased, and had an opportunity to commit the murder, and was found on the day when the murder was committed near the place of the murder, under suspicious circumstances, with a weapon which might have been the instrument with which the deceased was killed, and that the conduct of this person after the murder was such as to indicate that he had committed it, it would seem that evidence that this person, on the day before the murder, had threatened to kill the deceased if he could find him, and said that he was searching for him that he might kill him, would be significant of an intent to kill him, and ought to be admitted; and we find no well considered case where, on this state of facts, such evidence has been rejected. See *State v. Beaudet*, 53 Conn. 586, and cases cited; *Holt v. State*, 9 Tex. App. 571; *Cluverius v. Com.* 81 Va. 787, 826; *Walker v. State*, 63 Ala. 105; *Howard v. State*, 23 Tex. App. 266; *Purveyor v. Com. supra*; *Worth v. Chicago, M. & St. P. R. Co.* 51 Fed. Rep. 171.

In *Com. v. Felch*, *supra*, the defendant was charged with attempting to procure the miscarriage of Mary Ann Finley on July 2, 1881, by the use of some instrument to the jurors unknown, in consequence of which she died on the same day. He contended at the trial "that the operation was performed by Mary on herself; and there was evidence tending to show that it would have been possible for her to perform the operation on herself, considered as an operation, using for the purpose an ordinary lead pencil." He offered to prove by one Hughes "that in the month of June next preceding the time of the alleged offense Mary told her that she was pregnant by one Edward Titcomb, and that if Titcomb did not perform an operation to procure a miscarriage, or get some one to do so, she should perform the operation on herself with a lead pencil. It appeared that said declarations neither accompanied nor were explanatory of any act then done by her." The evidence was excluded, and the defendant excepted. This court, in the opinion, treats the evidence as hearsay, and says: "Such evidence is generally inadmissible. There are, however, several exceptions to this rule, and it is contended by the defendant that this evidence may properly be brought within some one of them. The only exception particularly designated is that relating to pedigree. This is, indeed, one of the well recog-

nized exceptions to the general rule. That which is technically hearsay evidence is competent evidence upon a question of pedigree." An examination of the original papers shows that one of the contentions of the defendant was that the evidence that Mary said that Titcomb was the father of the child was some evidence in the case that he was the father, on the ground that it was a declaration in relation to the pedigree of the child; and the argument was that, if Titcomb was the father, and the defendant was not, it was improbable that the defendant would attempt to procure a miscarriage. The decision of the court that no question of pedigree was involved in the case, and that for the purpose of proving that Titcomb was the father of the child the evidence was hearsay, and inadmissible, is undoubtedly correct. But the counsel for the defendant in that case also contended that evidence of this declaration was admissible to show an intention in the mind of the deceased to perform the operation, in connection with the evidence that the operation was one which she might have performed. There are some passages in the latter part of the opinion which perhaps tend to show that this argument did not wholly escape the mind of the justice who wrote it, but this particular aspect of the evidence is certainly not considered, and no cases are cited, and the whole discussion in the opinion is that this point in the consideration of the case might not have received the attention it deserved. Upon a re-examination of the question, we are of opinion that under the circumstances shown in *Com. v. Felch* a part of the evidence should have been admitted for the purpose of showing the intention in the mind of the deceased, and that to this extent that decision must be overruled. It is not necessary, in the present case, to determine what limitations, if any, in practice must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if one was made, is dead. She had an opportunity to commit suicide, and it was competent for the jury to find that she had a motive to commit it; and the declaration, if made, was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial. We cannot know whether the jury would or would not have found that the deceased was the person who had the interview with the witness, or whether they would have believed the witness, or whether, if they did believe her, they would have found that the deceased had really the intention which the declaration indicated, or whether the testimony, in view of all the evidence, would have affected the minds of the jury. We can only say that on the facts recited in the exceptions the evidence cannot be considered as immaterial or unimportant. We are of opinion that the presiding judges erred in refusing to receive this evidence, and that, for this reason, the verdict against Trefethen must be set aside.

The remaining exceptions may be noticed, although it is not absolutely necessary to decide them. The first exception is to the refusal of the court to permit the counsel for the

defendant to ask Charles E. Ray, one of the jurors, who was under examination by the court upon the *voir dire*, "to what extent he had read about the case in the newspapers." Ray was sworn as a juror, and sat as a juror at the trial. The court read to all the jurors summoned Pub. Stat., chap. 170, § 85, and chapter 214, § 7, and then read a portion of what was said by Shaw, *Ch. J.*, speaking for the full court, in *Com. v. Webster*, 5 Cush. 295, 297, 298, 52 Am. Dec. 711, viz.: "The statute intends to exclude any person who has made up his mind or formed a judgment in advance in favor of either side. Yet the opinion or judgment must be something more than a vague impression, formed from casual conversations with others, or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the question as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence." The court also read the statement made by Chapman, *Ch. J.*, speaking for the full court, in the trial of Samuel M. Andrews. Report of Trial of Andrews, by Charles G. Davis, p. 8. In the present case, the court, having put to the juror Ray all the statutory questions, which he had answered to its satisfaction, refused to permit the counsel for the defendant to put the question we have quoted above. The statutes we have cited, as also Stat. 1887, chap. 149, undoubtedly contemplate that other questions besides the statutory questions may be put to jurors by the court, or by the parties or their attorneys under the direction of the court. Pub. Stat., chap. 170, § 85, also provides that "the party objecting to the juror may introduce any other competent evidence in support of the objection." To determine whether a juror has such bias or prejudice that he does not stand indifferent in the cause is often a matter of a good deal of delicacy and difficulty, because persons most affected with bias or prejudice are sometimes the least sensible of it; but the extent to which the examination of the juror should be carried after the statutory questions have been answered has been said to be within the sound judgment and judicial discretion of the trial judge or judges. *Com. v. Burroughs*, 145 Mass. 242.

It is plainly impossible to exclude every juror who has read in the newspapers some statement of the case, because this might exclude every intelligent man in the country. It is well known, however, that there is a growing tendency in certain newspapers to publish not only the evidence given in any preliminary hearing on a charge of crime, but all sorts of unverified rumors and of crude opinions concerning the probable guilt or innocent of suspected persons. This reprehensible practice in a case which excites great popular interest may sometimes require extraordinary care on the part of the court in the selection of jurors, if the accused is to have an impartial trial. If the discretion of the court trying the case in the matter of the examination of jurors, after the statutory questions have been put and satisfactorily answered, is absolute, we cannot revise it, if it is not, we cannot say, as matter of law, on the somewhat meagre statement contained in the exceptions, and in the absence of

anything indicating what the counsel of the defendant had any reasonable expectation in providing that the court erred in excluding the question.

The mother of the deceased, Mrs. Davis, testified to a conversation with the defendant on the morning of December 24th, a part of which is as follows: "I asked him where Tena was. He said he hadn't seen her . . . Says I, 'Don't lie. She went out to meet you last night on the corner of Ferry street, and you have carried her off.' He said he had not. Said I, 'You have.'" The counsel for the defendant asked that this be stricken out, and objected to its admission. The court overruled the request, and admitted the testimony, and the defendant excepted. There are other examples of the admission of similar testimony against the objection of the defendant. It does not appear that the defendant testified as a witness in his own behalf, and no question arises of the admissibility of evidence to affect his credit as a witness. The exceptions recite that, "after Mrs. Davis had testified, the commonwealth introduced a large amount of testimony relating to the conduct of Trefethen after the disappearance of Tena, including statements, declarations, conversations, and conduct of Trefethen with Mrs. Davis" and other persons named, the general character of which is set out in the exceptions; and "that at the interview with Mrs. Davis on the morning of December 24, when accused by her of Tena's disappearance, he [Trefethen] shed tears, and was greatly excited; and also . . . that at various times in these interviews, during the period between December 23 and January 10, he met the statements quoted in this bill, made to Mrs. Davis by Tena, and repeated to him by Mrs. Davis or the officers, in various ways, sometimes by explicit denial, sometimes by silence, and sometimes by equivocal expressions, such as 'It must be a mistake,' 'It is all a mistake,' 'It must be some other party,' from all of which evidence the commonwealth claimed and argued, without objection, that these denials of his relations with Tena, of her seduction, of the appointment with her for the evening of December 23, and his connection with her disappearance and death, were false, and were made to protect himself against the charge of murder." If a defendant is charged with crime, and unequivocally denies it, and this is the whole conversation, it cannot be introduced in evidence against him as an admission. *Fitzgerald v. Williams*, 148 Mass. 462. If any part of a conversation with the defendant put in evidence tends to show, directly or indirectly, that he is guilty of the crime charged, the defendant has the right to have put in evidence all that was said to and by him at the same time and relating to the same subject, although it is in his favor. *Com. v. Keyes*, 11 Gray, 323. When a statement is made in the presence and hearing of a defendant, which, if true, tends to show that he is guilty, and he remains silent, or makes an equivocal reply, the rule of law has been stated to be as follows: "The rule is that a statement in the presence of the defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made

by such person, and under such circumstances, as naturally to call for a reply, unless he intends to admit it. But if he makes a reply wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Com. v. Galavan*, 9 Allen, 271; *Com. v. Brown*, 121 Mass. 69, 80. See *Com. v. Denamore*, 12 Allen, 535. *Com. v. Brown* was an indictment for procuring the miscarriage of one Ann Powers, otherwise called Emma L. Smith, and one Frances Ordway, otherwise called Frances A. Chase. In that case one George, a police officer, testified that he "took the defendant into the presence of Emma L. Smith and Frances A. Chase, and asked them in the defendant's hearing and presence if they knew him. Both said that they knew him. One knew him as Dr. King, the other knew him as Dr. Brown. I asked them if he performed an operation on them. They said he did. The defendant asked if they had been operated on previously by any other person. They said, 'No,'" etc. This testimony was admitted against the objection of the defendant. The full court says: "In this case, when Emma L. Smith and Frances A. Chase stated that the defendant had performed an operation on them, he did not remain silent, but asked them in reply if they had been previously operated upon by another person. The jury might infer from this an admission by him of the truth of their statements." It is obvious that when the reply of a defendant to a statement made to him, which, if true, tends directly or indirectly to prove that he is guilty of the crime charged, is not an equivalent affirmation or denial of the truth of the statement, difficult questions must often arise in determining whether the reply is of such a character that it has any tendency to show a consciousness of guilt which will warrant its admission as evidence against him. Perhaps a certain discretion must be left to the presiding judge or judges, in view of all the circumstances of the case. The same is true when the conduct and declarations of the defendant are put in evidence for the purpose of showing a consciousness of guilt on his part. See *Com. v. Piper*, 120 Mass. 185, 189.

The exceptions in the present case do not set out *verbatim* the whole conversation between Mrs. Davis and the defendant on the morning of December 24, and of that set out we cannot say, as matter of law, that some of the replies were not such as to warrant their admission as evidence against the defendant. If these were admitted, the defendant had the right to have the whole conversation on that subject put in evidence. The logical effect of an unequivocal denial of guilt, if it have any effect, is in favor of the defendant; and the admission of the denials of the defendant, if the jury properly considered the evidence, was in favor of the defendant. This is shown in the attempt, often made by a defendant when

the government has introduced evidence of a confession made on one occasion, to introduce evidence that on other occasions he has denied that he was guilty. While evidence that the defendant has made false statements in regard to many facts which are relevant to the issue is admitted against him as tending to show his guilt, it is not competent for the government to contend that a denial of guilt is of itself evidence against the defendant. To argue that by the other evidence the defendant is shown to be probably guilty, and that therefore his denial of guilt is false, and is additional evidence against him, ought not to be permitted. When a defendant in a criminal case is shown to have made certain false statements of facts and these facts are relevant to the issue, the fact that the defendant has knowingly made the false statements may have some tendency to show that he is guilty; but the jury must first be satisfied beyond a reasonable doubt that the defendant made the statements, and that they were false, and that the defendant knew that they were false, before any weight can be given to this evidence, unless the statements of themselves have some tendency to show his guilt. But when the defendant denies generally that he is guilty, this statement cannot be shown to be false, except by proving that he is guilty beyond a reasonable doubt; and then it is unnecessary. If there is a reasonable doubt of his guilt on all the other evidence, the fact that he unequivocally denied his guilt is not, of itself, evidence against him; and the denial cannot be assumed to be false because it has not been proved to be false by sufficient evidence. Some of the denials of the defendant in the present case were denials of facts which were relevant to the issue, and not a general denial of guilt, and we do not know whether the evidence was not such as to satisfy the jury beyond a reasonable doubt that these denials were knowingly false. Some of the evidence recited was competent on the ground that the conduct or replies of the defendant, in view of the statements made to him, had some tendency to show guilt on his part. If in one conversation some of the replies of the defendant has some tendency to show guilt, and some were explicit denials of guilt, we cannot say that the defendant has been prejudiced by the admission in evidence of all that was said at that interview directly or indirectly relating to his guilt or innocence if the jury were properly instructed upon the application to be made of this evidence. We cannot presume that the court did not take pains properly to instruct the jury upon the legitimate use to be made of the evidence admitted, and warn the jury that the statements made to the defendant were not to be considered, in and of themselves, as any evidence of the facts stated. On this part of the case the exceptions disclose no error of law.

Verdict against Trefethen set aside.

IOWA SUPREME COURT.

STATE of Iowa

v.

RHODES, *Appl.*

(.....Iowa.....)

1. A consignment of intoxicating liquors "arrives" in the state within the meaning of the Wilson bill, which makes such liquors subject "upon arrival in such state" to the laws of the state, as soon as it crosses the state boundary and enters the state, although the contract of carriage is not then completed.

2. Removing intoxicating liquor from the platform to the freight room of a depot is a transportation or conveyance thereof from "one place to another" within the state, within the meaning of the Iowa statute making transportation or conveyance an offense, in the absence of a certificate from the county auditor that the consignee is authorized to sell such liquors.

(May 3, 1894.)

A PPEAL by defendant from a judgment of the District Court for Washington County convicting and fining him for knowingly, willfully, and unlawfully receiving for the purpose of delivering to another certain intoxicating liquors which were being unlawfully conveyed in the state in contravention of the provisions of a statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. M. Eicher and Hedge & Blythe for appellant.

Messrs. John Y. Stone, Atty-Gen., Thomas A. Cheshire, C. J. Wilson, and E. M. Shelton for the State.

Kinne, J., delivered the opinion of the court:

1. The defendant was arrested upon an information charging that he was the agent of the Burlington & Western Railway Company at Brighton, Iowa, and that on August 6, 1891, as such agent, he "did knowingly, willfully, and unlawfully receive, for the purpose of delivering to another, certain intoxicating liquor that was being unlawfully transported or conveyed from Burlington, Iowa, to Brighton, Iowa, viz., one box containing a two-gallon jug, and said jug being full of whiskey, alcohol, or other intoxicating liquor; said box being marked 'W. H., Brighton, Iowa,' and was not plainly or correctly marked, showing the quantity and kind of liquor contained therein." The case was first tried before a justice of the peace, and defendant was convicted, and fined \$100. From this judgment he appealed to the district court, where a jury was waived, and

a trial had to the court. He was again found guilty, and adjudged to pay a fine of \$100, from which judgment this appeal is prosecuted. From the evidence it appears that on August 4, 1891, the Dallas Transportation Company, a corporation doing business in the state of Illinois, delivered to the Chicago, Burlington & Quincy Railway Company, at Dallas, Ill., one wooden box, about a cubic foot in size, marked "W. H., Brighton, Iowa;" that the consignor of said box, when it left it with the railway company for transportation, represented to the railway company that it contained groceries. This box was shipped over the Chicago, Burlington & Quincy Railway to Burlington, Iowa, and then transferred to the Burlington & Western Railway for shipment to Brighton, Iowa. The shipment was made the entire distance upon a single way bill, August 5, 1891, said box arrived at Brighton, and was delivered on the depot platform by the trainmen. Immediately thereafter the defendant, in compliance with the directions of his employers, carried said box from the platform into the freight room of the depot building, where, on the same day, it was seized by a constable under a search warrant. At the time of the seizure the freight on the box was due and unpaid. Inclosed in the box was a jug containing whiskey, but it was so inclosed as to be hidden from view. At the time it was seized the box was being held by the railway company for the payment of charges, and for delivery to the consignee. Neither the defendant, nor the road by whom he was employed, held a permit for the transportation or sale of intoxicating liquors; and neither had a certificate from the county auditor that the consignee was authorized to sell intoxicating liquors in Washington county, Iowa. Previous to the arrival of the box a mail carrier told defendant he was looking for a box from Dallas City for William Hown, and said it was likely to be marked "W. H.," and would contain alcohol or whiskey. That he told the mail carrier that he had not received a box of that description. That it arrived the next day. He supposed, perhaps, this was the box the mail carrier told him would come.

2. The information in this case is based upon a violation of Code, § 1553, as amended McClain's Code, § 2410. This section provides that: "If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person, shall transport or convey between points, or from one place to another within this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported, or is consigned for transportation, or within which it is to be conveyed from place to place, certi-

NOTE.—The construction of the Wilson bill, subjecting to state laws all intoxicating liquors transported into the state "upon arrival in such state" is brought in question for the first time, we believe, in the above case in respect to what constitutes such "arrival."

For importations of intoxicating liquors generally, see *State v. Winters* (Kan.) 10 L. R. A. 616, and *note*.

24 L. R. A.

See also 45 L. R. A. 567.

lying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offense and pay costs of prosecution, and the cost shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offense herein defined shall be held to be complete and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state to issue the certificate herein contemplated, to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records. Provided, however, that the defendant may show as defense hereunder, by preponderance of evidence, that the character and circumstances of the shipment and its contents were unknown to him." Under this section, in order to sustain the judgment in this case, it must appear that defendant, knowing that the box contained intoxicating liquor, transported or conveyed the same between points, or from one place to another, within this state, without first having been furnished with a certificate from the county auditor. We think defendant's testimony, heretofore referred to, clearly shows that he knew that the box contained intoxicating liquors. It is conceded that neither defendant, his company, nor William Hown, had a right or permit to sell intoxicating liquors, and that neither defendant nor said company had a certificate from the auditor of Washington county, showing that any of the persons named were authorized to keep or sell intoxicating liquors.

But two questions remain to be considered: First, did the liquor, when it first entered this state, become subject to the jurisdiction of our laws, or would such jurisdiction only attach when the shipment had reached its destination, viz., Brighton, Iowa, or when it was delivered to the consignee? And, second, was the defendant, in the removal of the liquor from the platform to the freight depot, engaged in transporting or conveying it, within the meaning of the section quoted?

An elaborate argument is made by defendant's counsel to show that the liquor did not become subject to the jurisdiction of our laws until its "arrival in" this state; and it is contended that it did not arrive within the state, within the meaning of the Wilson bill, until the contract of carriage had been completed. The so-called "Wilson Bill" reads as follows: "All fermented, distilled or other intoxicating liquors or liquids transported

into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in 'original packages' or otherwise." We do not deem it necessary to enter into an extended consideration as to what is interstate commerce. We think the language of the Wilson bill, when considered with reference to the evil sought to be remedied, clearly indicates an intention on the part of congress to make such liquors the subject of state legislation and jurisdiction the moment they cross the boundary of Iowa, and enter the state. Under the decision in *Leisy's Case*, 135 U. S. 123, 84 L. ed. 137, such liquors in original packages did not become the subject of state jurisdiction until mingled with the common mass of property therein, until sold. In that case the right of congress to permit the state to exercise jurisdiction over such articles prior to their sale therein was fully recognized. It was for the purpose of removing all impediments to local jurisdiction, as to imported liquors, on their arrival within such jurisdiction, that the Wilson bill was passed. *Wilkerson v. Rahrer*, 140 U. S. 545, 35 L. ed. 572. By the Wilson bill these imported liquors, upon arrival within the state, were subjected to the operation of its laws enacted in the exercise of its police powers, as fully as though such liquors had been produced in such state. Now, if, in this case, the liquor had been produced at a point within the state, and consigned, over the Burlington & Western Railway, to Brighton, Iowa, there could be no question that our laws would apply thereto; and it is equally clear that upon crossing the border of this state, and entering it, such imported liquor becomes at once subject to its laws, the same as produced in the state. In *Re Spickler*, 43 Fed. Rep. 653, 10 L. R. A. 446, the circuit court of the United States, in treating of this matter, says: "The Wilson bill, upon its adoption, made subject to state police laws all imported liquors as soon as they should pass within the boundary of the state." In the case of *Re Van Vliet*, 43 Fed. Rep. 761, 10 L. R. A. 451, it is said: "The original package, when it arrives within the state where its transit terminates, is at once reduced to the rank of domestic liquor,—enjoys no privileges not enjoyed by domestic liquor."

In *State v. Fraser*, 1 N. Dak. 425, the court said: "On crossing the boundary line of a state, the supreme authority has declared by this enactment that interstate liquor ceases to be an object of federal protection and control, and becomes mingled with the mass of property within the state, and, in common with all such property, is subject to local police regulations. If, as appellant contends, imported liquors consigned to a place within this state could be lawfully transported thereto, it is certain that such liquors

would not be subject to the operation of our laws" to the same extent, and in the same manner, as liquors produced in this state. It seems to us the view that state jurisdiction attaches when the imported liquor enters the state is not only in accord with a reasonable construction of the Wilson bill, itself, but in furtherance of the purposes sought to be accomplished by the passage of that act, and finds full support in the authorities.

8. Was the defendant, in the removal of the liquor, engaged in transporting or conveying it, within the meaning of our statute? The language of the statute is broad enough to cover the act of defendant in removing the liquor from the platform to the freight

room of the depot. He was one of the instruments necessary to complete the act of transportation. If it be not so, then clearly, he is within the terms of the act, as he conveyed the liquor from "one place to another within this state." His guilt is not to be determined by the distance he conveyed the package, but his conveying it any distance was a violation of the law. With the propriety of legislation making such an act a crime, and with the severity of the punishment attached to doing the act, we have nothing to do.

The judgment below must be affirmed.

Reversed in 170 U. S. 412, 42 L. ed. 1088.

PENNSYLVANIA SUPREME COURT.

Samuel K. NESTER *et al.*, *Appts.*,

v.

THE CONTINENTAL BREWING CO.

et al.

(161 Pa. 473.)

1. The true test of the illegality of a combination to restrict business is its effect upon the public interests.
2. A combination of brewers to silence and stifle competition among them within the city and county of Philadelphia and the county of Camden, N. J., fixing a minimum price at which any of them shall sell beer to the customer of another or to new trade is void as against public policy.
3. Equity will not aid a person in an action, if he requires the aid of an illegal transaction to establish his case.

(May 14, 1894.)

APPEAL by complainants from a decree of the court of Common Pleas, No. 1, for Philadelphia County in favor of defendants in an action brought to compel an accounting and a division of moneys in the hands of defendants to a portion of which complainant claimed to be entitled. *Affirmed.*

Certain brewers in the city of Philadelphia entered into an agreement for the organization of what was called the Brewers' Association of Philadelphia, to continue during the year beginning July 1, 1886. The agreement provided that no member should sell beer in the city and county of Philadelphia and Camden, and Camden county, N. J., or which was to be used in such places, to any new trade or any other brewers' customer or customers that belong to the association during the continuance of the agreement at less than \$8 per barrel, and it was stipulated that it should be regarded as selling for less than that price if he paid any portion of the rent of his customer, or his license or tax, or should buy

any fixtures for him or fix up his premises or give him beer for the purpose of sale, or make him any allowance, or cancel, satisfy, remit or release any account or debt, due or to become due, or to return to him any portion of the purchase price, or do anything which should directly or indirectly result in the diminution of the price below \$8 per barrel. It was further stipulated that for the mutual benefit of all the parties, and in order to equalize the profits, each of them should contribute at the rate of \$4 per barrel upon each and every barrel of beer sold during the month of June, 1886, and each succeeding month a like sum for every barrel sold during the previous month, of which contribution \$2 per barrel should be actually paid in cash to the treasurer of the association. After two months' payments had been made, the treasurer should distribute and pay over to the members of the association the amount in his hands of the payments so made for the month of June, 1886, and so on from month to month, the treasurer always retaining in his hands one month's contribution undistributed. The basis of the distribution was to be the proportion of the sales of each party during the three months ending June 30, 1886, and each succeeding three months, to the total sales distribution to be made at the rate of \$4 per barrel. In case any member violate the stipulation as to the price per barrel, he should forfeit to the association as agreed and liquidated damages any and all right to his *pro rata* share in the distribution of the month's contribution which should be undistributed after such breach was ascertained and entered of record and his share should be divided among the other members. Provision was made for investigation of the charges of breaches and for findings and judgment thereon.

This action was brought by the assignees of the Enterprise Brewing Company to recover that company's share of contributions which had accumulated in the hands of the treas-

NOTE.—The present case shows in a very interesting way the distinction between contracts in restraint of trade and contracts to regulate prices with reference to limitations of time and place. For the latter class, see *note* to *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770.

For contracts in restraint of trade without limitation of time and place, see *note* to *Carroll v. Giles* (S. C.) 4 L. R. A. 154, and *note*.

tation of place, see *Gamewell Fire Alarm Telegraph Co. v. Crane* (Mass.) 22 L. R. A. 673, and *note*.

As to partial restraint, see *National Benefit Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437, and *note*; *Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 469, and *note*; *Carroll v. Giles* (S. C.) 4 L. R. A. 154, and *note*.

urer of the association from time to time prior to the institution of this suit.

Further facts appear in the opinions.

The following is the opinion rendered in the court below by BIDDLE, J.:

"The bill of complaint in this case sets out that the defendants became members of the Brewers' Association of Philadelphia, which is an unincorporated association, familiarly known among its members as the 'Brewers' Pool,' and also the 'Pool;' that, under the articles of agreement, the defendants became indebted to them in a large amount of money, and that they have made repeated demands upon them for an account, and for payment of the amount due them under the provisions of the agreement, but the said account and payment have been refused. They therefore pray that an account may be taken, by and under the decree and direction of the court, of all the dealings and transactions of the said the Brewers' Association of Philadelphia, under the aforesaid agreement, for the said term, beginning on July 1, 1886, and ending on June 30, 1887, and that the amounts found due shall be paid over. To this demurrers have been filed by several of the defendants, alleging (1) that the plaintiffs have not, in and by their said bill, shown such facts as would entitle them to the relief prayed for; and (2) that the said agreement set out in the said bill, and alleged to have been entered into by the said Enterprise Brewing Company, Limited, and the defendants, and which the said plaintiffs seek to enforce, is not such an agreement as a court of equity will enforce, because the same is an agreement against public policy, and in restraint of trade.' The agreement, by the fifth section, provides that 'the undersigned hereby stipulate and bind themselves one to the other, and do hereby agree, one with the other, not to sell and deliver any beer in the city and county of Philadelphia and Camden and Camden county, N. J., or which is to be used in the city and county of Philadelphia, Camden, and Camden county, N. J., after July 1, 1886, to any new trade, or any other brewers' customer or customers that belong to this association, during the continuance of this agreement, at less than eight dollars a barrel.' For the violation of this agreement the severest penalties are then provided. By the sixteenth article, 'the board of trustees may call the association together from time to time, and at any such meeting the price at which beer may be sold may be changed by a vote of not less than two thirds of all the members belonging to said association at the time of voting thereon.' These are the only sections to which the demurrer would apply, and which it is necessary to consider at this time.

"It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of the county of Philadelphia, individuals, firms, and corporation, who have entered into it, to regulate and control the sales and prices of beer within the city of Philadelphia and the county of Camden, N. J. It certainly is a combination in restraint of trade, tending to destroy competition, and

to create a monopoly in an article of daily consumption. Is this, therefore, a matter in which a court of equity will interfere? It has been strenuously urged, and innumerable authorities have been cited to prove, that contracts in partial restraint of trade, limited by time and space, have been sustained, and that inasmuch as this only applies to 1,250,000 of people, and the space which they occupy, the agreement is perfectly lawful. While we admit the principle, we fail to see that it has any application to this case. Where a barber contracts not to open a shop within one square of another, for the space of six months, equity would no doubt interfere to prevent its violation. But suppose it had been a gambling house, or a house of ill fame, instead of a barber shop. Equity would then refuse to interfere, because these establishments are held to be illegal, and their recognition against public policy. The question would be there, as here, not a question of time and space, but a question whether equity would take cognizance of such a subject. The restriction would rather, in a case of this sort, make the plan more objectionable. The fact that the city was to be placed in a worse position than all the rest of the state could not certainly be in accordance with any enlightened system of public policy. Professor Patterson, in his recent work on the Law of Contracts in Restraint of Trade, after an able and exhaustive examination of all the authorities, says (page 51): 'The rule that is deducible from the cases seems to be that restraints on competition and production are valid, provided they be for the necessary protection of the parties' interests; but combinations between producers, to limit production and to enhance prices, are opposed to public policy, and are not merely void contracts, but are offenses, and punishable as such.' This doctrine is clearly that of our own state. See *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159. That this agreement is a necessary protection of the parties' interests is not averred, and we do not understand it is contended. Where a price is fixed arbitrarily for which a manufactured article may be sold, it necessarily limits the production of that article to the amount that can be sold for that price. An increased price put upon an article restricts its sale, and the restricted sale necessarily reduces the production. It is no answer to say: 'We do not restrict your production. You may produce any amount you like. We only restrain your sale of it.' Is this not practically a limit to production? Where a pool or combination reserves the right to regulate prices, they can, by the manipulation of prices, drive their competitors out of business, create a monopoly, and enhance at their pleasure the prices to consumers.

"It is also contended here by the complainants that the consideration is executed, and therefore, in accordance with a line of cases, the illegal nature of the original transaction will not be inquired into. The test, however, as to whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff re-

quired the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. *Swann v. Scott*, 11 Serg. & R. 164; *Morris Run Coal Co. v. Barclay Coal Co. supra*. Now, in this case, the bill itself sets out the agreement, prays that it may be taken as part of the bill, asks for an account, and calls upon a court of equity to enforce it. It is the very transaction, itself, complained of as illegal, that we are asked to enforce. Believing this agreement to be against public policy, we sustain the demurrers, and dismiss the bill."

Messrs. J. O. Bowman, Theodore P. Matthews, and Furman Sheppard, for appellants:

The purpose of the agreement under which the brewers' association was formed was to restrain ruinous competition amongst the associates and protect them from the petty exactions of consumers seeking to take advantage of that competition. It was not its purpose to effect a monopoly nor to restrain production nor regulate sales; and it did not attempt to control prices further than was necessary to effect its principal object.

The fixing of a uniform price tends to stimulate production, not to restrain it. Fluctuation in price, caused by undue competition, has been judicially declared to affect injuriously both producers and consumers.

Central Shade Roller Co. v. Cushman, 143 Mass. 353.

The agreement under which the brewers' association was formed does not impose an unreasonable restraint upon trade, nor inflict any injury upon the public, and is therefore not illegal as being against public policy.

The term "public policy" is too indefinite and uncertain to be made the foundation of a judgment.

Swann v. Swann, 21 Fed. Rep. 801.

Instances of its variable character are found in the well known facts that many practices formerly held to be against public policy are to-day recognized and lawful.

Baker, Monopolies, 107; *Bruce Smith*, Liberty and Liberality, p. 187; 4 Bl. Com. 158; *Ray*, Contractual Limitations, § 44; p. 197; *Swann v. Swann, supra*.

An analysis of all the cases adjudicated in the supreme court of Pennsylvania since 1857 to the present date shows that numerous restraints, partial in character as to duration and locality, have been held valid.

Gompers v. Rochester, 56 Pa. 194; *McClurg's App.* 58 Pa. 51; *Hall's App.* 60 Pa. 458, 100 Am. Dec. 584; *Harkinson's App.* 78 Pa. 196, 21 Am. Rep. 9; *Pazson's App.* 106 Pa. 429; *Smith's App.* 118 Pa. 579; *Shirley v. Keagy*, 126 Pa. 262; *Raub v. Van Horn*, 133 Pa. 578.

A reasonable restraint of trade is not against public policy.

Horner v. Graves, 7 Bing. 743; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 68, 22 L. ed. 318; *Baker*, Monopolies, p. 207; *People v. North River Sugar Ref. Co.* 5 L. R. A. 386, 54 Hun. 354; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Wickens v. Brans*, 3 Younge & J. 318; *Fairbank v. Leary*, 40 Wis. 687; 34 L. R. A.

Ontario Salt Co. v. Merchants Salt Co. 19 Grant, Ch. 540; *United States v. Trans-Missouri Freight Assn.* 58 Fed. Rep. 440.

The cases in which agreements have been adjudged illegal as against public policy are usually those where the end is accomplished by a wholesale restraint of trade, as in contracts not to manufacture, or not to sell at all, or except by permission of an association, or where members of an association must entirely stop work if so ordered.

Hilton v. Eckersley, 6 El. & Bl. 66; *Hornby v. Close*, L. R. 2 Q. B. 158; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 666; *India Bagging Assn. v. Kock*, 14 La. Ann. 164; *Arnott v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *People v. North River Sugar Ref. Co. supra*; *Olancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 395; *Pacific Factor Co. v. Adler*, 90 Cal. 110; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387; *United States v. Jellico Mountain Coal & Coke Co.* 12 L. R. A. 753, 46 Fed. Rep. 482; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282.

By the operation of the agreement during the year ended on June 30, 1887, a fund accumulated in the hands of certain of the associates which admittedly belongs to the assignee of the remaining associate, but the custodians of this fund seek to retain its custody by alleging illegality of the agreement as a ground for non-intervention by the court. In such a case equity will not permit the fund to be locked up forever, but will compel a settlement according to good conscience, even with a partner in the alleged illegal transaction; *a fortiori*, with an assignee wholly innocent of participation in or knowledge of the alleged illegalities.

Brooks v. Martin, 69 U. S. 2 Wall. 70, 17 L. ed. 732; *Sharp v. Taylor*, 2 Phil. Ch. 801; *Harvey v. Varney*, 98 Mass. 118; *Snell v. Dwright*, 120 Mass. 16; *Tenant v. Elliott*, 1 Bos. & P. 8; *Farmer v. Russell*, Id. 296; *Thomson v. Thomson*, 7 Ves. Jr. 478.

A fortiori, the assignee of the fund is entitled to an account and payment.

McBlair v. Gibbs, 58 U. S. 17 How. 232, 15 L. ed. 182; 1 Am. & Eng. Encyclop. Law, pp. 836-843.

The association having had notice of the assignment to Nester are bound by the equitable and moral obligation to pay the fund to the assignee.

Fox v. Cash, 11 Pa. 207.

It would be iniquitous to permit a trustee by the assertion of his own illegal actions to pocket the trust moneys which he admits belong rightfully to another, guilty of no illegality.

Lestapius v. Ingraham, 5 Pa. 71; Pollock, Cont. 340, 349, citing *Taylor v. Chester*, L. R. 4 Q. B. 809.

Agreements connected with but subsequent to an unlawful transaction are not void unless an integral part of the unlawful design.

Armstrong v. Toler, 24 U. S. 11 Wheat. 258, 259, 6 L. ed. 468, 469; *Miltenerberger v. Cooke*, 85 U. S. 18 Wall. 421, 21 L. ed. 864; *Davis v. London & Provincial Marine Ins. Co.* L. R. 8 Ch. Div. 477; 1 Pom. Eq. Jur. § 408, p. 442, note 2.

Messrs. Henry P. Brown, John K. Valentine, Joseph L. Tull, John Dolman, and Samuel Gustine Thompson, for appellees:

Combinations of this character have been condemned whenever the courts have been called upon to interpret questions concerning them. So great has become the public condemnation of them that in many of the states their formation has been declared by legislative enactment to be in violation of law and in 1890 congress of the United States passed the act to protect trade and commerce against unlawful restraints and monopolies.

Act July 2, 1890, 26 Stat. at L. 209; Spelling, Trusts & Monopolies, p. 75; Patterson, Contracts in Restraint of Trade, p. 51.

The manifest purpose was to control the price and maintain it at a fixed sum and to sweep away all competition. To accomplish this penalties were imposed. With such purpose clearly impressed upon it, the agreement is against public interest, and is therefore void as against public policy.

Morris Run Coal Co. v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Horne v. Graves*, 7 Bing. 743; *Seranton Electric Light & Heat Cos. App.* 1 L. R. A. 285, 122 Pa. 154; *More v. Bennett*, 15 L. R. A. 261, 140 Ill. 69; *Oummings v. Foss*, 40 Ill. App. 523; *Craft v. McConoughy*, 79 Ill. 346, 23 Am. Rep. 171; *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 130 Ill. 268; *Emery v. Ohio Candle Co.* 47 Ohio St. 820; *Hoffman v. Brooks*, 11 Ohio L. J. 258; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Central Ohio Salt Co. v. Guthrie*, 85 Ohio St. 666; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277; *Strait v. National Harrow Co.* 18 N. Y. Supp. 224; *Dolph v. Troy Laundry Machinery Co.* 28 Fed. Rep. 553; *Hoffman v. Brooks*, *supra*; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 565, 28 Am. Rep. 190; *People v. North River Sugar Ref. Co.* 5 L. R. A. 386, 54 Hun. 854; *Pittsburg Carbon Co. (Limited) v. McMillin*, 7 L. R. A. 46, 119 N. Y. 46; *Judd v. Harrington*, 46 N. Y. S. R. 925; *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *Santa Clara Valley Mills & Lumber Co. v. Hayes*, 76 Cal. 887; *Pacific Factor Co. v. Adler*, 90 Cal. 110; *India Bagging Assn. v. Kock*, 14 La. Ann. 164; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Clancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 407; *Hilton v. Eckerley*, 6 El. & Bl. 50.

Courts will decline to enforce contracts which impose a restraint, though only partial, upon business of such character; restraint to any extent will be prejudicial to the public interest.

Gibbs v. Consolidated Gas Co. of Baltimore City, 130 U. S. 396, 32 L. ed. 979; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 68, 22 L. ed. 315, 818; *United States v. Jellico Mountain Coal & Coke Co.* 12 L. R. A. 753, 46 Fed. Rep. 432.

There is a distinction between territorial limits, as applied to the occupation of one man or even of a few individuals, and trades or commerce in articles of prime necessity, or even of frequent use, among a large number of people in any locality.

Texas Standard Cotton Oil Co. v. Adous, 15 24 L. R. A.

L. R. A. 598, 83 Tex. 650; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 875; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 5 Mo. App. 347; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372.

The question as to whether the nature of the combination is tending towards monopoly and thereby injurious to the public, is to be determined by a construction of the provisions of the agreement constituting the combination, and not by its effect in actual operation.

Central Ohio Salt Co. v. Guthrie, and *Hilton v. Eckerley*, *supra*; *Acheson v. Mallon*, 43 N. Y. 149, 8 Am. Rep. 678; *Richardson v. Buhl*, and *Anderson v. Jett*, *supra*; *Rannie v. Irvine*, 7 Mann. & G. 969.

In the cases in which combinations have been upheld by the courts, it was apparent from the contracts themselves that they did not tend to create a monopoly or put an end to competition and the cases below cited by appellant demonstrate this.

Skrainka v. Scharringhausen, 8 Mo. App. 522; *Ontario Salt Co. v. Merchant Salt Co.* 18 Grant, Ch. 540; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *United States v. Trans-Missouri Freight Assn.* 53 Fed. Rep. 440; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 732.

As between parties to the illegal contract the courts will refuse relief to either.

Norton v. Blinn, 39 Ohio St. 145; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 271, 6 L. ed. 468, 472; *Snell v. Dwight*, 120 Mass. 16.

Sterrett, Ch. J., delivered the opinion of the court:

The conclusions of fact found by the learned court below were amply justified by the record: "It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of Philadelphia, individuals, firms, and corporations, who have entered into it, to regulate and control the sale and price of beer within the city of Philadelphia and the county of Camden, N. J. It certainly is a combination in restraint of trade, tending to destroy competition and create a monopoly in an article of daily consumption." The appellants, however, conceding these to be the facts, insist that the contract was not within the prohibition of public policy, because the restraint was but partial. "Contracts in partial restraint of trade, which the law sustains, are those which are entered into, by a vendor of a business and its good-will, with his vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But, in the present case, there is no purchase or sale of any business, nor any other analogous circumstances, giving to one party a just right to be protected against competition from the other. All the members of the association are engaged in the same business within the

same territory; and the object of the association is, purely and simply, to silence and stifle all competition as between its members. No equitable reason for such restraint exists.

More v. Bennett, 140 Ill. 69, 15 L. R. A. 261. The test question, in every case like the present, is whether or not a contract in restraint of trade exists, which is injurious to the public interests. If injurious, it is void, as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious. So, it is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, or the extent of space included, in the combination, but upon the existence of injury to the public. One combination, consisting of but part of those engaged in a given branch of trade, may amount to a practical monopoly, while another, less extensive in its scope, may, as well, bring disaster in its train. The difference lies only in degree, but equally forbids the aid of courts. In *More v. Bennett*, *supra*, where a combination had been formed among some of the stenographers in the city of Chicago, *Mr. Justice Baily* said: "True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association; but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection.

We can see no legal difference between the restraint on competition which it now exercises, and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of stenographic reporters." So, no one can for a moment doubt that more serious injury would result to a densely settled than to a much larger district, with scattered population. Thus, a combination to raise the price of breadstuffs would cause serious loss in a city, while it would be comparatively harmless in an agricultural state. "We can scarcely conceive," said *Mr. Justice Marr* in *Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, "how mere territorial limits can be the controlling test, in all instances, of the legality of the restraints imposed upon the ordinary course of trade. The criterion may do very well when applied to the occupation or profession of one man, or even a few individuals; for neither their labor, industry, business, nor services may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade in articles of prime necessity, or even of very frequent use, among a large number of persons in a given locality." *Hooker v. Vandewater*, 4 Denio, 849, 47 Am. Dec. 258; *Stanley v. Allen*, 5 Denio, 484, 49 Am. Dec. 282; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 261; *Hilton v. Eckersley*, 6 El. & Bl. 47; *India Bagging Assn. v. Kock*, 14 La. Ann. 164; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; and *Morris Run Coal Co. v. Barclay* 24 L. R. A.

Coal Co. 68 Pa. 178, 8 Am. Rep. 159,—were all cases (and they show the trend of decisions in this country) in which combinations in restraint of trade were partial in respect of the number of persons implicated, and territorial limits, and were yet held injurious to the public interests, and therefore void, as against public policy. The true test was the effect upon public interests. So, if the natural tendency of such contracts is to injuriously affect public interests, the form and declared purpose are immaterial. Courts will not lend their aid in illegal transactions, no matter how disguised. Thus, a contract entered into by the grain dealers of a town, which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination, which should stifle all competition, and enable the parties to control prices, was held void on the ground of public policy. *Craft v. McCoughy*, 79 Ill. 846, 22 Am. Rep. 171. *India Bagging Assn. v. Kock*, *supra*, is to the same effect.

The appellants insist that restraint of trade in the necessities of life, only, is within the prohibition of public policy. No standard has been furnished by which to ascertain what constitute these with reference to the general public. But, assuming that beer is not among them, it is equally within the reach of the rule. The law recognizes it as a commodity,—regulates its sale; it is "an article of daily consumption;" and the court should refuse to aid in any attempted imposition upon the public by means of illegal combinations. The fact that coal was "an article of prime necessity" was not mentioned as essential to the illegality of the combination which was involved in *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178, 8 Am. Rep. 159. but was suggested, *arguendo*, as an aggravation of the injury done the public. The whole course of discussion there shows that injury to the public was regarded as the true test of illegality.

Appellants also insist that "equity will not permit the fund accumulated here to be locked up forever, or dishonestly appropriated by defendants," but will compel a settlement, according to good conscience, even with a partner in an illegal transaction; *a fortiori* with an assignee wholly innocent of participation in, or knowledge of, the alleged illegalities. "The test, however," as was well said by the learned judge below, "is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. *Swan v. Scott*, 11 Serg. & R. 164; *Morris Run Coal Co. v. Barclay Coal Co. supra*." "The objection," said *Lord Mansfield* in *Holman v. Johnson*, Cowp. 348, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is even allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plain

tiff—by accident, if I may so say. The principle of public policy is this, '*Ex dolo malo non oritur actio.*' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of the law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would have the advantage of it, for, where both are equally at fault, '*potior est conditio defendentis.*'" As the bill here bears upon its face the evidence of the turpitude

of the transaction out of which the plaintiffs' demand arises, it is plain, upon this principle, that the court must have refused its aid, had the Enterprise Brewing Company itself been the beneficial claimant, and its assignees stand in no higher right. Notice of the character of the combination was in the channel of the assignees' title, and hence they are not "innocent of participation in or knowledge of the illegality" of the combination, and must be treated as having taken subject to the disabilities of their assignor. *Chamberlain v. Barnes*, 26 Barb. 160; *Riddle v. Hall*, 99 Pa. 116.

It follows that there is no error in the decree, and it should be affirmed.

Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

Report with opinion of court below.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* J. K. RICHARDS,
Atty-Gen.,

v.

MANUFACTURER'S MUTUAL FIRE ASSOCIATION OF AKRON.

(29 Ohio L. J. 160.)

- *1. Associations organized under sections 3686-3690, Rev. Stat., are not authorized to receive into their membership persons who are nonresidents of this state.
2. Persons who are not members of such association cannot lawfully fill the office of director thereof.
3. Such association is not authorized to do insurance business on what is known as the "joint-stock" plan, nor on the "contingent liability" plan, as defined in section 3634 of the statutes; but it is confined to insurance business in which its members insure each other against loss by fire and other casualties, and agree to be assessed specifically for payment of losses, and for incidental purposes.

•Headnotes by the COURT.

NOTE—*Right of nonresidents to become stockholders in corporations.*

The great number of instances in which nonresidents have become owners of stock in corporations have sufficed, with little contest, to establish the right of such persons to be stockholders beyond dispute, except when statutes provide to the contrary.

This right was questioned in *Humphreys v. Mooney*, 5 Colo. 282, but the court declared that the statutes did not prohibit it, and therefore that corporators and officers, as well as stockholders, might be nonresidents of the state.

Likewise, in *Central R. Co. of New Jersey v. Pennsylvania R. Co.*, 31 N. J. Eq. 475, where the statute provided that any number of persons, not less than seven (or thirteen in certain instances), might form a corporation for railroad business, and further provided that a majority of the directors should be residents of the state, it was decided that, subject to this provision as to a majority of the directors, the corporators might be nonresidents.

24 L. R. A.

(March 7, 1893.)

PROCEEDINGS in quo warranto to oust defendant from exercising the franchises of a corporation under the laws of the state, on the ground that it had abused its privileges. *Judgment of ouster.*

Statement by **Burket, J.**

This is a proceeding seeking to oust the said mutual fire association from exercising the franchise of a corporation under the laws of Ohio. The petition avers that the said defendant is a corporation duly incorporated under the laws of the state of Ohio, and that said defendant ought not to be permitted longer to exercise the franchise of a corporation, for the following causes, to wit: (1) Said association has written, and has now in force, policies of insurance on property located in 36 states and territories outside of Ohio, issued to nonresidents of this state, contrary to the laws of Ohio. (2) While incorporated as an assessment fire association, said defendant has transacted regular fire insurance business on the cash, or joint-stock, plan. (3) Said association,

In Pennsylvania the question arose again as to the right of nonresidents of the state to be stockholders in an agricultural corporation, known as a Farmers & Mechanics' Institute. The special act under which the association was incorporated authorized the exercise of the power "when any number of persons of this commonwealth are associated, or mean to associate" for the specified purposes, but the corporation had power to issue stock, and there was no restriction on its transfer, while the general statutes provided that the charter of an intended corporation must be subscribed by five or more persons, three of whom, at least, must be citizens." The court held that, under the statutes, while nonresidents might not be able to be the original corporations they might take a transfer of stock and were not excluded from membership in such corporation, when they were citizens of the United States. *Detwiller v. Com.* 7 L. R. A. 357, 121 Pa. 614.

In another case decided at the same time the right of membership in such a corporation was extended also to one who was not a citizen of the United States, but who was a resident and property

-contrary to law, has operated as a regular mutual fire insurance company, doing business on the contingent liability plan. (4) The majority of the board of directors are not members of said association. (5) Said association is hopelessly insolvent; its total cash assets consisting of cash deposited in the Akron Savings Bank, to the amount of \$72.42, while its total liabilities amount to \$27,986.17. Prayer for ouster and other proper relief. The defendant, by its answer, admits that it is incorporated under the laws of Ohio; that it has issued policies or certificates of membership to such of its members as were nonresidents of the state of Ohio, on their application therefor, and on property situated outside of the state of Ohio, and avers that it has a legal right so to do; that such has been the custom and method of doing business, by mutual fire associations incorporated under the laws of this state, ever since the passage of the Act of March 80, 1877, entitled, "An act to incorporate associations for the mutual protection of its members against loss by fire." Said defendant further avers that such has been the custom and method of doing business by such associations, to the knowledge of, and with the consent of, the commissioner of insurance of the state of Ohio, up to and until about the 15th of September, 1891, at which date defendant received instructions from said insurance commissioner, together with the written opinion of the attorney-general, to the effect that such mutual fire associations could not lawfully include in their membership nonresidents of Ohio, and could not lawfully issue to such nonresidents policies or certificates of membership on their property located outside of this state. The defendant further avers that, upon receipt of said instructions and opinion, it immediately ceased to issue policies or certificates to members nonresident of this state, insuring their property outside of Ohio, and recalled all certificates issued to such nonresidents, and did all in its power to bring itself within said instructions and opinion, and to abide thereby. Defendant denies that it has transacted a regular fire insurance business on

the cash or joint-stock plan, and avers that, by its by-laws and contracts with its members, each and all members agree to pay a first assessment in cash at the time the indemnity takes effect, and to pay such further sums thereafter as may from time to time be assessed against such members for the payment of all losses, and for incidental purposes, which shall accrue during the time such persons are members. Defendant denies that it has operated as a regular mutual fire insurance company doing business on the contingent liability plan, and avers that all members, in their certificates of membership, agree to pay such sums, from time to time, as may be assessed against them by the association; to pay all losses occurring to co-members, during the time that such persons are members. Defendant denies its insolvency, and generally denies the averments of the petition not in its answer admitted to be true, or qualified. The reply of plaintiff denies the averments of the answer, and avers that policies were issued by defendant in which it was expressly stipulated that there should be no assessments after the payment of the first assessment in cash; that such policies were issued on the joint-stock or cash plan, and were made nonassessable; that in many policies the liability of the member was limited to five times the amount of the first or cash assessment; thus constituting such policies the same as the policies of a mutual insurance company, doing business on the contingent liability plan. It appears from the admissions in the answer, and from the evidence, that the facts charged in the petition are substantially true as therein stated.

Mr. J. K. Richards, Atty. Gen., for the State.

Messrs. U. S. Marvin, Tinker & Waters, and Tibbals & Franks for defendants.

Burket, J., delivered the opinion of the court:

A construction was placed by this court up-

holder in the state. *Com. v. Hemingway*, 7 L. R. A. 360, 131 Pa. 636.

The question whether or not the Constitution of the United States confers upon citizens of the United States the right to hold stock in a corporation of a state in which they do not reside was discussed in *Detwiller v. Com.*, *supra*, and the decision in the lower court was based on this alleged constitutional right, but the supreme court of Pennsylvania said: "We put the right of the stockholder, not so much on the provision of the Constitution of the United States, which was discussed with so much learning by the judge of the court below, as upon the nature of stock as a personal chattel, and the right of an alien friend at the common law to deal in personal goods and embark in trade, loan money, sue, and be sued for the collection of debts and the protection of its person and personal estate." On this theory, the court in *Com. v. Hemingway*, *supra*, upheld the right of an alien resident to become a stockholder, reversing the decision of the court below, which denied the right on the ground that it rested on the Constitution of the United States.

In both the Pennsylvania cases above cited, the court also upheld the right of the nonresident citizen.

and of the alien to be directors; but the question of the right of nonresidents and aliens to become directors is not here entered upon, further than to call attention to the fact that in many states the statutes require that some, or all, of the officers and directors shall be citizens or residents of the state.

The decision in the main case being based on the statute in no respect changes the general rule as to the right when no statute denies it. The question of the right of a nonresident of the state who is a citizen of the United States to own stock in a corporation as one of his equal privileges and immunities under the Constitution of the United States remains unsettled by any direct decision upon the question.

As to regulation by by-laws of elections of private corporations, see *Cross v. West Virginia Cent. & P. R. Co.* (W. Va.) 18 L. R. A. 582, and *note*.

The right of infants to become members of a corporation, aside from the question of the right of the infant to disaffirm a contract of subscription, has been raised in respect to membership of a co-operative or assessment insurance company. See on this point *Re Globe Mut. Ben. Assn.* (N. Y.) 17 L. R. A. 547, and *note*.

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on some of the provisions of sections 3686-3690, both inclusive, Rev. Stat., in the case of *State v. Monitor Fire Assn.*, 42 Ohio St. 555; but the question as to whether or not such an association is authorized by law to receive into its membership nonresidents of Ohio was not decided in that case, and we are now requested, by both parties in this case, to pass upon and settle that question. Section 3686 provides that "any number of persons of lawful age, residents of this state, not less than ten in number, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes, or windstorms, and may make, assess, and collect, upon and from each other, such sums of money, from time to time, as may be necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, or wind storms, to any member of such association; and the assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association." Section 3687 provides that: "The object of the association, which shall only be to enable its members to insure each other against loss by fire and lightning, cyclones, tornadoes, or windstorms, and other casualties, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes, and for the payment of losses which occur to its members." Section 3689 provides that the persons named in the certificate shall elect directors and other officers to serve for one year, and such association, so organized, shall be a body corporate for all the purposes aforesaid; but in no instance shall the power to insure against losses by fire be exercised by others than members of the association. By section 3690 it is provided that all persons who sign the constitution of the association shall be considered and held to be members thereof, and shall be held, in law, to comply with all the provisions and requirements of the association.

It will thus be seen that the association is required, by the statute, to begin its existence with members who are residents of Ohio; and the object of the association is to insure its members, only, against loss by fire, etc. To become a member, the person must sign his name to the constitution. The officers are elected by the members, and the whole scheme contemplated by the statute seems to be an association of rather a local nature,—one in which the members are likely to be more or less acquainted with the standing of each other, and not scattered all over the country or the world. The success and solvency of such an association depend in a large measure upon the standing and responsibility of its members, the promptness with which they pay their assessments, and the confidence which each has that all the others will in the future continue to comply with the requirements of the association. This can best be done by limiting the membership to a small territory; and we think, and so hold, that it was the intention of the legislature, by the statute in question, to limit the membership of the association to our own state, and not to permit it to accept members who are nonresidents of the state, and not to insure property for such nonresidents situate outside of this state. Sections 3686-3690, both

inclusive, form a part of title 2 of part 2 of the Revised Statutes; and section 3248 provides that, in all "corporations formed under this title, . . . all directors and all the executive officers must be holders of stock, in an amount to be fixed by the by-laws, and trustees of corporations must be members thereof." So that it was the evident intention of the general assembly that, in associations of the character in question, the directors should be members of the association, and that persons who are not members of the association are not legally qualified to fill the office of director in such association. An association organized under said sections 3686-3690, is not authorized to transact insurance business upon the "joint-stock" plan, nor upon the "contingent liability" plan provided for in section 3634, Rev. Stat. It is expressly provided at the close of said section 3634 that "nothing in this section shall apply to associations for the mutual protection of their members against loss by fire, heretofore or hereafter organized, as provided in section 3686 of the Revised Statutes." And section 3687 confines the business of an association for the mutual protection of its members to insurance in which the agreement among the members is "to be assessed specifically for incidental purposes, and for the payment of losses which occur to its members." The only assessments which such an association has the lawful power to make are assessments for specific incidental purposes, and for specific losses sustained by its members. The idea upon which such associations are founded is that whenever a loss occurs to a member, the amount thereof being first ascertained and adjusted, a specific assessment is made upon all the members to pay such loss. But in practice the method pursued is not to make and collect an assessment for each loss as it occurs, but to make and collect assessments at stated periods for all losses which have occurred up to that time. In such an association the liability of the members is limited only by the amounts of the losses; and an attempt to limit the annual liability, either to the amount of the cash premium paid when the policy is issued, or to the amount of three or five annual cash premiums, is not sanctioned by law, but is expressly prohibited by said sections 3684 and 3687 of the Revised Statutes.

The evidence shows that the defendant has violated the statute in this regard. It is therefore clear that the defendant has been exercising powers and franchises not authorized by statute. But defendant pleads that what it has thus done has been the custom of such associations for years past, with the knowledge and consent of the commissioner of insurance of the state of Ohio. The evidence fails to show such knowledge and consent on part of the commissioner of insurance, and, even if it did, his knowledge and consent would not make the acts lawful. Nor would the fact that all such associations have had a custom among themselves to do their business in an unlawful manner add any legal sanction to such illegal methods. We therefore conclude that the course of business as transacted by said defendant is not only illegal, but inexcusable, and that the prayer of the petition should be granted.

Judgment of ouster.

NEBRASKA SUPREME COURT.

BIGLER, Executor, etc., of James E. Jones, *Pff. in Err.*,

vs.
James A. BAKER.

(.....Neb.....)

1. The vacation of a judgment by default during the term at which it is rendered is largely within the discretion of the trial court, and presents no grounds for reversal, unless there appears to have been a clear abuse of discretion.
2. This court will require a stronger showing of abuse of discretion where the motion to vacate is allowed than in cases where a trial on the merits is denied.
3. Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within the terms thereof.
4. The plaintiff, in an action of ejectment, must rely upon the strength of his own title, and not upon the weakness of that shown by the adversary.
5. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract, and not the lease.
6. An averment that an agent was duly authorized is sustained by proof of subsequent ratification by his principal.
7. The deed of an agent, executed in the presence and under the personal direction of his principal, is not within our statute of frauds, and is not void for the reason that the execution thereof was not authorized in writing.
8. When the vendor in a parol agreement for the sale of land puts the purchaser in possession, and the latter, while holding under such agreement, makes lasting and valuable improvements upon the premises, such facts amount to a performance of the contract by him, and are a sufficient defense in an action of ejectment by the vendor, notwithstanding default of payment for the land.

(May 2, 1894.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Pound & Burr, for plaintiff in error:

To entitle a defendant to have default and judgment set aside he must furnish not only satisfactory reasons in excuse for his default, but he must accompany his motion by his proposed answer duly verified so that the court may see whether he has a defense to the action.

Spencer v. Thistle, 13 Neb. 227; *Hale v. Bender*, Id. 66; *Muthollan v. Scoggin*, 8 Neb. 203.

*Headnotes by Post, J.

NOTE.—As to mutuality of contracts for options, see note to *Litz v. Gossling* (Ky.) 21 L. R. A. 127. 24 L. R. A.

The amended answer alleges that the plaintiff executed the written contract by his authorized agent C. C. Burr and the contract is signed "James E. Jones by C. C. Burr, Agt."

This allegation of the answer cannot be proved by testimony that Jones directed Burr to execute the contract as his agent in the presence of Baker.

Burlington & M. River R. Co. v. Harris, 8 Neb. 140; *Marwell v. Longenecker*, 89 Ill. 102; *Anderson v. Hubble*, 98 Ind. 570, 47 Am. Rep. 394.

The allegation that the plaintiff made the contract through his duly authorized agent cannot be proved by evidence that he made the contract in person.

Wood v. Goodridge, 6 Cush. 120, 52 Am. Dec. 771; *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740; *Jansen v. McCahill*, 23 Cal. 565, 83 Am. Dec. 84; 2 Greenl. Ev. § 295; *Story*, Ag. § 51; *Ball v. Dunsterville*, 4 T. R. 818.

The contract in question is void for want of mutuality. By the terms of this contract Baker was not bound to do anything. If he failed to make these payments mentioned in the contract as they became due Jones could not enforce payment for Baker made no promise to pay. If Baker failed to execute the notes and mortgage referred to in the contract, Jones was without remedy, for Baker did not agree to execute any notes or mortgage. The contract attempts to bind Jones absolutely while Baker has his election whether to be bound or not. If the latter pays, then Jones must give a deed, but if he does not pay he is not liable for any default—no agreement can be enforced against him for he has made none. Such contracts cannot be enforced in equity.

Pom. Cont. §§ 162-165; Fry, Spec. Perf. 286; Jacobs v. Peterborough & S. R. Co. 8 Cush. 224; *Cooper v. Pena*, 21 Cal. 404; *Maynard v. Brown*, 41 Mich. 298; *Irwin v. Bailey*, 72 Ala. 467; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Bodine v. Glading*, 21 Pa. 58, 59 Am. Dec. 749; *Ballou v. March*, 135 Pa. 64; *McMurtrie v. Bennette*, Harr. Ch. 124; *Hawley v. Sheldon*, Id. 420.

The defendant did not go into possession of the premises under the contract of sale.

The mere fact that a person has made a contract for the purchase of land does not entitle him to enter upon and hold it, and a purchaser's possession so obtained, in the absence of some agreement permitting him to enter, would be unauthorized and unlawful.

Williams v. Forbes, 47 Ill. 148; *Dean v. Comstock*, 82 Ill. 173; *Roe v. Doe*, 76 U. S. 9 Wall. 290, 19 L. ed. 712.

If the defendant was in possession under a lease at the time the contract of sale was made, his possession after that time must be referred to the original tenancy and not to the contract of sale.

Mahana v. Blunt, 20 Iowa, 142; *Rosenthal v. Freeburger*, 26 Md. 75; *Wills v. Stradling*, 3 Ves. Jr. 378; *Jacobs v. Peterborough & S. R. Co.* 8 Cush. 224; *Carlisle v. Brennan*, 67 Ind. 12.

To be availed of, ratification and estoppel must be pleaded.

Cravens v. Gillilan, 78 Mo. 529; *Noble v. Blount*, 77 Mo. 235; *Bray v. Marshall*, 75 Mo. 327; *Burlington & M. River R. Co. v. Harris*, 8 Neb. 140; *Maxwell v. Longenecker*, 89 Ill. 102; *Anderson v. Hubble*, 98 Ind. 570, 47 Am. Rep. 394; *Robbins v. Magee*, 76 Ind. 381; *Sims v. Frankfort*, 79 Ind. 452; *Ragan v. Chenault*, 78 Ky. 545; *Pollard v. Gibbs*, 55 Ga. 45; *Wilson v. Butler*, 4 Bing. N. C. 748.

If a vendee in possession of premises under a contract of purchase is in default of payments, or of any of the conditions imposed upon him by the terms of the contract, the vendor can maintain ejectment to recover possession.

Roe v. Doe, 76 U. S. 9 Wall. 290, 19 L. ed. 712; *Baker v. Gittings*, 16 Ohio, 485; *Wright v. Moore*, 21 Wend. 230; *Williams v. Forbes*, 47 Ill. 148; *Keys v. Mason*, 44 Tex. 144.

Messrs. Holmes, Cornish & Lamb, and **R. J. Green**, for defendant in error:

Where a judgment has been regularly entered against the defendant, personally served with summons, it is largely within the discretion of the court to say whether he shall be permitted to go in afterwards and make defense, but unless it be made to appear that there has been an abuse of discretion by the court below, in this particular, this court will not interfere.

Mulhollan v. Scoggin, 8 Neb. 202.

Under a general denial in the answer the defendant may prove any fact which negatives the plaintiff's right to the possession.

Dale v. Hunneman, 12 Neb. 221; *Rowe v. Beckett*, 30 Ind. 180, 95 Am. Dec. 676; *Stehman v. Crull*, 26 Ind. 436; *Wicks v. Smith*, 18 Kan. 508; *Warren v. Crew*, 22 Iowa, 315; *Sparrow v. Rhoades*, 76 Cal. 208; *Kimball v. Gearhart*, 12 Cal. 50; *Bell v. Brown*, 22 Cal. 672; *Willson v. Cleveland*, 80 Cal. 201; *Bell v. Bed Rock Tunnel & Min. Co.* 86 Cal. 219; *Semple v. Cook*, 50 Cal. 29; Maxwell, ed. 1885, p. 611; *Bliss*, Code Pl. 1879, §§ 249, 351; Pom. Rem. & Rem. Rights, § 679.

The defendant in an action to recover the possession of lands may rely upon any equitable defense he may have. He may set up in his defense the same facts, which in a court of equity would entitle him to the conveyance of the land.

Crary v. Goodman, 12 N. Y. 266, 64 Am. Dec. 506; *Traphagen v. Traphagen*, 40 Barb. 587; *Tibeau v. Tibeau*, 19 Mo. 78; *Hayden v. Stewart*, 27 Mo. 286; *Cadiz v. Majors*, 33 Cal. 288.

Where the principal having left no deed for the property, nor authorized an agent to make such deed or to receive the money under the contract, the law would excuse the nonpayment of the contract by the vendee, until the payment of the purchase money could be accompanied by a title deed.

Warren v. Crew, 22 Iowa, 315.

A party not bound by the agreement has no right to call upon the court to enforce performance as against the other to the contract, and to be, by expressing his willingness, in his bill, to perform his part of the agreement.

His right to the aid of the court does not depend upon his willingness to perform upon his part, but upon its original obligatory character.

24 L. R. A.

Pom. Cont. §§ 164, 165, and notes.

Where the agreement in the contract for the sale of land left nothing more for the vendee than his liability to pay a certain sum of money, it may always be enforced by a suit in equity on behalf of the vendee, since the purchaser may, in the same manner, obtain the performance of the vendor's duty to convey.

Walker v. Eastern Counties R. Co. 6 Hare, 594; *Dalzell v. Crawford*, 1 Pa. L. J. 155; Pom. Cont. § 165.

When the contract makes no mention of the possession and the land is vacant, and the vendee has paid the entire consideration and fully performed on his part, and the delivery of the deed is all that remains to be done, there is an implied agreement or license that the vendee may at once take possession and have the use of the land.

Sherman v. Savery, 2 McCrary, 118; *Miller v. Ball*, 64 N. Y. 293; *Suffern v. Townsend*, 9 Johns. 85.

Tender is equivalent to payment.

Gaven v. Hagen, 15 Cal. 208; *Henry v. Raiman*, 25 Pa. 354, 64 Am. Dec. 708; *Pierce v. Tuttle*, 53 Barb. 155.

Mr. C. C. Burr now being the owner of the land is by the law of estoppel precluded from asserting title superior to that of the defendant in error, Baker.

Where an agent makes a representation of a fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge upon the faith of which another party acts, the principal is precluded from controverting his fact so alleged.

Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; *Smith v. McNeal*, 68 Pa. 164; *McKelvey v. Truby*, 4 Watts & S. 823; *Sherrill v. Sherrill*, 73 N. C. 8.

Post, J., delivered the opinion of the court:

This was an action by James E. Jones, in the district court of Lancaster county, to recover possession of a part of the northwest quarter of section No. 14, township No. 10, range No. 6, in said county, which is fully described in the pleadings, but which does not call for a more specific description in this opinion. At the September, 1890, term of the district court, the defendant in error, who was the defendant below, being in default, judgment was entered in favor of the plaintiff, in accordance with the prayer of his petition. Three days later, and presumably at the same term, the defendant filed a motion, supported by affidavit, for the vacation of said judgment, which motion was at the November, 1890, term, sustained, and leave given the defendant to answer, which he did four days later, to wit, on the 15th day of December. At the September, 1891, term, a trial was had, resulting in a finding and judgment for the plaintiff, which was, on the motion of the defendant, set aside, and the cause continued. At the February, 1892, term, the defendant, by leave of court, filed an amended answer, to which a reply was in due time filed, and a trial had, resulting in a verdict and judgment for the defendant, which we are now asked to review upon petition in error. Subsequent to the filing of the petition in error, Jones died, whereupon the action was revived in the name of

the plaintiff in error, his executor. The alleged errors are:

1. "The court erred in vacating the judgment by default." In this connection, it is argued that the grounds stated in the affidavit accompanying the motion were not sufficient to excuse the default, and that the motion should have been accompanied by the proposed answer. The affidavit referred to is as follows:

"R. D. Stearns, being first duly sworn, on oath says: That he is attorney for said defendant in the above entitled cause, and has been for the last two years or more. That at the commencement of the September, A. D. 1890, term of the district court, affiant spoke to C. C. Burr, one of the attorneys of record in the above cause, and informed him (said Burr) that he (affiant) was attorney for defendant, and told him (said Burr) that he (affiant) was very busy with the criminal docket, and asked said Burr if it made any difference if said answer was not filed for a while; and said Burr said, 'No, it didn't make any difference;' that he would take no advantage of it, as the case could not be tried, anyhow, this term. That, within a day or so, affiant prepared an answer to plaintiff's petition, except the attaching of a copy of a contract which defendant desired to make a part of his answer, and which contract had been mislaid, and defendant was unable to find at that time, and the filing of the answer was thereby delayed. Affiant says he was entirely misled by Attorney C. C. Burr in the matter. He had no idea the case could possibly be reached; a jury case, No. 309 on the docket. This said case is one in ejectment, affecting the title to valuable land, which defendant claims to be entitled to. That defendant has been a resident of this land some four or five years; has put valuable and lasting improvements upon said land, such as dwelling house, farm corrals, windmills, fences, etc. That he has a good and valid defense to the claims made by plaintiff in his petition. In any event, defendant is an occupying claimant, and is entitled to compensation for his valuable and permanent improvements placed upon said lands. Wherefore, defendant asks to have said judgment opened up, and defendant allowed to come in and defend; and defendant now asks leave to file his answer setting out his defense. R. D. Stearns.

"Subscribed in my presence, and sworn to before me, this 27 day of Oct., 1890. J. D. Harris, Deputy Clerk Dist. Court."

It is not claimed for his affidavit that the showing therein is, in all respects, such as good practice requires. For instance, the defense must be inferred from the conclusions of the affiant, rather than the facts alleged. But the vacation during the same term of judgments by default is so largely a matter of discretion for the trial court that this court will decline to interfere unless there appears to have been a clear abuse of discretion. *Mulholland v. Scoggin*, 8 Neb. 202. It may be said, also, that good practice requires the motion to be accompanied by the proposed answer, in order that it may be determined whether there is a sufficient defense to the action. Where, however, the court has resolved that question in favor of the moving party, upon the evi-

dence in the motion, and affidavits, and an answer subsequently filed, and trial had, a stronger showing of abuse of discretion will be required than where a trial on the merits has been denied. *Westphal v. Clark*, 46 Iowa, 262.

2. It is argued that the court erred in admitting in evidence the written agreement upon which the defense rests. In this connection it is deemed proper to set out the material allegations of the answer, which, after a general denial, are as follows:

"Further answering, this defendant alleges that he is in possession of the premises described in plaintiff's petition, and has been since the 25th day of May, 1886, by virtue of a certain written agreement given by the plaintiff through his authorized agent, C. C. Burr, which agreement was in words and figures as follows, to wit: 'Law Office of Charles C. Burr, Lincoln, Nebraska, May 25, 1886. In consideration that James A. Baker shall pay me \$300 on June 1, 1887, execute a mortgage and notes to me aggregating \$1,900, as follows: \$200, due June 1, 1888; \$200, due June 1, 1889; \$200, due June 1, 1890; \$200, due June 1, 1891; \$300, due June 1, 1892; \$400, due June 1, 1893; \$400, due June 1, 1894,—with interest at six per cent per annum from June 1, 1887, I agree to convey to him, by quitclaim deed, the undivided ($\frac{1}{2}$ of S. $\frac{1}{2}$ N. W. $\frac{1}{2}$) two-thirds of the south half the northwest quarter, 14—10—6. [Signed] Jas. E. Jones, by C. C. Burr, Agt.' Which said agreement was duly filed for record in the office of the county clerk for Lancaster county, Nebraska, on the 25th day of May, 1886; being same land described in petition; interest having been apportioned in partition. Defendant further alleges that since entering in and upon the said described premises by virtue of said contract of sale, as aforesaid, he has made lasting and permanent and valuable improvements on said premises, of the value \$10,000. Defendant further alleges that he has performed all of the terms and conditions of said written contract upon his part to be performed, and upon the 1st day of June, 1887, this defendant tendered to C. C. Burr, the agent as aforesaid, \$100 lawful money of the United States, and at the same time made known his willingness and intentions to execute the notes and mortgage as provided in said written agreement, and that afterwards, and from time to time, the said defendant has made tender of all the money due and owing upon said written agreement to the said plaintiff, which tender had been refused; and the said defendant now brings into court the full sum of money due upon said contract, together with all accrued interest thereon, and makes tender for the same in open court. And defendant avers that, at all times since the making of said memorandum or agreement, this defendant has been ready and willing to pay the several sums of money at they became due, from time to time, and has made tender of the same, either to plaintiff or to his agent."

The ground of the objection to the agreement is that, according to the testimony of the defendant, it was made with the plaintiff, and not with Burr, as agent, and that the only connection of the latter with the transaction was to reduce the agreement to writing in ac-

cordance with the dictation of the plaintiff. We will not controvert the proposition that an allegation of a contract through an agent is not sustained by proof of a contract in person by the party sought to be charged. It is asserted by the plaintiff, and readily conceded, that where an instrument is executed in the name of the maker, in his presence, and at his request, it will be regarded as the personal act of the latter. But that is a rule for the benefit of the adverse party, and has never, so far as we are informed, been given the application here suggested. The defendant might have alleged a personal agreement; but, having elected to treat Mr. Burr as agent of the plaintiff, the latter will not be heard to complain, since the agreement set out is the identical one tendered to and accepted by the defendant.

8. It is contended that the agreement relied upon is void for want of mutuality. It is true there is found therein no express agreement by the defendant to purchase the land in controversy. But it is charged in the answer, in substance, that the defendant went into possession under said contract on the day of its execution; that he has, since said date, made lasting and valuable improvements thereon; and that he has performed all of the conditions imposed upon him by the terms of said contract. With regard to the degree of mutuality required in a contract, in order to warrant its enforcement at the hands of a court of equity, the authorities are, unfortunately, not harmonious. There are cases in this country which hold that unilateral agreements, like the one under consideration, are mere wagers, and will not be enforced, either at law, or in courts of equity. See *Maynard v. Brown*, 41 Mich. 298. But the true rule is believed to be that want of mutuality, in such cases, is not a valid objection, even to decree of specific performance, where the moving party had performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement. See *Van Doren v. Robinson*, 16 N. J. Eq. 259; *Green v. Richards*, 28 N. J. Eq. 82; *Reynolds v. O'Neil*, 26 N. J. Eq. 223; *Johnston v. Trippe*, 38 Fed. Rep. 580; *Schilds v. Horbach*, 30 Neb. 536; *Fry*, Spec. Perf. 291.

Perhaps the leading case in this country is *Clason v. Bailey*, 14 Johns. 484, where Chancellor Kent was at first disposed to follow Lord Redesdale in *Lawrenson v. Butler*, 1 Sch. & Lef. 18; but, upon a careful review of the authorities, he concluded that the contrary doctrine was firmly established in the English courts. Our conclusion is that the answer alleges such an acceptance of the agreement, and performance of its conditions, as to bring this case clearly within the rule stated.

4. It is next argued that the evidence does not prove that defendant went into possession under the contract of sale. It is conceded that he was in possession, as tenant of Jones, at the date of the contract. It is a well-established rule that where one is in possession, as tenant at the time he contracts for the purchase of the demised premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown to result from the subsequent agreement. 1 Sugd. Vend. 162, 163; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 24 L. R. A.

45; *Mahana v. Blunt*, 20 Iowa, 142. The trial court, in several paragraphs, instructed the jury, in substance, that, in order to find for the defendant, they must be satisfied that he entered into possession under the contract of sale. The court might, with propriety, have added that the defendant's subsequent possession was presumed to be under his lease, especially since it, by its terms, did not expire until some months thereafter. But, as no such instructions were tendered by the plaintiff, the inference is that he was satisfied with that feature of the charge. The jury evidently found that the defendant held under the contract, and not the lease; and with that finding we cannot interfere, for reasons which will be stated in the consideration of the application of the statute of frauds to the contract in question.

5. Plaintiff offered to prove by a witness called to testify in rebuttal that the defendant had sold the contract relied on to Mr. Imhoff, and had, in pursuance of said sale, placed it in the hands of the witness; that Imhoff, had paid to plaintiff \$200, and agreed to pay the further sum of \$800 therefor; and that plaintiff had "surreptitiously obtained said contract" from the witness while the latter was holding it for Imhoff. This evidence was excluded, on the objection of the defendant, which ruling is assigned as error. The plaintiff in ejectment must recover on the strength of his own title, and cannot rely upon the weakness of that shown by his adversary. *Butler v. Davis*, 5 Neb. 521. If the contract had been so far executed by the defendant as to entitle him to possession thereunder, it would not avail the plaintiff to prove that a stranger had subsequently acquired rights which would entitle the latter to possession, as against him. The trial court, therefore, did not err in excluding the evidence offered.

6. Several paragraphs of the instructions are assailed on the ground that the question of ratification by Jones of Burr's act in executing the contract was thereby submitted to the jury, whereas it was not presented by the pleadings. In other words, it is contended that ratification by a principal of the unauthorized act of his agent must be specially pleaded by the party asserting it. The authorities cited in support of this proposition are all, we believe, cases involving the question of estoppel, and therefore not in point, while it has been held that an averment in a pleading that an agent was duly authorized by his principal is sustained by proof of subsequent ratification. *Hoyt v. Thompson*, 19 N. Y. 207; *Hubbard v. Williamstown*, 61 Wis. 400.

7. The question of Burr's authority to execute the contract mentioned was presented, both during the trial, and by requests to instruct. It is provided by section 3 of our Statute of Frauds that "no estate or interest in land other than leases for a term not exceeding one year, nor any trust over or power concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared unless by act or operation of law or by deed of conveyance in writing subscribed by the party creating, granting, assigning or surrendering or declaring the same." Comp. Stat. chap. 82. And by section 25 it is provided that

"every instrument required by any of the provisions of this chapter to be subscribed by any person may be subscribed by his agent thereunto authorized by writing." These provisions were construed together in *Morgan v. Bergen*, 8 Neb. 209, where it was held that a written agreement executed in behalf of his principal by an agent did not satisfy the requirement of the statute, but that the authority of the latter must also be in writing. To this, which is, without doubt, the general rule, there are recognized exceptions, some of which will now be noticed: In *McMurtry v. Brown*, 6 Neb. 375, it is said: "The character of a power under which an agent may execute a deed for another depends upon the presence or absence of the principal. If it is signed in his presence, and by his direction, an oral request to do the act is all that is required." And the rule, as there stated, is sustained by the decided weight of authority. See *Gardner v. Gardner*, 5 Cush. 423, 52 Am. Dec. 740; *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193; Story, Ag. § 512; 2 Greenl. Ev. 295.

According to the testimony of the defendant, the agreement under consideration was prepared and signed in the presence of Jones, and in accordance with his personal direction. The question of authority was therefore properly submitted to the jury. Another exception to the general rule is where the vendor in a parol agreement for the sale of land puts the purchaser in possession, and the latter, while holding under such agreement, and induced thereby, makes valuable and lasting improvements upon the premises. In such case the purchaser may, upon tendering the consideration price, demand a specific performance of the contract, or may rely upon such facts to defeat an action of ejectment by the vendor, although in default of payment of the purchase money. Pom. Eq. Jur. 1409. The defendant testified that upon the execution of the contract he took immediate possession of the premises, and built thereon a house (24 by 60 feet, and 16 feet high), barn and windmill; that he dug three wells on the land), set out trees, and broke up a part of it,—which improvements are of the value of \$5,000. He also testified that, while engaged in the erection of the house above described he was visited by Jones, who, although aware of said improvements, made no objection thereto. It is conceded that defendant, on the 1st day of June, 1887, tendered to Mr. Burr, who executed the agreement of sale as agent of Jones, the sum of \$100, being the first payment to mature under said agreement. This tender was refused by Burr for reasons assigned in writing as follows: "Lincoln, Neb., June 1, 1887. I hereby acknowledge tender to me of \$100 by Jas. A. Baker, J. E. Jones, under a pretended contract of his, dated May 25, 1886, involving the undivided $\frac{1}{2}$ of S. 2, N. W. 4, Sec. 14, T. 10 N., R. 6 E., Lancaster Co., Neb., for the reason that I am not the agent of the said James E. Jones, nor authorized to receive any money for him for any purpose whatsoever. C. C. Burr." Defendant made repeated but unsuccessful efforts to find Jones, who, it seems, had left about that time for his home in England. Finally, he was re-

ferred to a Mr. Muff, of Crete, as the person to receive payment of the sum due, to whom he offered settlement, but which was refused, on the advice of Mr. Burr, to the effect that the agreement was not binding on Jones. Again, in the year 1890, defendant tendered the plaintiff the full amount due by the terms of the contract, which was also refused. The making of the improvements enumerated does not appear to have been controverted on the trial. Defendant is corroborated to some extent by Mr. Strode, who was present at a conversation of the former with Jones in May, 1890, when the latter, referring to the amount alleged to be due on the contract, remarked that he wanted all of the money. Although this evidence was contradicted on the trial by the testimony of Jones, who is, to some extent, corroborated by other evidence, the question was properly submitted to the jury.

8. It is strenuously argued that the verdict is not supported by the evidence. It is sufficient to say that the evidence is conflicting, and, while we might have reached a conclusion different from that of the jury, we cannot now disturb the judgment based upon the verdict without overruling a multitude of cases which assert a rule as salutary as it is well established, viz., that this court will not reverse a judgment on account of mere difference of opinion between ourselves and the trial court on questions of fact.

The judgment is affirmed.

CAPPS & MCCREARY, *Plfs. in Err.*,

v.

HASTINGS PROSPECTING CO.

(.....Neb.)

- *1. **The plaintiffs in error were sued on a writing signed by them, as follows:** "For the purpose of organizing a corporation . . . to bore for gas, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names . . . within thirty days from the organization of said corporation." *Held*, that by this writing the plaintiffs in error promised to take and pay for stock of a corporation *de jure*, not of a corporation *de facto*, thereafter to be organized.
2. **A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in quo warranto proceedings.**
3. **The Hastings Prospecting Company was organized for the purpose of boring for gas; its articles of association fixed its principal place of business in Adams county, Neb.; it did not file its articles of incorporation in the office of the county clerk of said Adams county. *Held*, that by such default it failed to become a corporation *de jure*.**
4. **It seems that persons subscribing for the stock of an association, then acting as and assuming to be a corporation, are estopped in a suit on such subscription from**

*Headnotes by RAGAN, C.

NOTE.—For preliminary subscriptions to proposed corporations, see also *Winston v. Brooks* (Ill.) 4 L. R. A. 507, and *note*.

questioning the legal existence of such corporation.

5. A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber from afterwards denying the legal existence of the corporation in a suit by the alleged corporation upon the subscription.

(May 2, 1894.)

ERROR to the District Court for Adams County to review a judgment in favor of plaintiffs in an action brought to recover the amount alleged to have been subscribed by defendants, to the plaintiff company. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. Capps, McCreary & Stevens, for plaintiffs in error:

A contract with a mere fictitious person is a nullity. Nor is it otherwise, though the non-existing person or corporation comes afterwards into existence.

Bishop, Cont. enlarged ed. § 886; *Re Empress Engineering Co.* L. R. 16 Ch. Div. 125; *Glass v. Glass*, 71 Ind. 392.

A mere offer or promise not accepted involves no concurrence of wills, and it can never constitute a contract.

Bishop, Cont. § 821.

It was agreed that plaintiffs in error should obtain for their agreement to subscribe for stock and as the consideration thereof, all the rights secured by it (the contemplated corporation) of membership in the corporation contemplated, and the rights and interests accruing from such membership. When these rights are not secured by the agreement to take stock, it is wanting in consideration, as are notes or any other obligations which might be given for the payment of subscription.

Grangers Life & Health Ins. Co. v. Kamper, 78 Ala. 325; *Scovill v. Thayer*, 105 U. S. 148, 26 L. ed. 968.

Defendant in error is not and never was an organized corporation.

Section 126 provides that the "corporation previous to the commencement of any business, except its own organization, . . . must adopt articles of incorporation and have them recorded in the office of the county clerk of the county, or counties, in which the business is to be transacted."

These requirements are expressed in affirmative language.

See *Dubuque Dist. Twp. v. Dubuque*, 7 Iowa, 276.

Affirmative expressions that introduced a new rule imply a negative of all that is not within the purview.

The general law under which the association is formed and the articles of incorporation adopted and filed as required, taken together, are in law considered in the nature of a grant from the state, and as a charter of the company.

Abbott v. Omaha Smelting & Ref. Co. 4 Neb. 419.

Any material omission will be fatal to the existence of the corporation, and may be taken 24 L. R. A.

advantage of collaterally in any form in which the fact of incorporation can properly be called in question.

Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 427, 78 Am. Dec. 658.

It may be argued by defendant in error that its promoters did organize, and that our agreement was "to subscribe and pay for stock within thirty days from the date of the organization of said corporation."

The reply to this is that there could eventuate no organization except a legally organized corporation.

Livesey v. Omaha Hotel Co. 5 Neb. 50; *Estabrook v. Omaha Hotel Co.* Id. 76; *Abbott v. Omaha Smelting & Ref. Co.* *supra*.

The agreement in question contains two conditions precedent: first, corporate existence; second, organizing a corporation with a capital stock of \$15,000, subscribed for. Neither of these conditions precedent have been complied with as is fully shown by the evidence. Defendant in error must fail to recover in this case.

Ticonic Water Power & Mfg. Co. v. Lang, 63 Me. 480; *Twain Oreok & O. Turnp. Road Co. v. Lancaster*, 79 Ky. 552; *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185; *Garling v. Baechtel*, 41 Md. 805; *McCann v. American Cent. Ins. Co. of St. Louis*, 4 Neb. 256; *Livesey v. Omaha Hotel Co.* *supra*.

The agreement is a mere proposition to subscribe for the stock in question upon certain conditions after the charter should have been obtained and the corporation organized. The agreement was not enforceable.

Thrasher v. Pike County R. Co. 25 Ill. 893; *Strasburg R. Co. v. Echlernacht*, 21 Pa. 220, 60 Am. Dec. 49; *Mt. Sterling Coal Road Co. v. Little*, 14 Bush, 429.

A subscription for shares of stock made prior to the organization of corporation to be promoted is inchoate and incomplete until organization is lawfully finished.

Athol Music Hall Co. v. Carey, 116 Masa. 571.

A contract to subscribe for stock of a corporation to be brought into existence in the future does not estop the maker thereof to deny the existence of the corporation.

Rikhoff v. Brown's Rotary Shuttel Sewing Mach. Co. 68 Ind. 388; *Indianapolis Furnace & Min. Co. v. Herkimer*, 46 Ind. 142.

An association of persons cannot claim a corporate existence unless they shall have fulfilled the conditions precedent which are prescribed by the law authorizing existence.

Cockburn v. Union Bank of Louisiana, 18 La. Ann. 299; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416; *Livesey v. Omaha Hotel Co.* 5 Neb. 50.

An abortive attempt to organize a corporation under a statutory law can never be said to prove the legal existence of a corporation.

Ward v. Brigham, 127 Masa. 24.

Messrs. Batty, Casto & Dungan for defendant in error.

Ragan, C., filed the following opinion: The Hastings Prospecting Company sued Lucius J. Capps and Willis P. McCreary, copartners doing business under the name,

firm, and style of Capps & McCreary, in the district court of Adams county, on a subscription or writing obligatory signed by them, in words and figures as follows: "For the purpose of organizing a corporation with a capital stock of \$15,000 to bore for gas, oil, or coal, at or near the city of Hastings, Adams county, Nebraska, and to buy or lease the land to experiment thereon for such purposes, and to buy, lease, or hire the necessary machinery and labor for such purposes, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names; said stock to be paid for in the manner following, to wit: Ten per cent within thirty days from the organization of said corporation, and the balance at the call of the directors: provided, that said directors shall not have power to call for more than 10 per cent of said stock at any one time, and provided, further, that payment shall not be called for oftener than once a month.

Names.	Number of Shares.	Dollars.
Capps & McCreary.	Ten Shares.	100.00."

The case was tried to the court, a jury being waived, resulting in a finding and judgment in favor of the prospecting company; and Capps & McCreary bring the case here for review.

The only errors assigned are that the findings and judgment of the court are contrary to the evidence and the law. The undisputed evidence in the case is that the plaintiffs in error, and a number of other citizens, signed the subscription paper quoted above; that, after the \$15,000 of stock had been subscribed, the subscribers, or some of them, met and elected a board of directors, adopted articles of incorporation, and filed a copy of the same in the office of the secretary of state, and the original in the office of the register of deeds of Adams county, the county in which the principal place of business was fixed by the articles of association. This incorporation, or attempted incorporation, occurred on the 15th day of April, 1889. The articles of incorporation were never filed in the office of the county clerk of Adams county. We have here, then, the questions: (1) Whether the prospecting company failed to become, as it attempted, a corporation *de jure*, by neglecting to file in the office of the county clerk its articles of incorporation; (2) and, if it did, whether such default or failure on the part of the prospecting company is available as a defense to the plaintiffs in error.

The first inquiry which presents itself is as to the nature of the agreement which the plaintiffs in error signed. What did they promise to do? We think a fair construction of the writing signed by them amounts to this: that they agreed to accept and pay for ten shares of the capital stock of the corporation the subscribers to the enterprise of boring for gas should organize, such payment to be made within thirty days after such corporation should be organized.

The next inquiry is, What is meant by the expression "when the corporation shall be organized?" It must be remembered that the plaintiffs in error agreed to become stockholders in the corporation that should be

formed, and a fair construction of this promise is that they meant to become stockholders in a corporation *de jure*, and not a corporation *de facto*. A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in quo warranto proceedings. The plaintiffs in error might have been willing to invest a part of their capital towards a public enterprise, and take their chances of the investment being remunerative, if no further liability would attach to them than that of stockholders in a *de jure* corporation, when they would not have embarked the same money for the same purpose in a partnership or a *de facto* corporation, where they would assume liabilities greater than those of stockholders in a *de jure* corporation. We hold, then, that by the subscription signed by the plaintiffs in error they promised to take and pay for ten shares of the capital stock of such *de jure* corporation as might be formed for the purpose for which the subscription was made. Is the Hastings Prospecting Company, or has it ever been, a *de jure* corporation? It is admitted that it did not file in the office of the county clerk of Adams county—that being the county in which its articles of incorporation fixed its principal place of business—its articles of incorporation. Did this default prevent the Hastings Prospecting Company from becoming a corporation *de jure*? The authorities are not entirely in harmony on this question, but the weight of authority is that, where the statute requires the articles of incorporation to be filed with some public officer before the commencement by the proposed corporation of the business for which it is organized, such filing is a condition precedent to the right of such corporation to perform any corporate function; consequently, until a compliance with the statute, the corporation has no valid existence as a *de jure* corporation. Morawetz, Priv. Corp. § 27, says: "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and, until it has been performed, the association will have no right whatever to assume corporate franchises." Cook, Stock & Stockholders, § 231, speaking of this same subject says: "Occasionally, however, it happens that this certificate is not fully made out, as required by statute, or is not filed, or some other step prescribed by law is not complied with. The corporation is then not duly incorporated, and the state, by quo warranto, may oust it from its user of corporate franchises." In *Doyle v. Mizner*, 42 Mich. 332, it was ruled: "All private corporations must be organized under general laws, and can be valid only when strictly conforming to all the conditions imposed on their completion." The court says: "The incorporation was sought to be shown by asking Doyle, on cross-examination, concerning

the signing of a paper purporting to be articles of incorporation, which had been filed in the Detroit city clerk's office, April 6, 1875. This paper was not acknowledged, and was not filed in the county clerk's office.

The statute concerning manufacturing corporations expressly requires that the articles shall be 'acknowledged before some person authorized by the laws of this state to take acknowledgments of deeds;' and, before any such corporation shall commence business, the articles shall be filed with the secretary of state and county clerk." And the court held that, by reason of the failure to acknowledge and file in the office of the county clerk the articles of incorporation, the association did not become a corporation *de jure*. To the same effect are *Stowe v. Flagg*, 73 Ill. 397; *Bigelow v. Gregory*, 73 Ill. 197; *Utley v. Union Tool Co.* 11 Gray. 139; *Unity Ins. Co. v. Gram*, 43 N. H. 636; *Childs v. Smith*, 46 N. Y. 34; *Harris v. McGregor*, 29 Cal. 125. Comp. Stat. 1893, chap. 16, § 128, provides: "Every corporation previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation and have them recorded in the office of the county clerk of the county . . . In which the business is to be transacted." Section 182 of said chapter provides: "Any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are filed by the county clerks of the counties as required by this subdivision and shall be valid if a copy of its articles be filed in the office of the secretary of state and the notice required be published within four months from the time of filing such articles in the clerk's office." These two sections of the statute, read together, leave little room for doubt that the filing of the articles of incorporation in the office of the county clerk is one of the things required to make the corporation one *de jure*. To organize a corporation there must be subscribers to the stock; a meeting of said subscribers, or some of them; the adoption of articles of association for the government of the proposed corporation, and such articles must be filed in the office of the county clerk of the county in which is fixed the corporation's principal place of business. These sections of the statute quoted above were construed by this court in *Abbott v. Omaha Smelting & Ref. Co.*, 4 Neb. 416, and it was there said: "In this state the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company." A corporate franchise is a privilege, a power, a right. It is a very different thing from the performance of any step necessary to the organization.

In *Indianapolis Furnace & Min. Co. v. Herkimer*, 46 Ind. 142, the question we are considering arose, and was decided by the supreme court of Indiana under a statute substantially like the one we have quoted above, and the court said: "The signing of

articles of association by parties proposing to form a corporation does not create such corporation; the subscribers must also make, sign, and acknowledge the certificate of incorporation prescribed [by the statute], and must file the same in the recorder's office of the proper county." We think, therefore, that the Hastings Prospecting Company, the name of the corporation attempted to be organized by the subscribers who signed the subscription on which the plaintiffs in error are sued, is not, and has never been, a corporation *de jure*.

2. Is that fact available to the plaintiffs in error as a defense to this suit? It is to be borne in mind that the plaintiffs in error did not subscribe for the stock of any corporation, either *de facto* or *de jure*, then in existence; and there is a distinction as to the liability of parties for subscriptions to a corporation or an association which assumes to be, and is, acting as a corporation, and the liability for subscriptions made by parties for the purpose of organizing a corporation from among the subscribers. If the subscription made by Capps & McCreary had been made to the Hastings Prospecting Company when it was acting as a corporation, when it was exercising the functions of a corporation, when it was claiming to be a corporation, and had their agreement been to pay such corporation certain sums of money for certain shares of its stock, it seems that they would then be estopped from setting up as a defense that the prospecting company was not a corporation *de jure*. Cook, Stock & Stockholders, § 186, and cases there cited. Morawetz, Private Corporations, § 67, thus lays down the rule in such cases: "Every subscription [to the stock of a corporation to be organized] by implication refers to and incorporates the terms of the charter or general law under which the corporation is to be formed; and every subscriber agrees to become associated with the others only upon condition that the formalities prescribed by the charter shall be observed in making the mutual contract. Thus, if certain preliminaries, such as the filing of a certificate, are required to be performed after the articles of association have been subscribed, but before the corporation shall be in existence, the contract of membership does not go into effect until these formalities are complied with; and the subscriber to the articles cannot until then be made to contribute the amount of his subscription." In *Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co.*, 68 Ind. 388, it was held: "A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber to afterwards deny the existence of the corporation in a suit upon the subscription." See also *Indianapolis Furnace & Min. Co. v. Herkimer*, 46 Ind. 142, where it is said: "Until the statutory requirements to organize a corporation have been complied with a subscriber to the articles of association is not estopped to deny the existence of the corporation." See also *Dorris v. Sweeney*, 60 N. Y. 463. We think these authorities are decisive of the case under consideration. The rule they lay down

is sound law, good sense, and exact justice. If the plaintiffs in error are to pay for the stock subscribed, it of course follows that they become entitled to the stock. This would make them stockholders in a *de facto* corporation, and liable as copartners, whereas their contract was to become liable as stockholders. The plaintiffs in error have not broken their promise.

The judgment of the District Court is reversed.

Joseph THOMAS, *Pff. in Err.*,

v.

CITY NATIONAL BANK OF HASTINGS.

(.....Neb.....)

*1. While a national bank may not lend its credit for the accommodation of others, still it may guarantee the payment of commercial paper as incidental to the exercise of its power to buy and sell the same.

2. A., being indebted to a national bank, and being the holder of certain negotiable notes, indorsed them generally, and delivered them to the president of the bank, who negotiated them for value to C., at the same time executing in the name of the bank a written guaranty of payment. From the proceeds of the sale, A's debt to the bank was canceled. *Held*, following *People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago*, 101 U. S. 181, 25 L. ed. 907: First, that the guaranteeing of the notes under such circumstances was within the powers of the bank; second, that the authority of the president to execute the guaranty would be conclusively presumed in favor of the purchaser acting without notice to the contrary; third, that the retention and enjoyment by the bank of the proceeds of such transaction constituted a ratification of the president's act.

3. Where the evidence on behalf of the plaintiff suing upon such a guaranty tended to establish the state of facts set forth in the foregoing paragraph, it was error for the trial court, in the giving and refusal of instructions, to withhold from the jury the law as above stated.

(May 2, 1894.)

ERROR to the District Court for Adams County to review a judgment in favor of defendant in an action brought to enforce defendant's guaranty of certain notes, which it had indorsed and delivered to the plaintiff. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. Capps & Stevens and *O. H. Dean*, for plaintiff in error:

It was competent to go to the jury for the purpose of showing that even though Bostwick had neither the apparent nor actual authority to execute the guaranty in question, the fact that the defendant subsequently paid

interest and recognized the transaction at various times, alone, would be such a recognition of the act of its president that it would amount to a ratification of the act and make it the act of the defendant itself.

Sandwich Mfg. Co. v. Shiley, 15 Neb. 110.

An agent's act binds his principal not only while acting within the scope of his authority, but in all acts that are apparently within the scope of his authority.

People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago, 101 U. S. 181, 25 L. ed. 907, arose on a state of facts similar, if not identical, to the facts in this case.

In that case the court says: "We see no reason to doubt that under the circumstances in this case it was competent for the defendant to give the guaranty in question."

The doctrine of *ultra vires* has no application in cases like this.

Merchants Nat. Bank of Boston v. State Nat. Bank of Boston, 77 U. S. 10 Wall. 604, 19 L. ed. 1006.

If there were any defects of authority on the part of the officers the retention and enjoyment of the proceeds of the transaction by their principal shows an acquiescence as effectually as would have been the most formal authority in advance, or the most formal ratification afterwards.

People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago, *supra*; *Whart. Ag. § 89*; *Bigelow, Estoppel*, p. 423; *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 892, 19 L. ed. 117.

When one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence.

People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago, 101 U. S. 188, 25 L. ed. 903; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, *supra*.

The liability of a corporation does not depend on the benefits it receives from the hands of its officers. "Corporations are liable for every wrong for which they are guilty, and in such cases the doctrine of *ultra vires* has no application."

Merchants Nat. Bank of Boston v. State Nat. Bank of Boston, 77 U. S. 10 Wall. 645, 19 L. ed. 1018.

Corporations are liable for the acts of their servants while engaged in the business of their employment, and to the same extent that individuals are liable in like circumstances.

Ang. & A. Priv. Corp. §§ 382, 388; *Dezell v. Odell*, 8 Hill, 216, 38 Am. Dec. 628; *Farmers & M. Bank v. Butchers & D. Bank*, 16 N. Y. 133, 69 Am. Dec. 678; *Bank of United States v. Davis*, 2 Hill, 465; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Herman, Estoppel*, §§ 1165, 1166; *Stoney v. American L. Ins. Co.* 11 Paige, 636, 5 L. ed. 261.

The notes in question in this suit are payable to the order of C. H. Paul. The plaintiff found them in the possession of the defendant indorsed in blank as follows, to wit: "Charles

NOTE.—The present case, although not novel since it is expressly based on a decision of the Supreme Court of the United States, touches a question of national bank law which we desire to have 24 L. R. A.

presented in this series. As to the power of banks to indorse for accommodation, see *note to Flannagan v. California Nat. Bank*, 23 L. R. A. 336.

H. Paul." If the paper is indorsed in blank, possession is prima facie proof of the ownership.

Tiedeman, Com. Paper, p. 312; *Carpenter v. Longan*, 88 U. S. 16 Wall. 271, 21 L. ed. 313.

The holder of commercial paper is presumed to have taken it under due for a valuable consideration and without notice of any objection that might exist against it, and this presumption stands until overcome by sufficient proof.

Swift v. Tyson, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Lexington v. Butler*, 81 U. S. 14 Wall. 282, 20 L. ed. 809; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424.

The apparent authority is the real authority. *North River Bank v. Aymar*, 3 Hill, 286.

Messrs. M. A. Hartigan and W. W. Morseman, for defendant in error:

Estoppel, to be available, must be pleaded under the practice in Nebraska.

Norwegian Plow Co. v. Haines, 21 Neb. 691; *Burlington & M. R. R. Co. v. Harris*, 8 Neb. 140; *Schribar v. Platt*, 19 Neb. 629.

The power of national banks is limited, as well as the power of their agents, to certain acts and for certain purposes, and this power is defined by the law creating and calling them into existence, which every one is supposed to know. The law presumes that every one dealing with them knows the law, and they have notice of the limitations of their power and the manner of its execution.

Mechem, Ag. §§ 276, 289-292; *Rice v. Peninsular Club*, 52 Mich. 87. See *Jemison v. Citizens Sav. Bank*, 9 L. R. A. 708, 123 N. Y. 135; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Chaffe v. Stubbs*, 37 La. Ann. 656.

The officers of a national bank are special agents, the law creating the bank being in its terms the limit of their authority which they carry with them, and is notice to those who assume to deal with them.

Mechem, Ag. § 288, and authorities there cited; *Blane v. Proudfit*, 8 Call (Va.) 207, 2 Am. Dec. 546; *Thompson v. Stewart*, 8 Conn. 171, 8 Am. Dec. 168; *Beals v. Allen*, 18 Johns. 363, 9 Am. Dec. 221, and note; *Baring v. Peirce*, 5 Watts & S. 548, 40 Am. Dec. 584; *Torole v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Brown v. Johnson*, 13 Smedes & M. 398, 51 Am. Dec. 118; *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 86 Pa. 498, 78 Am. Dec. 390; *Baillies, Sureties & Guarantors*, 46.

In this case Mr. Bostwick could not use the bank's credit to serve himself, his friends, and partners in the brick business, in the face of the statutory restrictions creating the bank.

Bank of Genesee v. Patchin Bank, 18 N. Y. 313; *National Bank of Gloversville v. Wells*, 79 N. Y. 498; *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, C. C. 647; *Ball*, National Banks, ed. 1881, 48, and note, 52, 114, 115, and note; *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *Morse, Banks & Banking*, ed. 1888, § 65, and note.

There was no consideration shown for the guaranty and the record shows that the bank never owned the paper.

Abbott, Trial Ev. ed. 1880, 472; *Klein v. Currier*, 14 Ill. 237.

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Irvine, C., filed the following opinion:

The plaintiff in error sued the defendant in error, a national bank, alleging that on January 21, 1889, one Elsmore and one Knowlton made and delivered to Charles H. Paul certain promissory notes secured by real estate mortgage of the same date. That Paul, in the ordinary course of business, indorsed and delivered the notes to the bank. That the bank executed and delivered to plaintiff a guaranty as follows: "For value received, we hereby assign and transfer the within note to Joseph Thomas, trustee, and guaranty payment of the principal and interest on the same on the terms and conditions stipulated in the mortgage of even date securing the same."

" { City National Bank of }
[Seal.]
Hastings, Neb. }

City National Bank, Hastings, Nebr.,
"By H. Bostwick, Pt."

That the foregoing contract was written upon each of said notes, and that plaintiff, relying thereon, and on the delivery of said notes and mortgage to him, paid over to the bank \$10,500 as consideration therefor, which money was transmitted by certain bills of exchange which were duly indorsed, received, accepted, used, and transmitted to the credit of the bank. The petition then avers a default in payment, and the insolvency of the makers, and prays judgment upon the contracts of guaranty. The bank admitted the execution and delivery of the notes and mortgage, but denied the default of payment. This defense was, however, waived on the trial. As a second defense, it denied the indorsement or transfer of the notes to the bank, or that the bank was ever the owner thereof; denied its execution of the guaranty; denied that it authorized the guaranty to be executed; and denied the payment of any money by the plaintiff, to the bank. It then alleged that Bostwick (who is shown to have been the president of the bank), without any right or authority, and solely for the accommodation of a partnership of which he (Paul) and the makers of the notes were all members, wrote the transfer and guaranty upon the notes, and thereby forged the signature of the bank. As a third defense, substantially the same allegations are repeated, and the defense of *ultra vires* set up. There was a fourth defense pleaded, but it was evidently abandoned in the district court, and has not been referred to in the argument here. The evidence on the part of the plaintiff tended to show that the notes and mortgage were made and delivered to Paul in payment for an interest in a brickyard; that Paul was then indebted to the bank in the sum of about \$7,000, \$5,000 of which seems to have grown out of the brickyard business, but constituted a debt which Paul testifies he had individually assumed. Bostwick, the president of the bank, took the notes and mortgage. Paul having indorsed the notes, sold them to the plaintiff, writing the guaranty thereon before their transmission. The payment was made by two drafts of the National Bank of Commerce of Kansas City upon the National

Bank of the Republic of New York. Each was drawn to the order of the defendant bank. Each draft bears the following indorsement: "Pay to the American Exchange Bank, New York, or order for collection, account of City National Bank, Hastings, Neb. J. M. Ferguson, Cashier." Ferguson was cashier of the defendant bank. He testifies he did not place the indorsement upon the drafts, and that he never saw them before the trial, but that it was not his duty to make such indorsements; that they were generally made by the remittance clerk. The drafts were paid, and from the proceeds Paul's debt to the bank was canceled, and the remainder passed to his credit. The method of bookkeeping pursued in order to accomplish this result is left doubtful by the evidence. But the evidence is uncontradicted that this result was reached. Subsequently, one note of the series was paid plaintiff in a draft through the City National Bank. A letter signed by Bostwick indicating that the bank paid it was excluded from evidence. The theory of the plaintiff is that the guaranty was within the scope of the bank's authority and that of the president, but, if not so, the bank, having adopted the benefit of the transaction by receiving the proceeds in satisfaction of Paul's debt, Bostwick's acts were ratified. The theory of the defendant is that the arrangement was a scheme between Bostwick, the makers, and the payee of the notes, constituting the brick company, to obtain money; that the bank never owned the notes; and that the president's act was not within the scope of his authority, but amounted to a forgery, committed by him while acting individually, and that the guaranty was, in any event, a pledge of the bank's credit, and *ultra vires*. From *Rich v. State Nat. Bank of Lincoln*, 7 Neb. 201, 29 Am. Rep. 882, we quote the following: "As a general rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of third persons having no knowledge to the contrary." "And it may also be laid down as a rule that no officer of a bank can bind it by a promise to pay a debt which the corporation does not owe, and was not liable to pay, unless the bank authorize or has ratified the act."

In *People's Bank of Belleville v. Manufacturers' Nat. Bank of Chicago*, 101 U. S. 181, 25 L. ed. 907, one Pickett made his notes for \$50,000, payable to his own order, indorsed them, and delivered them to the national bank, to be negotiated to the plaintiff. The vice-president of the national bank, with the knowledge and consent of the president and cashier, but without any authority from the board of directors, or from a majority of them as individuals, transmitted the notes to the plaintiff, with a written guaranty signed by himself. The plaintiff's account with the defendant was debited with \$50,000 on account of the notes. At the same time Pickett's papers held by the defendant was canceled to the same amount. It will be observed that in all its essential features this case was similar to the one under considera-

tion, according to plaintiff's theory of the facts. The language of *Mr. Justice Swayne* in that case is therefore entirely appropriate to this, and, so far as it concerns the law of the case, we quote it entire in lieu of an original discussion: "The National Bank Act (Rev. Stat. p. 993, § 5186) gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bill of exchange, and other evidences of debt, by receiving deposits,' etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse 'Waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence. The doctrine of *ultra vires* has no application in cases like this. *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008. All the parties engaged in the transaction, and the privies, were agents of the defendant. If there were any defects of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal words. These facts conclude the defendant from resisting the demand of the plaintiff. *Whart. Ag. § 89; Bigelow, Estoppel*, 428; *Chicago, R. I & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 892, 19 L. ed. 117; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. 426; *Baltimore & P. S. B. Co. v. McCutcheon*, 18 Pa. 18. A different result would be a reproach to our jurisprudence." The case involving to a certain extent the construction of the national banking act, the decision referred to is probably binding upon this court, but, whether it is or not, we accept it as a correct statement of the law.

The errors assigned relate to the admission and exclusion of evidence, and to the giving and refusal of instructions. Some are not assigned with sufficient definiteness to permit a review. In ruling upon the evidence, the trial court seems to have proceeded upon the theory that the plaintiff had no right to rely upon the apparent authority of Bostwick, and that it was not competent to show a ratification by subsequent acts. In instructing the jury, he placed before it only the defendant's theory of the case, and assumed that there was evidence to show that the guaranty was merely for the accommodation of the parties to the notes, and not within the line of the bank's business. The instructions

asked by plaintiff, and refused, were based upon competent testimony tending to establish his theory as we have outlined it, and were in language receiving direct support from the case of *People's Bank of Belleville v.*

Manufacturers' Nat. Bank of Chicago supra. In failing to submit the case in this aspect to the jury the court erred.

Reversed and remanded.

WYOMING SUPREME COURT.

STATE of Wyoming, *ex rel.* Harry B. HENDERSON,

Charles W. BURDICK, State Auditor.

(.....Wyo.....)

A continuing appropriation of the amount of the salary, which omission of annual appropriation will not affect, is made by a statute creating an office and fixing the salary in obedience to a constitutional mandate and requiring it to be paid by the treasurer in the same manner as other salaries of state officers are paid where the constitution provides that an officer's salary shall not be diminished during his term, although it also provides that no money shall be paid out of the treasury except on appropriations made by the legislature.

(June 1, 1898.)

PETITION for a writ of mandamus to compel defendant to draw a warrant upon the state treasurer in payment of relator's claim for salary as state examiner. *Granted.*

The facts are stated in the opinion.

Messrs. Lacey & Van Devanter for relator.

Mr. Charles N. Potter, Atty-Gen., for respondent.

Groesbeck, Ch. J., delivered the opinion of the court:

This proceeding invokes the original jurisdiction of this court, and is submitted on the petition of the relator for the writ, and the demurrer thereto. The following facts appear from the petition: The relator is the duly and regularly appointed and qualified state examiner of the state of Wyoming, and was such during the entire month of April, 1898. On the 18th day of May, 1898, he presented to the auditor of the state his bill and voucher, duly verified, against the state, for the sum of \$166.66, the amount of his salary as state examiner for the month of April last past, and demanded a warrant upon the state treasurer in payment of the same. The auditor disallowed said claim, indorsing thereon, as cause for disallowance, that there was no appropriation by the second state legislature with which to pay said salary for the said month of April, 1898. Under section 27 of the Act providing for the office of state examiner, defining his powers and duties, prescribing his bond, and

fixing his compensation, approved January 10, 1891 (Sess. Laws 1890-91, chap. 84), it is provided that the state examiner shall receive an annual salary of \$2,000, which sum shall be paid by the treasurer in the same manner as other salaries and expenses of other state officers are paid. The salaries of other state officers, except such as are specifically required by law to be paid quarterly, are allowed by the auditor and paid by the treasurer of the state monthly. It is alleged in the petition that, in and by said section 27 of the Act referred to, the sum of \$2,000 per annum is appropriated by the legislature and by law for the purpose of paying the salary of the state examiner, and so an amount of money sufficient to pay said salary due to the relator for said month of April, 1898, is in the treasury, and has been regularly appropriated by the legislature of the state, and by law, as required by the constitution of the state. The constitutional provision for this office is in the following words:

"The legislature shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of [the] state treasurer, supreme court clerks, district court clerks, and all county treasurers, and treasurers of such other public institutions as the law may require, and [he] shall perform such other duties as the legislature may prescribe. He shall report at least once a year, and oftener, if required, to such officers as are designated by the legislature. His compensation shall be fixed by law." Wyo. Const. art. 4, § 14. The act referred to, creating the office (Sess. Laws 1890-91, chap. 84), fixes the compensation in the following language: "Sec. 27. The state examiner shall receive an annual salary of two thousand dollars, and a contingent fund of not to exceed fourteen hundred dollars for the incidental expenses of his office, which same shall be paid by the treasurer of the state, in the same manner as other salaries and expenses of state officers are paid." The first state legislature made an appropriation "for state examiner from January tenth, eighteen hundred and ninety-one, four thousand dollars" (Sess. Laws 1890-91, chap. 61, § 2), the act being approved on the same day as the act fixing the compensation and duties of the state examiner. This appropriation was in the general appropriation bill for the expenses of the state government, and covered the period

NOTE.—As to necessity of specific appropriation in order to justify payment of public money, see *Henderson v. State Soldiers & Sailors Monument Comrs.* (Ind.) 13 L. R. A. 160, and *note*; *Henderson* 24 L. R. A.

v. Hovey (Kan.) 13 L. R. A. 222, and *note*; *Carr v. State* (Ind.) 11 L. R. A. 370; *State v. Hlokmann* (Mont.) 8 L. R. A. 403.

from the passage of the act until and including March 31, 1898. No appropriation was made in the appropriation act, or by any statute passed by the second legislature, for the salary or contingent expenses of the state examiner for the fiscal years and biennial term beginning March 31, 1898, and ending March 31, 1899, although appropriations were made to pay the salaries of all state officers except the veterinarian, the examiner, and the board of livestock commissioners. The claim of the relator is based wholly upon the provisions of section 27 of the Act creating the office of examiner, quoted *supra*.

The following are the provisions of the constitution relating to the payment of moneys from the treasury of the state: "Except for interest on [the] public debt, money shall be paid out of the treasury only on appropriations made by the legislature, and in no case otherwise than upon warrant drawn by the proper officer in pursuance of law." Article 3, § 85. "No money shall be paid out of the state treasury except upon appropriations by law, and on warrant drawn by the proper officer, and no bills, claims, accounts, or demands against the state, or any county or political subdivision, shall be audited, allowed, or paid, until a full itemized statement in writing, verified by affidavit, shall be filed with the officer or officers whose duty it may be to audit the same." Article 16, § 7. It will be seen that the first section quoted (art. 3, § 85) employs the words "appropriations made by the legislature," while the latter (art. 16, § 7) uses the term "appropriation by law." These terms "legislature" and "law" seem to be used as synonyms. They appear to be employed interchangeably, and are evidently so used in the section directing the creation of the office of state examiner (art. 4, § 14, *supra*), where the direction is that the "legislature" shall provide for the office; specifying, in the list of his duties, that he shall perform, such other duties as the "legislature" may prescribe, and providing that he shall examine such other public institutions as the "law" may require. His compensation shall be fixed by "law." The executive of the state is intrusted with a veto power by the constitution, which may be overridden by a vote of two thirds of the members elected to each house, and which may become an absolute veto, if the bill be not approved, in case it is presented to him within the last three days of the session, and he retains it without returning it, when he has fifteen days after the adjournment to approve or disapprove it. It certainly cannot be successfully contended that the legislature alone can enact any law without the assent of the governor, or by passing it with a two-thirds vote of the membership of each house, except where his veto becomes absolute by the failure to pass and present the bill to him in sufficient time for him to return it with his objection to the house where it originated. In other words, any appropriation, to be effective, must be a "law." Possibly, the meaning of these constitutional provisions, construed together, is that an appropriation must be made by statute, and not by the

force of any constitutional provision. It is not necessary, however, to consider this question, as the appropriation in this case, if any there be, is made by a statute, and not by reason of any provision of the constitution.

Does section 27 of chapter 84 of the Session Laws of 1890-91, which provides for the compensation of the state examiner, make a valid appropriation for his salary? There is no provision in our constitution, as there is in the constitution of some states, requiring legislative appropriations annually or biennially to make funds in the treasury available for the payment of the ordinary expenses of the government. The limitation in the Federal Constitution is that "no money shall be drawn from the treasury but in consequence of appropriations made by law." The object of this limitation, and that contained in the constitutions of the several states of similar import, is to secure to the legislative department the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty-Gen. U. S. 670. It had its origin in the British parliament, when the people of Great Britain, to provide against abuse by the king and his officers of the discretionary power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by parliament. Hallam, Const. Hist. 55. This was the fruit of the English revolution of 1688, which sent the king to Versailles, and changed the succession to the throne. This wise restraint has become a part of the fundamental law of nearly every state in the Union. It has been well said that these provisions were "obviously inserted to prevent the expenditure of the people's treasure without their consent, either as expressed by themselves in the organic law, or by their representatives in constitutional acts of legislation. To use the language of *Justices Story* (vol. 8, Com. § 1842), its purpose 'is to secure regularity, punctuality, and fidelity in the disbursements of the public money.' And, as said by *Judge Tucker* in his Commentaries, . . . all the expenses of the government being paid by the people, it is the right of the people, not only not to be taxed without their own consent, or that of their representatives freely chosen, but also to be actually consulted upon the disposal of the money.' Such a provision, says the same learned writer, 'forms a salutary check, not only upon the extravagance and profusion in which the executive department might indulge itself, and its adherents and dependents, but also against any misappropriation which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make. In those governments where the people are taxed by the executive, no such check can be interposed. The prince levies whatever sum he thinks proper, and would deem it sedition against him and his government if any account were required of him in what manner he had disposed of any part of them. Such is the difference between governments where there is responsibility and where there

is none." *Thomas v. Owens*, 4 Md. 225. This opinion, which has been much cited, then proceeds to show that the constitutional provisions in that state, that the comptroller "shall receive" an annual salary of \$2,500, was the expression of the will of the people in their written constitution, and must be obeyed, as the fiat of their supreme will. The constitution of Maryland inhibited the legislature from diminishing the salary of state officers, and on this point the court says: "Were it not for such a provision, the whole government would exist only by permission of the legislature. It can only be carried on through the instrumentality of individuals, and their services can only be obtained by being paid for. The framers of the constitution and the people who adopted it, aware of this, determined not to submit the durability of their work to the caprice, passion, or prejudice which possibly might, at times of great excitement, triumphantly rule the action of the legislature, and therefore wisely did the work themselves by ingrafting in the organic law a provision for the protection of those who should be charged with its execution; in other words, they made the appropriation."

In our state constitution, salaries provided for certain state officers, the governor, secretary of state, auditor, and treasurer, are temporarily fixed, "until otherwise provided by law," with the rule,—repeated in almost every instance where salaries are mentioned,—that such salaries shall not be increased or diminished during the period for which such officers were elected or appointed; and, in addition to this, there is the general rule prescribed that no law shall increase or diminish the salary of any public officer after his election or appointment. Article 3, § 32. This was intended to secure official independence, and to prevent the legislature from being assailed by the demands of importunate officials, to the detriment of public business. The stability and permanence of the salaries of public officials were guaranteed by the constitution, after once fixed, secure during the official term from legislative control. *Converse County Comrs. v. Burns*, 3 Wyo. 704-718. Although some courts seem to distinguish between salaries fixed by the constitution and those fixed by an un repealed statute, it seems that this is a distinction more nice than wise. In either case, the people have given their assent to the measure,—in one method by their organic law, which they have accepted, adopted, and ratified by their votes, and in the other by their representatives in the legislature. The salaries are to be fixed by law, and all such officers, whether of the state, county, city, town, or school, "shall be paid fixed and definite salaries." Wyo. Const. art. 14, § 1. The law relating to the state examiner provides that he "shall receive" an annual salary of \$2,000, and the constitution requires that his compensation shall be fixed by law, and shall be a fixed and definite salary, which shall not be increased or diminished after his election or appointment. It will be conceded that the second legislature could not have reduced his salary during his term, 24 L. R. A.

either by a direct act for that purpose or in an appropriation bill. It is equally clear that they could not take it away, directly or indirectly. An imperative direction to create the office is found in the constitution, and the same authority is bestowed in that instrument to fix the compensation. The first state legislature, in obedience to that mandate, did create the office, and fixed the compensation of the officer. This law has not been repealed. If the constitution had fixed the salary, and the time and manner of payment, there would have been no doubt, under the great weight of authority, that this would have been an appropriation made by "law," as the supreme law had so provided, and an act of the legislature, it seems, would have been unnecessary. *State v. Hickman*, 9 Mont. 870, 8 L. R. A. 408; citing, in support of this proposition, *Thomas v. Owens*, 4 Md. 189; *Green v. Purnell*, 12 Md. 333; *State v. Weston*, 4 Neb. 216. In this case (*State v. Hickman*) the Montana supreme court says upon this point: "We do not know of any rule to the contrary where the same constitutional provisions exist which are embodied in the supreme law of the state. An illustration of the principles which are applied where salaries of the officers are not prescribed by the constitution, and the case of *Thomas v. Owens*, *supra*, is not followed, may be found in *Myers v. English*, 9 Cal. 348." And, again: "We cannot add anything to the discussion of this vital proposition. The doctrines which were announced in *Thomas v. Owens*, *supra*, have been accepted for years without a question, and have remained inflexible under every test." In the California case *Myers v. English*, *supra*, the court declined to follow the ruling in *Thomas v. Owens*, but Field, J., did not concur with the other two judges in the opinion, although he did not expressly dissent. The court in the Montana case seems to think there was a difference in applying a direct constitutional provision providing for salaries of state officers and one made by a statute in force; but the California court held differently, and say: "But we think it must be conceded that the decision is a case in point, and sustains, fully, the position taken, notwithstanding this difference. The principle involved is the same." And, further: "But, with all due deference to the learned and distinguished jurists who decided the case of *Thomas v. Owens*, we are compelled to arrive at a different conclusion."

The opinions of the California supreme court have not been consistent on this subject, as appears in the note to the case of *Carr v. State*, 22 Am. St. Rep. 638, taken from 127 Ind. 204, [11 L. R. A. 370.] In the case of *People v. Brooks*, 16 Cal. 11, at page 28, the court announces this doctrine: "When the constitution, therefore, says that 'no money shall be drawn from the treasury but in consequence of appropriations made by law,' it only means that no money shall be drawn except in pursuance of law." This decision was evidently not in harmony with *Redding v. Bell*, 4 Cal. 333, and *Myers v. English*, 9 Cal. 348, and it was apparently overruled in *Stratton v. Green*, 45 Cal. 149.

where the rule announced in *Redding v. Bell*, was "preferred;" but the later cases in that state are in harmony with the cases of *People v. Brooks*; *Froll v. Dunn*, 80 Cal. 220; and *Humbert v. Dunn*, 84 Cal. 57. See *State v. Kenney*, 10 Mont. 485. In the case of *Humbert v. Dunn* the relator was a member of an examining commission on rivers and harbors, and asked for a writ of mandate commanding the comptroller of the state to draw a warrant in favor of relator for \$200 for salary as a member of said commission for the month of November, 1889, the same having been presented to the state board of examiners, and by them audited, allowed, and approved, and ordered paid out of any money in the state treasury not otherwise appropriated; the comptroller having refused to draw his warrant therefor. The court says that the usual formula, "There is hereby appropriated the sum of ——— dollars out of any moneys in the state treasury not otherwise appropriated for the payment of salaries," etc., is not found in the act, but the intention of the legislature was clearly manifested in the language used, which was that "each member ——— shall receive a salary of two thousand four hundred dollars per annum, payable monthly," and that it was to be paid out of any money in the state treasury not otherwise appropriated; and it held that there was nothing in such language indicating any intention to postpone the payment of the salaries of the commission until the next session of the legislature. In this case, as in the case of *People v. Brooks*, it was held that it is not essential to the validity of an appropriation that the usual formula, "There is hereby appropriated the sum," etc., or any of them, should be used, if the legislature fixed the amount of the claim, and designated its payment out of a certain fund. In *Campbell v. State Soldiers & Sailors Monument Comrs.*, 115 Ind. 594, an act of the state legislature appropriating \$200,000 for the erection of a soldiers' and sailors' monument, and providing a compensation for the commissioners and their secretary, was under consideration. It was held that the sum appropriated must be applied to the structural work of the monument, excluding incidental expenses and the compensation of the officers, and that these expenses and compensation could be paid under another statute, authorizing the auditor of state to draw warrants on the treasury for all moneys directed by law to be paid out of the treasury to public officers, or for any other object whatever, as the same become payable. The court says: "It is true, as claimed, that no money can be rightfully drawn from the treasury, except in pursuance of an appropriation made by law; but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific, terms. It may also be a continuing or fixed appropriation, as well as one for a temporary purpose or a limited period. The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said, generally,

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that a direction to the proper officer or officers to pay money out of the treasury on a given claim or class of claims, or for a given object, may by implication be held to be an appropriation of a sufficient amount of money to make the required payments. *Ristine v. State*, 20 Ind. 828." This case was affirmed in *Henderson v. State Soldiers & Sailors Monument Comrs.*, 129 Ind. 92, 13 L. R. A. 169.

In *State v. Weston*, 6 Neb. 16, it was held that, as the provisions of the constitution of Nebraska were that no money could be drawn from the treasury except in pursuance of a "specific" appropriation made by law, there was no such specific appropriation made by a statute which provided for the compensation of an officer, or the incidental expenses of his office, and when they were to be paid, as the manner of payment and out of what particular fund they were to be paid was not mentioned, the statute being silent in that respect. A ruling to the same effect may be found in *State v. Kenney*, 10 Mont. 485, and the syllabus to the case indicates that the constitutional limitation in Montana is about the same as that of Nebraska. The word "specific" is omitted in the provision in our constitution; but, if it were not, the reasoning in the case of *State v. Bordelon*, 6 La. Ann. 68, seems to me to be clearer. It is said in the judgment of the district court, a view which was adopted by the supreme court: "Is the appropriation specific in the intent of the constitution? It is specific in the amount to be paid,—two thousand five hundred dollars a year. It is specific in the person to whom it is to be paid,—one or the other of the named officers, as the case may be. It is specific as to the time when the money is to be paid,—in each year during two years. It is specific as to the purpose for which it shall be used,—the maintenance of the Legion, [of the Louisiana militia] and certain other volunteer companies. It is specific as to the money out of which the same shall be paid,—any moneys in the treasury not otherwise appropriated. In what other respects an appropriation could be constitutionally required to be specific has not been suggested by counsel, nor does it occur to the court. In the only sense, then, in which the words of the constitution can have any meaning, so as to distinguish a specific appropriation from any other appropriation, the present act seems to be as specific as it can possibly be made."

It was said in *Reynolds v. Taylor*, 48 Ala. 480, where the law fixing the compensation of marshal of the supreme court declared, "The annual salary of the marshal is two thousand dollars," and a general section of the code provided, in effect, that the salaries of all officers are payable monthly, notwithstanding the fact that the legislature had made an appropriation in another and later act for such officer at the rate of \$1,000 per annum, it was held, under the authority of a case decided thirty years previous, *Nichols v. Comptroller*, 4 Stew. & P. 154, that, in order to authorize the comptroller to issue his warrant on the treasury for the amount of the salary, it was not necessary that there should be a special annual appropriation by

act of the legislature, where there was a general law fixing the amount of the salary, and prescribing its payment at particular periods; and the court observed: "We are not aware that this decision has been doubted from that day to the present time." It has been no unusual thing for a legislature to adjourn without making appropriations for the salaries of state officials, or some of them, either through intention or mistake. In Colorado it was held by the attorney-general that a law fixing the salary of the adjutant general at \$1,800 per year, payable monthly, the same as a general provision as to other state officers, constituted an appropriation, within the meaning of the constitution of that state, which closely resembles in this particular our fundamental law. This opinion says that "the case of *People v. Spruance*, 8 Colo. 580, might appear, from a casual reading, to be opposed to the proposition above, but a careful reading of this decision shows that it does not apply to any case of fixed salaries, such salaries being guaranteed by the constitution." Rep. Atty-Gen. Colo. 1890-91, p. 60, followed by the next attorney-general of that state, Rep. 1891-92, p. 23. The Indiana legislature failed to make any appropriation for the fiscal year ending October 31, 1888. The attorney-general of that state held that a general act providing that the officers named therein should be entitled to receive and charge for their services as such officers the salaries, fees, and compensation allowed and set out in the act, and this and other statutes, either "expressly appropriated the sums named, or provided that the officer shall receive the sum named as his salary, thereby creating an appropriation by force of the language used," according to the rules laid down in the opinion deduced from the decisions of the courts. Rep. and Ops. Atty-Gen. Ind. 1888, p. 155. These views of the law departments of these states seem to have been accepted without question and without a struggle in the courts.

But we have a ruling in this jurisdiction, made at an early day, which is directly in point. The legislature had failed to make a direct appropriation for the transportation of criminals. The supreme court of the territory held that a general law providing that the county commissioners, when it became necessary to transport, or to transport and provide for, any idiot, lunatic, insane, blind, deaf, deaf-mute, or criminal to any eastern asylum, school, or prison, should apply to the governor for pecuniary or other aid in such case; and, if the governor approved the application, he was authorized to call upon the auditor for a warrant upon the treasurer, in favor of the board of county commissioners, sufficient for the purpose, and it should be placed in the hands of the county commissioners, who should be officially and personally responsible for the proper application of such funds, as far as they might be able, — was a sufficient authority to compel the auditor to audit the proper account for the same, and to compel the treasurer either to pay the account when audited, or to certify, that there was no funds in the treasury to pay the same.

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Donnellan v. Nicholls, 1 Wyo. 61. It was in effect held that the general statute met such emergencies as the one presented, — the failure of the legislature to appropriate money for such purposes in an appropriation bill. In the general appropriation act of the second legislature, making appropriations until March 31, 1895, which fails to provide for the salary and expenses of the veterinarian and the examiner (Sess. Laws 1893, chap. 22), section 48 provides that any and all balances remaining in the treasury on the 31st day of March, 1895, more than the outstanding obligations then contracted for, and properly payable from such appropriations, shall be converted into the general fund on that day, but excepted from the provisions of the section all balances in any special fund established by law, which are continued in their respective fund, and made available for their proper use. Section 49 of this Act repeals all inconsistent acts and parts of acts, and provides that "no money shall be paid out of the state treasury during the period covered by this act, and for the purposes hereinafter provided, in excess of the appropriations hereby made, or otherwise specially provided by law," etc. It seems, then, that the legislature intended that other appropriations theretofore made were to be paid, and other funds theretofore created were to remain intact, and subject to future disposition according to law, untrammelled by this general appropriation act. In addition to the constitutional provision, the territorial statutes continued in force after the admission of the state provide that no warrant shall be drawn by the auditor, or paid by the treasurer, unless the money has been previously appropriated by law, and, further, that in all cases where the law recognizes a claim for moneys against the territory (state), and no appropriation shall be made by law to pay the same, the auditor shall audit and adjust the same, and give the claimant a certificate of the amount thereof, under his official seal, if demanded, shall report the same to the legislature, with as little delay as possible. Wyo. Rev. Stat. §§ 1709, 1711. Another provision is that, in all cases of accounts audited and allowed against the territory (state), and in all cases of grants, salaries, pay, and expenses allowed by law, the auditor shall draw a warrant on the treasurer for the amount due, in the form set forth by the revenue department. Id. § 1708. The provision is for the issuing of the certificate of indebtedness by the auditor, where the law recognizes a claim against the state, but there is no appropriation to pay for it, or some portion of it. It seems that salaries "allowed by law" were not to be governed by this provision, but by that of another section, *supra*, where, in such case, the auditor shall draw his warrant upon the treasurer for the amount due. Under a statute in Alabama requiring the comptroller or auditor to examine and adjust the claims of all persons against the state, where provision for payment had been made by law, it was held that such a provision "manifestly refers to special claims against the state, and does not refer to the salaries of public officers, where not

only the amount, but the time of payment, is determined by the general law." *Reynolds v. Taylor*, 43 Ala. 480.

The annual salary of the examiner must be paid by the treasurer of the state in the same manner as other salaries of state officers are paid. This indicates that the salary is to be paid out of the same fund as that from which other state officers are to be paid. It has never been the legislative custom in this jurisdiction to make biennial appropriations at each regular legislative session for all purposes, or to meet all the obligations of the state, contracted or incurred by statute. The acts for the maintenance of the university and the insane asylum each require the levy of a specific tax annually for such purpose, and this has been deemed a continuing appropriation. After the taking effect of these acts providing for such specific levies, no subsequent legislature has deemed it necessary to provide for the support of these institutions by direct appropriations therefor, or by renewing the tax; and the same may be said of the tax levied annually, pursuant to law, for the incidental expenses connected with the management of the capitol building. Interest on the public debt is paid without a direct appropriation therefor. The first state legislature provided for the compensation of presidential electors in a special act regulating their duties and time and place of meeting. No specific appropriation was made otherwise than by this act, and none was necessary, as the appropriation in the act itself was sufficient, and is a perpetual one, so long as the law is in force. It is clear that the act creating the office of state examiner does, in section 27 thereof, make an appropriation at least for the salary of such officer, which is a continuing appropriation. The appropriation is exact as to the amount of money, the person to whom it is to be paid, when it is to be paid,—that is, for each year,—and that the treasurer shall pay it. The direction to the treasurer to pay the amount of the annual salary of the examiner to that officer may be held by implication to be an appropriation of a sufficient amount of money to make the required payments. *Campbell v. State Soldiers & Sailors Monument Comrs.* 115 Ind. 594. The fund set apart and allotted to this purpose is the general fund of the state provided from the general revenue. The expenses of maintaining the state government are paramount to all others, and must be set apart before other claims are paid. *Re Appropriations by General Assembly*, 13 Colo. 816. It is true that no time of payment of the salary of the examiner is provided in the act, but I do not think this is material. It has been the custom to pay state officers in this state monthly, where there is no particular time prescribed by statute when they shall be paid, or at what intervals payments may be made on account of their salaries. This was conceded on argument, and is so alleged in the petition, which must be taken as true on demurrer. It can make no difference to the state that this method is pursued, and it may be left to the auditing department to fix such a rule of monthly payments, when there is no provision of the

law to the contrary. There being no statutory or constitutional provision fixing the time of payment of certain state officers, including the examiner, the auditor and treasurer may very properly make a rule that the salaries of such officers may be paid monthly.

As has been indicated herein, the constitutional requirement that no money shall be paid from the treasury except by appropriations made by the legislature or by law means that no money shall be paid out of the treasury except in pursuance of some law. It inhibited the expenditure of public moneys at the mere caprice of those in power at their own pleasure, without authority derived from the sovereign people, as expressed by them, either in their written constitution, or by the consent of their representatives freely chosen, in their solemn enactment. The appropriation here made is by law and by the legislature, and that expressed will of the people, through their chosen representatives, stands unrepealed and unmodified. A law fixing the salary of a public officer cannot, under the constitution, be so modified or repealed as to increase or diminish his salary or emoluments after his election or appointment. In the United States it is conceded to be a fundamental axiom of government that the three great departments of government shall be kept separate, distinct, and independent of each other. As is well said by *Chancellor Kent*, at page 281 of volume 1 of his Commentaries: "It would be in vain to declare that the different departments of government should be kept separate and distinct, while the legislature possessed a discretionary control over the salaries of executive and judicial officers. This would be to disregard the voice of experience, and the operation of invariable principles of human conduct. A control over a man's living is, in most cases, a control over his actions." This power to deprive a public officer of his salary for a stated term ought not to be lodged in a single branch of the legislature, to such an extent that during a period of great political excitement, or through party rancor, or dislike of an official, by failure or refusal to make an appropriation for his salary, he might be singled out and shorn of the remuneration for his labors for a term or a portion of his term, in flagrant disregard of the constitutional provision securing him a definite and fixed salary, to be ascertained before he accepted the office. If a case arises where an officer has been derelict in his duties, or guilty of malfeasance in office, the methods prescribed by the organic or statutory law to secure his displacement or punishment should be pursued. If his salary cannot be diminished during any portion of his official term, it certainly cannot be withheld for a certain portion of his term by a failure to provide at each session of the legislature a sufficient sum to pay his salary, already fixed and appropriated by law. To hold otherwise is to say that the legislature, or one branch of it, at one session, may by nonaction suspend the operation of a public statute providing that an officer "shall receive" a certain, definite, and fixed salary, to be paid by the treasurer of the state, and

thus deprive the state of his services, and in effect abolish the office, when it is created, and the compensation of the officer fixed, under a constitutional mandate. To grant this is to make all officials mendicants upon the bounty of the legislature, whenever that body meets, and to reduce the other departments of state to a condition of vassalage to one department,—a state of affairs abhorrent to the constitution, and in palpable violation of many of its express provisions. The act before us is in effect and operation an appropriation act, and it stands unrepealed and unmodified. It provides for the compensation of a public officer, and requires the

treasurer to pay it. It does not require any other legislation, or a special appropriation at each biennial and regular session of the legislature, to keep it alive, and effective.

This proceeding was stated to be an amicable one, in order to determine the question, which the auditor did not wish to assume the responsibility of deciding. He was cited to show cause on this application why the writ should not run. The cause being submitted on demurrer to the petition, it must be overruled, and *the peremptory writ must be allowed.*

Conaway and Clark, JJ., concur.

FLORIDA SUPREME COURT.

JACKSONVILLE, TAMPA & KEY WEST R. CO., *Appt.*,

v.

Charles S. ADAMS, Admr., etc., of John S. Adams, Deceased, *et al.*

(83 Fla. 603.)

* 1. The purpose of the provision of section 29 of article 16 of the Constitution, that compensation for property, appropriated to the use of any corporation or individual shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by

* Headnotes by RANNEY, Ch. J.

law, is that there shall be the concurrent judgment of the twelve as to what is just compensation. The legislature cannot make the judgment of less than twelve competent to answer the requirement of the constitution. The words, "as shall be prescribed by law," relate to procedure, and do not authorize any change or impairment of the agency by which compensation is to be fixed.

2. The provision that a majority of the jury of twelve may determine all matters before them, to be found in the Act of June 8, 1887, amending certain sections of the Act of February 12, 1885, regulating the condemnation of lands for the use of railroads, is in conflict with section 29 of article 16 of the Constitution,

NOTE.—*Constitutionality of verdict by less than all the jurors.*

The necessity of the agreement of the entire panel of twelve jurors to render a valid verdict seems to have been one of the few legal principles which was so thoroughly settled in the early period of the formation of the English system of jurisprudence that few have been found with sufficient temerity to question it, within the period covered by the regular reports now extant.

There are a few references in books which pretend to be collections of legal principles in the early times to instances in which verdicts have been taken from a jury which was not unanimous.

An instance is cited in Fitzherbert, Abr. (Verdict, 40) where, in an action of trespass, eleven jurors agreed in finding the defendant not guilty, but the other would not agree to this, so the court received the verdict of the eleven and committed the other to prison; but Brooks' Abridgment (Jurors, 53), in citing the above comments by saying that this practice was not usual at the time of his writing. 23 Edw. III.

In 2 Hale, P. C. 297n. it is said that anciently the practice was if the twelve could not agree, to take both verdicts and have them fully recorded, and then give judgment according to the saying of the major part, citing Abbott of Kirkstede v. Edward de Eynocourt, 56 Hen. III., Rot. 20, in Dorso and Tristram v. Simenel, Pas. 14 Edw. I.

But in a case found in the book of assizes (Y. B. pt. 4), 41 Edw. III., pl. 11, it seems to be agreed that a verdict can be no verdict unless all the jurors are in accord, and although means were taken to coerce the recalcitrant juror in that case, which afterwards fell into disuse, the law seems to have been ever since settled in England that there must be an agreement of the jurors for a valid verdict.

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Viner, Abr. title Trial (Y. B. pl. 6n.) says "for a verdict of eleven without the twelfth shall not be accepted," for which it cites Brooke, Trial, pl. 65, which in turn is stated to cite 49 Assize, 1. But Viner's citation cannot be traced, so that his statement must be received for what it is worth as authority. Viner cites several methods of coercing jurors, which were practiced in early days.

In Winsor v. Reg., 6 Best & S. 170, L. R. 1 Q. B. 280, 35 L. J. M. C. 121, 12 Jur. N. S. 91, 14 L. T. N. S. 195, 14 Week. Rep. 423, the lord chief justice states that "our ancestors insisted on unanimity as the essence of the verdict."

Such seems to have been the unquestioned law at the time of the formation of the constitutions under which the governments in this country are operated, and whenever the constitution guarantees a trial by jury, or by jury as formerly practiced, it seems to have been understood that the reference was to a jury of twelve who must agree in order to render a verdict. In fact, so universal has been the understanding that but few decisions have ever been rendered upon the question.

In Campbell v. Woldredge, Ga. Dec. pt. 2, 125, it is said that each member of the jury must agree to the verdict. A verdict found by a majority is illegal.

In Work v. State, 2 Ohio St. 206, 59 Am. Dec. 671, the court enters into quite an elaborate discussion of the question, and holds that the jury must be unanimous to render a verdict, and that case is cited as late as Kent v. Perkins, 36 Ohio St. 639.

In Cruger v. Hudson River R. Co. 12 N. Y. 198, the court in passing on the regularity of the formation of a commission to assess damages to property taken by eminent domain, says: "The term 'trial by jury,' as used in the constitution, means a jury of twelve men, whose verdict must be unanimous."

in so far as the latter section ordains that the compensation for property appropriated to the use of a corporation or individual shall be ascertained by a jury of twelve men in a court of competent jurisdiction, and is void; yet such void provision does not impair the validity or efficiency of the other provisions of the Act of 1897.

3. The Act of February 12, 1885, regulating the condemnation of lands for the use of railroads, provided that compensation should be ascertained by six disinterested freeholders, registered voters of the county, they being styled "commissioners." It was composed of nine sections, and was of itself a complete statute. The Constitution of 1885 became operative January 1, 1887. Held, that the provision of this constitution that compensation for property appropriated to the use of a corporation or individual shall be ascertained by a jury of twelve men, in a court of competent jurisdiction (section 20, article 16), did not have the effect to render the Act of 1885 incapable of amendment by legislation subsequent to the taking effect of the constitution, so as to make it conform to the provisions of section 20 of article 16 of the Constitution.

4. The Act of February 12, 1885, regulating the condemnation, of lands as amended by the Statute of June 8, 1887, does not offend the clause of the constitution prohibiting special or local laws for summoning grand or petit jurors.

5. A report of a jury, under the Act of February 12, 1885, regulating the condemnation of lands, as amended by the Act of June 8, 1887, was signed by each of the twelve jurors, but contained this statement: "This report and verdict are concurred in by ten of the jurors." Held, that the report was evidence that ten jurors, and no more, concurred in the finding.

6. That an appeal lies from an order of the circuit court dismissing a proceeding under the act for the condemnation of land for railroad purposes, as amended in 1897, has been adjudicated already in this cause.

(May 1, 1894.)

APPEAL by complainant from an order of the Circuit Court for Volusia County dismissing proceedings instituted by the railroad company to condemn certain land for its right of way. *Reversed.*

On April 1, 1891, the Jacksonville, Tampa & Key West Railway Company filed a petition for the condemnation of a right of way over certain lands, stating that the company existed under the laws of the state, that the road of the company was then constructed on and across the lands in question, describing them, and that the lands were essential for the use of the corporation; that the corporation had made its survey, and maps thereof, by which its road was designated, and that it had located its road according to such survey, and had filed a certificate of such location, signed by the engineer of the corporation, in the office of the clerk of the circuit court for Volusia county; that the petitioner had acquired the right to use the land; was in possession of a portion of it, and that appellee was in possession of the balance, claiming, together with Helen Maria Adams, to own the land. The petition prayed for an order for summoning a jury to appraise and value the land and fix the amount of compensation to be paid to the owners, and for such further proceedings as were requisite to enable petitioner to hold the land for its purposes. The circuit judge made

And the principle of unanimity is also recognized in *Weeks v. Hart*, 24 Hun, 181.

In *State v. Austin*, 6 Wis. 205, the court says: "That the court should refuse to receive a verdict not fairly and unanimously agreed in."

In *Scott v. Scott*, 110 Pa. 387, it is said that less than the twelve jurors cannot render a verdict; the finding of a majority is not a verdict; yet it may be called a verdict and declared void.

In *Lawrence v. Stearns*, 11 Pick. 501, it is said that the only verdict which can be received and regarded as a complete and valid verdict of a jury upon which a judgment can be rendered is one which is assented to as the unanimous act of the jury.

The Opinion of the Justices, 41 N. H. 550, perhaps more nearly covers the exact point in question than any other. In it the court held that the legislature could not provide that a number of the petit jury, less than the whole, could render a verdict in a case where the constitution gives the right of trial by jury.

The numerous cases upon the question of the right to poll the jury recognize and grow out of this principle of unanimity, and in *Bunn v. Hoyt*, 3 Johns. 255, it is held that the jury may be sent back to agree.

When it was ascertained that two of the jurors had agreed to submit to the majority, but that the verdict found was not their verdict, the judgment entered thereon was set aside. *Adkins v. Blake*, 2 J. J. Marsh. 40.

A new trial was granted when one juror expressed his dissent at the time the verdict was opened. *Perry v. Mays*, 2 Bail. L. 354.

The question has arisen in at least two cases in territorial courts besides the case of *Hines v. 24 L. R. A.*

WHITE (Utah) post, 277, both of which are opposed to that decision.

In *Kleinschmidt v. Dunphy*, 1 Mont. 118, the court held that the trial by jury granted by the United States Constitution is a trial by a jury of twelve men, acting only in unanimity, and that a territorial act authorizing a verdict by agreement of nine was void. That case was reversed by the Supreme Court of the United States. *Dunphy v. Kleinschmidt*, 78 U. S. 11 Wall. 610, 20 L. ed. 223, but that court refused to pass upon this branch of the case. It was, however, followed on this point in *Aylesworth v. Beece*, 1 Mont. 200.

In *Bradford v. Territory*, 1 Okla. 366, it is held that a territorial legislature cannot authorize a verdict by a majority of the panel. In that case the court says that the principle that the verdict must be unanimous is so well settled at common law that they deem it unnecessary to cite authorities.

The rule requiring the unanimous agreement of the jurors has not, however, been entirely satisfactory and attempts have been made to devise means for permitting verdicts by a majority. In view of the above decisions the only one found feasible was a constitutional provision permitting it, and therefore there have been several such provisions recently inserted in state constitutions.

The new Constitution of California, 1879, provides that in civil actions three fourths of the jury may render a verdict. Majority verdicts are also permitted in Idaho, Louisiana, Nevada, South Dakota, Texas, Washington, and Montana, while in Wyoming the inviolability of the right to jury trial is guaranteed in criminal cases only. These provisions are, however, as yet mere experiments, and nothing definite can be stated as to their success.

H. P. F.

an order directing the sheriff to summon twelve disinterested freeholders, registered voters of Volusia county as a jury to meet at the courthouse at a day and hour stated to proceed under their oaths to take steps to appraise and value the land described in the petition and to fix the compensation to be awarded. The jury met and proceeded to view the land, heard the parties and appraised, ascertained and determined the value of the tract proposed to be taken, and the damage that would be sustained by the owner by reason of the taking, at \$50, and fixed the amount of compensation to be made at that amount, and stated in their report that such "report and verdict are agreed in by ten of the jurors." The report was signed by the entire twelve. Defendants filed exceptions to this report which were sustained, and the court refused to order further proceedings on the ground of the unconstitutionality of the law authorizing the same, and dismissed the case.

Further facts appear in the opinion.

Messrs. J. R. Parrott, Hamlin N. Stewart and T. M. Day, Jr., for appellants:

A statute may contain some unconstitutional provisions, "and yet the same act, having received the sanction of all the branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exceptions. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent upon others which are unconstitutional."

Cooley, Const. Lim. p. 177.

A section or a part of a section of a statute providing a method by a corporation of exercising the right of compulsory purchase of land may be unconstitutional. If, however, there are sufficient independent provisions constitutional in their character to provide a complete method of proceeding, effect will be given to such last-named portions of the act, and the condemnation authorized.

State v. Jacksonville, T. & K. W. R. Co. 20 Fla. 616.

It was the duty of the court to have referred the case to another jury to be tried under the rules and principles of law, and according to the intent of the legislature and the framers of the constitution, if any irregularity was found in the proceedings of the jury or their finding.

The provision of the statute for a majority verdict is not in conflict with the constitution.

The usual constitutional provision securing the right of trial by jury does not apply to condemnation cases.

Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Hickox v. Cleveland*, 5 Ohio, 548, 32 Am. Dec. 780; *Lewis Em. Doni*, § 811, and cases there cited; *Elliott, Roads & Streets*, 149.

The jurors are in fact twelve commissioners only, and should be regarded as commissioners by the law.

Soens v. Racine, 10 Wis. 271; *Cruger v.* 24 L. R. A.

Hudson River R. Co. 12 N. Y. 190; *Lewis, Em. Doni*, § 419.

Messrs. A. W. Cockrell & Son, for appellees:

In the absence of a confirmation of the report or verdict of the jury and the payment of the award and the entry consequent thereon of the rulings of the judge as the judgment or decree of the court, there is no basis, constitutional or statutory, upon which the supposed or actual jurisdiction of this court may be invoked by way of "appeal."

The jurisdiction, the power to hear and determine, was vested in the judge and not in the court.

Bryant v. Stearns, 16 Ala. 303.

If the verdict of the jury is not satisfactory to the corporation, it cannot become or be the basis of a judgment or decree of the court. At no stage is the proceeding as to the corporation, "in *initium*."

It is idle to contend that this statute, or the General Statutes, § 1, Acts February 10, 1832, § 1, chap. 3006, allow to the corporation an appeal from the action of the judge or jury which can never become effective, never become the judgment or decree of the court unless it is made so by the voluntary act of the corporation, clothed as to this particular proceeding with a delegated sovereignty.

Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399.

The woof and warp of the sections in terms amended by the Act of 1887 proceeded upon the theory that the property of the landowner could, as was the law under the constitution in force at the time, be divested by the act of six commissioners, had in conformity to that act, and confirmed by the circuit judge.

When, therefore, the constitution which became operative in January, 1887, in section 29, article 16, declared that the land owner could not be so divested of his property, the Act of 1885, as to these sections thus sought to be amended, was absolutely repealed.

The Act of 1887, as is shown by its title and by its terms, was merely amendatory of sections that had been theretofore repealed, sections constitutionally incapable of amendment, not the subject of amendment.

Louisville & N. R. Co. v. East St. Louis, 184 Ill. 656.

The Act of 1887, therefore, which sought to amend sections having at that time no legal existence, was absolutely void.

It was clearly the purpose of the Constitution of 1885 to enlarge the rights of the landowner in reference to his getting "full compensation," by ordaining its ascertainment, not by viewers or commissioners of appraisal, but by a "jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law."

Chicago, M. & St. P. R. Co. v. Hook, 118 Ill. 587.

The Act of 1887 then, had it not been amendatory to sections which at the time had no legal existence and therefore void, would be void, because it deprives the land owner of his constitutional right to have the question of his compensation tried by a jury.

Postal Teleg. Cable Co. v. Alabama G. S. R. Co. 92 Ala. 331; *Ex parte Reynolds*, 52 Ark. 330.

Raney, J., delivered the opinion of the court:

1. The following provisions are to be found in our constitution: The right of trial by jury shall be secured to all, and remain inviolate forever—section 3, Declaration of Rights. The number of jurors for the trial of causes in any court may be fixed by law, but shall not be less than six in any case—section 38, article 5. No private property, nor right of way, shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law—section 29, article 16. This constitution became operative on January 1, 1887; and the statute regulating the condemnation of lands for the use of railroads, which was of force at this time was that of February 12, 1885, chapter 3595 of our laws. Under it the appraisalment was to be made by "six disinterested freeholders, registered voters of the county in which the land is situated," the statute designating them as commissioners. The first legislature that assembled under the constitution referred to, enacted the Statute of June 8, 1887, chapter 3712, amending certain sections of the above Act of February 22, 1885, and providing that on the presentation of the petition the judge of the circuit court should make an order for the summoning of twelve disinterested freeholders, registered voters of the county in which the land is situated, "as a jury, to appraise and value the said land, on their oaths well and truly so to do, and to affix the amount of compensation to be made to the owner or owners of the land. It also provided that the jury should view the land described in the petition, hear the allegations of the parties, and appraise, ascertain, and determine the value of each tract or parcel of land proposed to be taken, with the value of the improvements thereon, and each separate estate therein, and the damage that will be sustained by the owner or owners by reason of the taking thereof, and they shall fix the amount of the compensation to be made to each of the owners thereof; and further: "A majority of the jury may determine all matters before them."

The Act of 1885 was composed of nine sections, and was, of itself, a complete act. The Act of 1887 is an act to amend the second, third, fourth, fifth, sixth, and seventh sections of the former statute. One of the contentions of Adams' counsel is that the Statute of 1885 was entirely repealed by the new constitution, as that statute provided for a divestiture of the owner's interest in the land by the act of six commissioners, and the constitution substituted the different agency of a jury as indicated above; and hence that the designated sections were incapable of amendment, and the Act of 1887 was absolutely void. In support of this contention such counsel cite the case of *Louisville & N. R. Co. v. East St.* 24 L. R. A.

Louis, 184 Ill. 656, where, in 1889 a statute was passed which purported to amend a specified section of an Act approved April 10, 1872, but the stated section had been amended by the enactment of a distinct and complete section in 1887; and it was held that as the Amendment of 1887 was a repeal of the original section, such section was not in existence nor the subject of amendment in 1889, and hence that the amendment of 1889 was of no effect. To avoid any erroneous inference from the statement of the doctrine of this case we should not fail to remember that in Florida the adjudicated law is that where a section of a statute is amended expressly—as by an enactment that it "shall read as follows," the amendment desired following—the amendatory section becomes for future purposes, including those of subsequent amendment or repeal, the named section of the first act. *Barnett v. Jacksonville*, 19 Fla. 664; *Saunders v. Provisional Municipality of Pensacola*, 24 Fla. 226; Const. art. 3, § 15. However, we do not think that section 29 of article 16 of the Constitution, *supra*, had the effect to strike down or abrogate entirely the Act of 1885, or those sections of it amended by the Act of 1887; on the contrary, our judgment is that the stated section of the constitution merely rendered invalid and inoperative those clauses of the act which provided for an ascertainment of the damages by commissioners, and the act, as thus affected, was amendable to make it conform to the provisions of section 29 of article 16 of the Constitution. *State v. Monmouth Pl. Road Co.* 26 N. J. L. 99; *State v. Seymour*, 35 N. J. L. 47; *Bonaparte v. Camden & A. R. Co.* 10 Baldw. 205; *McCauley v. Weller*, 13 Cal. 600; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564. We find neither authority nor good reason to the contrary of this conclusion.

The purpose of the last-mentioned provision of our constitution (section 29 of article 16), in so far as it provides that the compensation to the land owner shall be ascertained by a jury of twelve men in a court of competent jurisdiction, is that there shall be the concurrent judgment of the twelve as to what is a just compensation in any case. We appreciate the arguments to the contrary founded upon both the existence of the former system of commissioners as the proper agency for fixing the damages, and the subordination of the same to the legislative will (*Cruger v. Hudson River R. Co.* 12 N. Y. 190; *Menges v. Albany*, 56 N. Y. 878), but our judgment is that the essential guaranty of the constitution in substituting for it a jury of twelve men was to secure to the landowner the protection of the judgment of this number; and to permit the judgment of a smaller number to control is not to be reconciled to either the meaning of the language used or to the intent shown by it, and the change which has been made. If the legislature can authorize a majority of the jury to ascertain the compensation or determine the matters before them, they can give the same power to less than a majority. A concession to the legislature of power to make the judgment of less than the entire twelve competent to

answer the requirement of the constitution, is a surrender of all protection from the prescription of the stated number, and renders this feature of our organic law a useless declaration. The words "as shall be prescribed by law," at the end of the section relate to the procedure in such cases, but do not authorize any change or impairment of the agency by which the compensation is to be fixed.

In *Chicago, M. & St. P. R. Co. v. Hock*, 118 Ill. 587, where the provision of the Constitution of 1870 was: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law," and where it was held that the right to a jury might be waived, it was said that this section of the constitution "was no doubt intended as a new protection to the citizen—one not theretofore enjoyed—an additional safeguard placed in the hands of the citizen to which he might resort when a necessity seemed to exist to afford him full compensation for property" taken. To this we may add that to permit legislation doing away with the necessity for a concurrence of the twelve would, in our judgment, remove all "additional safeguard."

The provision of the Act of 1887: "A majority of the jury may determine all matters before them," at least as applied to fixing the amount of compensation to which the land owner is entitled, is void, but it is so distinct and severable from the other provisions of the statute as not to impair their validity or efficiency, or the practical operation of the statute as a means for condemning lands for the purposes contemplated and of ascertaining through the agency of a jury of twelve men in a court of competent jurisdiction, the amount of compensation to which the land owner is entitled. The decision and reasoning of this court in the cases of *Donald v. State*, 31 Fla. 255, and *English v. State*, Id. 340, are conclusive of this question. There a statute provided that every grand jury should consist of twelve persons, and the assent of eight of them be necessary to the finding of an indictment, and it was held the act was valid in so far as it provided that the jury should consist of twelve persons, although the clause requiring the assent of only eight to the finding of an indictment was declared to be unconstitutional and void.

It appears from the record before us that the report of the jury of their proceedings concerning the land in which is their verdict as to the amount or award of compensation due for the land is signed by each of the twelve persons, but it contains this statement: "This report and verdict are concurred in by ten of the jurors." We are unable

to conclude that the fact of the signing of it by the twelve can be taken, notwithstanding the above statement, as evidence that the entire twelve concurred in the finding, but our judgment is that the signing of all is their attestation of the truth of what is stated in the body of the report, and that ten, but not more, concurred in the finding. The only natural and safe conclusion is that only ten concurred in it. There is no evidence that any more did. Because of the concurrence of only ten we think the judge should have refused to confirm the report.

The contention that the legislation under discussion offends section 20 of article 3 of the Constitution is unsound. That section ordains that the legislature shall not pass special or local laws providing for summoning grand and petit juries. This jury is neither a grand nor a petit jury in the sense in which those terms are there used. Such jurors as these constitute a distinct class of themselves and the statute is applicable to all cases of the class covered by the statute, and is neither special nor local in its operation or effect within the meaning of the named section of the constitution.

The Statute of 1887, section 5, provides that should the owner or owners show, on the hearing on the report, good cause why the report should not be confirmed, the judge shall refuse to confirm the same, and he shall order and cause to be taken such further proceedings in the matter not inconsistent with the act, as in his judgment right and justice demand. The judge erred in so far as his order declared the law to be unconstitutional and refused to order further proceedings under the act. In view of the conclusion of this opinion as to the majority clause set out above there should have been further proceedings.

The proceeding is one in the circuit court, as distinguished from one before the circuit judge. They are instituted and conducted in that court, and the acts of the judge are as the judge thereof, his orders and decrees being required to be recorded in the chancery order book thereof, and such orders and decrees or judgments are appealable as any other chancery order. This has already been decided in this cause, *Jacksonville, T. & K. W. R. Co. v. Adams*, 29 Fla. 260.

In view of what has been decided in *Orange Belt R. Co. v. Oraver*, 32 Fla. 28, it is unnecessary for us to say more on the general subject of procedure in such cases.

Our conclusion is, that, *the order appealed from, in so far as it in effect dismissed the proceeding, is erroneous, and should be reversed*, and the cause remanded for further proceedings according to the law and practice in such cases.

It will be ordered accordingly.

UTAH SUPREME COURT

H. A. HESS *et al.*, *Appts.*,

v.

Margaret WHITE, Admx., etc., of George
M. White, Deceased, *Respt.*

(9 Utah, 61.)

A territorial statute providing for a verdict by three fourths of the jury in a civil case does not violate that clause of the Federal Constitution which provides for the right of trial by jury.

(June 2, 1908.)

A PPEAL by plaintiff from a judgment of the District Court for Salt Lake County, and from an order denying a motion for a new trial after a verdict in defendant's favor by ten of the jury, two members dissenting, in an action upon a guaranty to pay for goods sold and delivered to a third person. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Richard H. Cabell and Ritchie & Ritchie*, for appellants:—

Section 17 of the Organic Act and section 1891 of the Revised Statutes of the United States extend the constitution over the territory of Utah.

The words "trial by jury" as used therein mean trial by jury as it was understood at the adoption of the constitution.

Miller, Const. 492.

This amendment extends over the District of Columbia (*Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223), and the territories.

Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; *Webster v. Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761; *Hornbuckle v. Toombs*, 85 U. S. 18 Wall. 655, 21 L. ed. 967.

The words "trial by jury" in the constitution mean a jury which renders a unanimous verdict.

Kleinschmidt v. Dunphy, 1 Mont. 180; *Aylesworth v. Reece*, 1 Mont. 200; *Cruger v. Hudson River R. Co.* 12 N. Y. 198; *Cancemi v. People*, 18 N. Y. 128; *May v. Milwaukee & M. R. Co.* 8 Wis. 219; 10 Bacon, Abr. 306, 815; 9 Bacon, Abr. 564; *Corpenier v. State*, 4 How. (Miss.) 163, 84 Am. Dec. 116; *Kent v. Perkins*, 36 Ohio St. 639; *Hill v. People*, 16 Mich. 855. See also *Thompson & M. Juries*, 6; *State v. Cox*, 8 Ark. 436; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Brazier v. State*, 44 Ala. 887; *Turns v. Com.* 6 Met. 224; *Lamb v. Lane*, 4 Ohio St. 167; *People v. Kennedy*, 2 Park. Crim. Rep. 812; *Byrd v. State*, 1 How. (Miss.) 163; *Radius v. Wofford*, 4 Smedes & M. 579; *State v. McClear*, 11 Nev. 89; *Smith v. Atlantic & G. W. R. Co.* 25 Ohio St. 91; *Gibson v. State*, 16 Fla. 291; *Wynahamer v. People*, 18 N. Y. 378.

A state legislature has no power, in the absence of constitutional authority, to pass an act fixing the number of the jury at less than twelve in cases civil or criminal, nor to provide that a number of the jury, less than the whole

number, can render a verdict in any case where the constitution gives to the party a right to a trial by jury.

Opinion of the Justices, 41 N. H. 550; *Thompson & M. Juries*, 10; *Normal v. Rice*, 2 Wis. 28; *May v. Milwaukee & M. R. Co.* and *Work v. State*, *supra*; *Vaughn v. Seade*, 30 Mo. 600; *Foster v. Kirby*, 81 Mo. 496; *Allen v. State*, 51 Ga. 264; *Henning v. Hannibal & St. J. R. Co.* 35 Mo. 408; Miller, Constitution of United States, 491; *Maduska v. Thomas*, 6 Kan. 153; *Hill v. People*, 16 Mich. 851, *Com. v. Shaw* (Pa.) 7 Am. L. Reg. 289; *Allen v. State*, 54 Ind. 461; *Dixon v. Richards*, 2 How. (Miss.) 771; *Bone v. McGinley*, 7 How. (Miss.) 671; *State v. Van Matre*, 49 Mo. 268; *State v. Meyers*, 68 Mo. 266.

A trial by jury secured to the citizen by the constitution is a trial according to the course of the common law, and the same in substance as that which was in use when the constitution was framed.

Plant River S. B. Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 186, *note*; *Reece v. Knott*, 3 Utah, 454; Miller, Constitution of United States, 491; *Opinion of the Justices*, 41 N. H. 550.

Messrs. Richards, Moyle & Richards, for respondent:

The 7th Amendment to the Constitution of the United States is not restrictive upon the states or state legislation, and there is no reason why it should be held to be restrictive upon territorial legislation.

The intention was to confine the application of this amendment to common-law suits of a civil nature, in which the jury, by the rules of common law, constitutes an element of the trial.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436; *Ehlenbecker v. Plymouth County Dist. Ct.* 134 U. S. 31, 33 L. ed. 801; *Edwards v. Elliott*, 88 U. S. 21 Wall. 557, 22 L. ed. 492; *Barron v. Baltimore*, 32 U. S. 7 Pet. 243, 8 L. ed. 672; Story, Const. §§ 1763, 1778, *notes*; *Re Smith*, 10 Wend. 449; *Murphy v. People*, 2 Cow. 815; *Livingston v. New York*, 8 Wend. 102, 22 Am. Dec. 623; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 559; *Boring v. Williams*, 17 Ala. 510; *Colt v. Eves*, 13 Conn. 248; *note to New York Sup. Ct. Justices v. United States*, 76 U. S. 9 Wall. 274, 19 L. ed. 658; Hamilton, in the *Federalist*, No. 83.

Territorial courts are not courts of the United States within the meaning of the constitution; hence the amendment does apply to them.

Clinton v. Englebrecht, 80 U. S. 18 Wall. 434, 20 L. ed. 659; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Benner v. Porter*, 50 U. S. 9 How. 235, 13 L. ed. 119; *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341; *American Ins. Co. of New York v. 356 Bales of Cotton*, 26 U. S. 1 Pet. 511, 7 L. ed. 242; *Hornbuckle v. Toombs*, 85 U. S. 18 Wall. 648, 21 L. ed. 966; Story, Const. § 1826; Const. art. 3, §§ 1, 2; Utah, Organic Act, § 9.

Its whole object was to restrict the power of the federal government, in its action through the federal courts.

McElvaine v. Brush, 142 U. S. 155, 35 L. ed.

NOTE.—For authorities upon the question of the power to authorize a verdict by less than all of the jury, see *note to the preceding case of Jacksonville, T. & K. W. R. Co. v. Adams*, *ante*, 272.
24 L. R. A.

971; *Tressa v. Brush*, 142 U. S. 160, 35 L. ed. 974.

Before an act of the territorial legislature can be declared invalid, it must be shown to be in direct contravention of the act of congress.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616. See also *Bowman v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Ex parte Wall*, 107 U. S. 288, 27 L. ed. 561.

The term "due process of law," means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569.

Law in its regular course of administration through courts of justice is due process.

Leeper v. Texas, 189 U. S. 462, 35 L. ed. 235.

Per Curiam:

This was an action at law, brought by the appellants against the respondent to recover upon a written guaranty to pay for goods sold and delivered to one Frances Brown. The guaranty was executed by the respondent's intestate. The cause was tried by a jury regularly impaneled. After the jury had deliberated upon their verdict, they brought into court a verdict, signed by ten of their number, but two of the jury dissented from it, and refused to sign it. The appellants objected to the entry of judgment upon this verdict "because the verdict was rendered in a manner not authorized or warranted by the constitution and laws of the United States applicable to the territory of Utah, but contrary thereto, in that said verdict was not a unanimous verdict, but was agreed to by ten of said jurors only, and is therefore illegal, and of no effect." Judgment was entered upon the verdict, whereupon a motion for a new trial was made, and as ground therefor the same objection was urged. The motion for a new trial was overruled, and appeal taken to this court.

The sole question argued upon appeal is whether a verdict rendered by ten out of the twelve jurors is legal under the constitution and laws of the United States and under the laws of the territory of Utah. The clause of the constitution relied upon is the seventh article of amendments thereto: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The laws of the United States applicable are cited as follows: Section 17 of the Organic Act, which provides "that the Constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah, so far as the same, or any provision thereof, may be applicable." This section was approved September 9, 1850. Also section 1891 of the Revised Statutes of the United States, which enacts: "The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere in the United States." Also there was

an act in force April 7, 1874, which provided (18 Stat. at L. 27) "that it shall not be necessary in any of the courts of the several territories of the United States to exercise separately the common-law and chancery jurisdiction vested in said courts; and that the several codes and rules of practice adopted in said territories, respectively, in so far as they authorize a mingling of said jurisdictions, or a uniform course of proceeding in all cases, whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby, validated and confirmed: Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." At the time this last statute was passed there was a law of the territory of Montana which authorized the rendition of a verdict upon the concurrence of three fourths of a jury. This law had been enacted in January, 1869. The law of the territory of Utah was passed under the grant of legislative power in the Organic Act, section 6 of which provides "that the legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act," and that "all the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null, and of no effect." In pursuance of this grant of legislative power, section 493 of the Code of Civil Procedure, which is section 3371 of 2 Comp. Laws 1888, p. 286, in force August 1, 1884, provided: "When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but, if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must be sent out again." This statute had superseded section 174 of an Act approved February 17, 1870, Comp Laws 1876, p. 447, which provided: "When the verdict is given, which must be by unanimous agreement, except by the consent of the parties, it shall be read aloud," etc. In 1892 the legislature amended section 3371, *supra*, to read as follows: "In all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury. When the jury have agreed upon their verdict, they must be conducted into court by their foreman. The verdict must be in writing, and signed by their foreman, if he is a concurring juror, and if he is not a concurring juror it must be signed by all the concurring members, and be read by the clerk to the jury, and the inquiry made whether it is their verdict, and the answer may be made by any juror

signing the verdict. If more than three jurors dissent, they must be sent out again, but, if not more than three jurors dissent, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. Either party may require the jury to be polled, which shall be done by the judge or clerk asking each juror if it is his verdict. If more than three answer in the negative, the jury must be sent out again." Utah Laws 1892, p. 46. It will be seen that until 1892 the statutes of the territory by express enactment required the verdict of the jury to be unanimous. The original Act of 1870 permitted this unanimity to be waived by the consent of the parties, but the Act of 1884 was silent upon such waiver.

It is apparent that the sole question here is whether the provision for a verdict by three-fourths of the jury in a civil case was a rightful subject of legislation consistent with the Constitution of the United States, providing that the right of trial by jury shall be preserved. In other words, do the words "trial by jury," as used in the seventh amendment of the constitution, mean a jury which renders a verdict by the unanimous action of its twelve members? It may be remarked that unanimity of action was not considered a constituent part of trial by jury by the framers of the California Constitution of 1879, which provided in section 7, article 1: "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three fourths of the jury may render a verdict." This is not preserving the right of trial by jury inviolate if a trial by jury in a civil action requires unanimous action by the members of the jury. At the time the amendments to the constitution were proposed in the house of representatives by Mr. Madison, the original proposition applied to trial of crime the express qualification of unanimity for conviction, but did not apply the same to suits at common law. At that period unanimity of action on the part of the jury was not required in Scotland, and such a requisite had been strongly attacked in England by John Locke and Jeremy Bentham. Originally, unanimity of action had not been required, even by the common law of England. One of the qualifications of jurors at the time of the adoption of the constitution was that they should be freeholders, yet this qualification has not been considered as a part of the trial by jury; but, if the words "trial by jury," as used in the seventh amendment, means a jury trial with all its accustomed requisites, it is difficult to see how the qualification as to freeholders could be changed. Upon this question the Supreme Court of the United States has, so far as we have been referred, never passed. That court expressly declined to pass on the question in *Dunphy v. Kleinsmith*, 78 U. S. 11 Wall. 610, 20 L. ed. 223, where this precise question was involved in an appeal from the territory of Montana. We are aware that there are decisions in large number which affirm that a jury must consist of twelve, and a very few that the action of the jury must be unanimous in civil cases. But we think the reasoning of the Supreme Court of the United States in the case of *Hurtado v. People*, 110

U. S. 516, 28 L. ed. 232, upon the phrase "due process of law," is equally applicable to the case at bar. Mr. Justice Matthews said in that case: "The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail the ideas and processes of civil justice are also not unknown. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mould and shape it into new and not less useful forms." And again: "Restraints that could be fastened upon executive authority with precision and detail might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while, in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and methods of attainment. Such regulations, to adopt a sentence of Burke's 'may alter the mode and application, but have no power over the substance of original justice.' This reasoning, we believe, is decisive of the case. "Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society." *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559. One of the signs of progress is the provision for a verdict by three fourths of a jury in a civil cause. Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive in civil trials at common law and under our constitution this unanimity of verdict. If they could waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions.

For these reasons, because society progresses and modes and legal procedure must change with that progress, because this enactment is

a "just and reasonable expression of the public will," because it is calculated to be a great benefit to all classes of litigants, because it reaches justly and fairly and impartially all classes of men, because it is claimed only to be an infringement of a broad and general statement in the constitution which ought not to be so narrowly construed as to be a bulwark

against progress, we hold that this law was a rightful subject of legislation, and *this judgment should be affirmed.*

Zane, Ch. J., and Miner, Barch, and Smith, JJ., concur.

Rehearing denied.

NORTH CAROLINA SUPREME COURT.

Lawrence WARD and Wife, *Appts.*,

v.
I. A. SUGG *et al.*

(113 N. C. 489.)

A note given solely for usury is void even in the hands of a bona fide holder under a statute which provides that taking "usury" shall be deemed a forfeiture of the entire interest, but which does not avoid the debt as to the principal.

(December 19, 1903.)

APPPEAL by plaintiffs from a judgment of the Superior Court for Pitt County in favor of defendants in an action brought to cancel a note and to enjoin a sale of land under a mortgage which had been given to secure its payment. *Reversed.*

The facts are stated in the opinions.

Mr. James E. Moore for appellants.

Mr. T. J. Jarvis for appellees.

Clark, J., delivered the opinion of the court:

The jury found that the \$400 note in suit was wholly given for a usurious charge for the use of money, and that the present holder acquired it before maturity, for value and without notice. The question whether it is valid in his hands is not an open one in this state. Such note is held to be void, into whatever hands it may pass. *Ruffin v. Armatrong*, 9 N. C. 411, 11 Am. Dec. 774; *Collier v. Nevill*, 14 N. C. 80. Such was also the law in England until the law was in some respects modified by the Act of 58 Geo. III., and is the law in New York and other states, except where modified by statute. Randolph, Com. Paper, § 525; 8 Parsons, Cont. 5th ed. 117; *Powell v. Waters*, 8 Cow. 669; *Wilkie v. Roosevelt*, 3 Johns. Cas. 206, 2 Am. Dec. 149; *Solomons v. Jones*, 8 Brev. 54, 5 Am. Dec. 538; *Oneida Bank v. Ontario Bank*, 21 N. Y. 495, cited by Smith, Ch. J., in *Rountree v. Brinson*, 98 N. C. 107; *Callanan v. Shaw*, 24 Iowa, 441.

When the statute makes a note void, it is void into whosesoever hands it may come, but, when the statute merely declares it illegal, the note is good in the hands of an innocent holder. *Glenn v. Farmers Bank of North Carolina*, 70 N. C. 191, 206. Hence, it was argued strenu-

ously that the authorities above cited were good under our former statute, which made the contract void, but that the present statute merely makes the contract illegal. It does not so seem to us. The former statute (Rev. Code, chap. 114; Rev. Stat. chap. 117) denounced the contract as void as to the whole debt,—principal and interest. The present statute (Code, § 3886) makes it void, not as to principal, but as to the interest only. It provides that "the taking, receiving, reserving or charging a rate of interest greater than is allowed . . . shall be deemed a forfeiture of the entire interest . . . which has been agreed to be paid," with a further provision that, if such interest has been paid, double the amount can be recovered back by the debtor. The only difference between the two acts is that formerly the whole note was forfeited and of no avail, and now only the stipulation as to the interest is *ipso facto* deemed forfeited and void. But the point has already been adjudicated by this court. In two cases this court, and by most eminent judges, has expressly held that the words "deemed a forfeiture," in the Act of 1876-77 (now Code, § 3886), make void the agreement as to interest. If any attention is to be paid to the doctrine of *stare decisis*, the precedents in our own court do not leave this open to debate. In *First Nat. Bank of Charlotte v. Lindeberger*, 88 N. C. 454 (on page 458), Ashe, J., quotes this section in full, and says: "The purpose and effect of this statute were not only to make void all agreements for usurious interest, but to give a right of action to recover back double the amount after it has been paid." Dillard, J., in *Moore v. Woodward*, 83 N. C. 581 (on page 585), says: "They [the notes there sued on] are both wholly for illegal interest, if the allegations of the answer be true, and, if so, then the sentence of the law is that they are void;" and further says: "The device of taking a distinct bond and mortgage for the interest does not take the case out of the operation of the statute." The opinions of such judges upon a court constituted as the bench then was are surely entitled to be considered the law in this state until changed by legislation. And in *Glenn v. Farmers Bank of North Carolina*, 70 N. C. 191 (bottom of page 205), Rodman, J., says that "it is admitted law" that "notes vitiated by a usurious or gaming consideration cannot be enforced in the most innocent hands, but are always, and under all circumstances, void." Our own decisions upon our own statute should govern, even though a court of another jurisdiction, upon a somewhat similar statute, had ruled differently. But in fact the case relied on to

NOTE.—The above case is noticeable as one in which a note is held wholly void even in the hands of a bona fide purchaser because given wholly for usury where a statute forfeits the interest but not the principal for usury.

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that effect (*Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580), merely holds that the contract, being not void *in toto*, but only as to the interest "being legal in part and vicious in part, the former will support a contract of indorsement." But here the note is solely for usury, and, being wholly vicious, this authority is against its validity in the hands of the assignee. In 1 Daniel on Negotiable Instruments, § 198, it is stated that where the statute provides that when, "In an action brought on a contract for payment of money, it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest so taken, it was held to apply to the innocent indorsee of a note, who received it in due course of trade; and, as a general rule, all contracts founded on considerations which embrace an act which the law prohibits under a penalty are void;" citing *Kendall v. Robertson*, 13 Cush. 156; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671. In *Kendall v. Robertson*, the Massachusetts law had undergone a change similar to ours, and Shaw, Ch. J., says: "The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee. The natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the legislature to extend such partial forfeiture in like manner, and attach it, as before, to the note, although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same,—to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequence to the contract itself, whenever set up as a proof of a debt." And at the last term of this court (*Moore v. Beaman*, 119 N. C. 558), it is said: "The contract, usury being pleaded, is simply a loan of money which in law bore no interest." The note for the usurious interest being in the hands of an assignee, he, and not the maker, must suffer. The law regards the maker, not as *in pari delicto* with the payee, but as the victim of an oppression which the law has denounced and prohibits under penalty. *Merchants Bank of Fayetteville v. Lutterloh*, 81 N. C. 142. If, by passing the note off before maturity and for value, the indorsee may recover on it, the statute is useless, as the protection intended, and the penalty and prohibition, are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law, which had declared the "entire interest forfeited" *ab initio*, by the fact of "charging or reserving" it. On the other hand, the innocent indorsee has his recourse upon the payee who has indorsed the note to him (1 Dan. Neg. Inst. § 807); a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. At any rate, the fact that the indorsee's sole remedy as to the interest is against the payee and indorser, not against the maker, will cause such lenders to be more chary of shouldering off upon innocent parties the collection of their usurious contracts.

The only case in our Reports that seems to mitigate against the otherwise uniform tenor of our decisions on this subject is *Coor v.*

Spicer, 65 N. C. 401, which held that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the statute. Rev. Code, chap. 50, § 5 (now Code, § 1549). Aside from the fact that this is held expressly otherwise in the later case of *Moore v. Woodward*, 83 N. C. 531, an examination of § 1549 will show that *Coor v. Spicer* was a palpable inadvertence. The statute cited (Code, § 1549) in fact does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property at sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice, usually, to the assignee of the note. There is a broad distinction, which runs through all the cases everywhere, between contracts upon an illegal consideration, as to which, the parties being *in pari delicto*, the courts will aid neither party, but will protect the note in the hands of a holder for value without notice, and a contract which, in whole or in part, is declared void or forfeited in its inception, which can acquire no validity by being passed on to other hands. *Henderson v. Shannon*, 1 Dev. L. 147; *Glenn v. Farmers Bank of North Carolina*, *supra*. As to usurious contracts, the law regards the maker, not as *in pari delicto*, but as acting "in chains" (1 Story, Eq. Jur. § 802); and to permit his contract which is deemed exacted under duress to come under the general rule in favor of innocent holders for value of commercial paper would be to nullify the protecting statute. The recourse of the holder is against the payee and indorser, who is more likely, by far, to be able to respond than the maker. The statute makes the "taking, receiving, reserving or charging usury when knowingly done," *i. e.* intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, "or which has been agreed to be paid thereon." The note in this case falls exactly within the evil denounced in the last clause. It is a written promise to pay the usury reserved or charged on the note, and such charging or reserving is *ipso facto* a forfeiture, which attaches either by the taking, receiving, reserving, or charging, as the lawmakers evidently intended to prevent and head off all casuistry, for which this class of law breakers have in all times been specially noted, and to carry out the legislative intent of bona fide protecting the public, not nominally, but in fact, from evasions of this law. But if, in truth, the forfeiture was limited to the "knowingly receiving," the holder of this note certainly knows now, and doubtless did before suit brought, that this note was given for usury "agreed to be paid," and his receiving it would *eo instanti* work a forfeiture. Besides, if the maker should have voluntarily paid this note, the receiver of such payment knowing it was for usury, the statute gives the person "by whom it was paid, or his legal representative," an action to recover back twice the amount. *Out-*

done, then, shall the debtor be compelled by law to pay the usurious note, when instantly he can recover back double the sum of the party to whom he pays it, as a punishment for knowingly receiving it? Such multiplicity of actions was not tolerated under the old practice, and certainly will not be under the present simpler and more practical system of procedure. *Merchants Bank of Fayetteville v. Lutterloh*, 81 N. C. 142, was decided under the Act of 1866, and, to cure the defect in that act, the wording of the present statute is made explicit, and gives the action to recover back. Under the Act of 1866 there was no forfeiture, as now, but simply interest could not be collected. While the "charging, reserving," etc., is now a forfeiture of the contract as to all interest *ab initio*, the recovery of double the sum paid is necessarily from the party to whom it is paid, for the language is "may recover back" double the sum paid, which can only be from the party receiving the money. With the policy of the lawmaking power the courts have nothing to do, further than as it may throw light upon the meaning of the statute by considering the evil to be remedied. That is thus considered by Taylor, *Ch. J.*, in *Ruffin v. Armstrong*, 9 N. C. 411, 416, 11 Am. Dec. 774: "It is not less important now than it was then to restrain the power of amassing wealth without industry, and to prevent those who possess money from sitting idle and fattening on the toil of others; it is not less important to prevent those who desire profit from their money without hazard from receiving larger gain than those who employ it in undertakings attended with risk, calculated to encourage industry, and to multiply the sources of public prosperity; nor is it less important to facilitate the means of procuring money on reasonable terms, and thereby to render the lending of it more extensively beneficial." In a matter so capable of oppression as the lending of money, the legislature has deemed it wise to regulate the limit of what is a reasonable exaction for its use, since all interest is the creation of statute. *Moore v. Beaman*, *supra*. As to lenders upon a lawful rate of interest, the legislature has looked upon them with a favorable eye, and of late years has raised the limit from 6 to 8 per cent. But there is nothing in the action of the legislature, nor in the circumstances of the day, which indicates that this is a propitious time to relax the restrictions placed heretofore upon the illegal exactions to those who would use their money contrary to law, and yet call upon the law to aid them, directly or indirectly, to secure their unlawful gains.

Error.

Burwell, J., dissenting:

I cannot agree to the conclusion of the court, and deem it proper to give the grounds of my dissent. By the terms of the statute which was in force in this state before the Act of 1866, all contracts founded upon a usurious consideration were declared to be void, and, according to all the authorities, promissory notes thus expressly avoided are void in the hands of indorsees for value without notice. By the Act of 1866 the legal rate was fixed at 6 per cent, with a proviso allowing 8 per cent

to be charged for money loaned, if the contract was in writing, and signed by the party to be charged; and it was therein enacted that, if a greater than the legal rate was charged, the interest should not be recoverable. This law, as was said by Justice Dillard in *Merchants Bank of Fayetteville v. Lutterloh*, 81 N. C. 144, introduced a new theory. It was an expression of the popular will. It did not declare the contract void in whole or in part. It did declare that the contract, so far as it related to interest, was not enforceable in the courts,—that it could not be collected by law,—and in effect it enacted that so much of the contract as concerned the rate of interest was void, the word "void" being used here as it is in *Moore v. Woodward*, 83 N. C. 581. Speaking accurately, the contract for interest in excess of the legal rate was made by that act, not void, but illegal. This act remained in force until 1875, when the legislature adopted a law which distinctly declared "void" all contracts, both as to principal and interest, if a greater than the legal rate was charged. When this statute went into effect, what are called "usurious contracts," and all notes, bonds, etc., founded on such contracts, were not only illegal, but void. At January term, 1874, of this court, the case of *Glenn v. Farmers Bank of North Carolina* was decided, 70 N. C. 191, and Justice Rodman said, in his opinion filed in that cause: "If the statute declares a security void, it is void in whosoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such a holder. The case of *Hay v. Ayling*, 16 Q. B. 428, is a notable illustration of the difference. Gaming securities were declared void by 9 Anne, chap. 14, § 1, and it was held that they were void in the hands of a bona fide, innocent indorsee. The Act of 5 & 6 Wm. IV., chap. 41, § 1, modified the act of Anne, and declared they should be illegal. The court held that after that act they could be recovered on by an innocent holder." It is to be presumed that the Act of 1874-75, enacted, as it was, one year after that announcement of the rule of law, was framed by men acquainted with that decision, and that it was then provided that all usurious contracts should be void in order that they might be invalid in whosoever hands they might come. In 1876-77 another change was made in the law, and the statute then enacted is in force at this time. That act nowhere, in *totidem verbis*, declares void a contract for interest in excess of the legal rate. It is to be presumed that this enactment was also framed in distinct recognition of the rule laid down by the learned justice in *Glenn v. Farmers Bank of North Carolina*, *supra*, and I think much significance is to be attached to the fact that, with this rule thus brought to its attention, the legislature repealed a law which declared all such contracts void, and adopted one which omitted to so declare them. And here it may be well to note the often inaccurate, or rather misleading, use of the word "void," in statutes and reports. Parker, *Ch. J.*, in *Somes v. Brewer*, 2 Pick. 184, 18 Am. Dec. 406, says,

of the words, "void and voidable," that they "have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them;" and then he adds that, for the purposes of the case he was considering, "the term 'void' will be used to express that which is in its very creation wholly without effect,—an absolute nullity." In *Baucom v. Smith*, 66 N. C. 588, Pearson, *Ch. J.*, said of the bond there in suit that it "was void in the hands of the obligee for the illegality of consideration;" and then he adds: "Had the bond been assigned before it was due, the assignee for valuable consideration, and without notice, could have maintained an action to enforce payment. This is settled. *Henderson v. Shannon*, 12 N. C. 147." Numerous instances of the use of the word "void" could easily be cited from our Reports. Justice Reade makes similar use of the word in *Coor v. Spicer*, 65 N. C. 401. What he there says may well be quoted here: "Except as otherwise provided by statute, a negotiable instrument, void as between the original parties by reason of any illegality in the consideration, was nevertheless good in the hands of an indorsee for value and without notice."

If it be said that the effect of the provision of the Act of 1876-77 is to make void all contracts entered into contrary to its provisions, it is to be replied that, in the interest of commerce and trade, bona fide purchasers of commercial paper are favorites of the modern law of every enlightened nation, and, at this day at least, it is not allowable to destroy, by an inference, negotiable instruments in the hands of such purchasers. The rule is, as I understand, that if the maker of a negotiable note contests the right of one who has acquired it by indorsement for value before maturity and without notice of any defense, to recover of him the amount of the note, he must be able to show a statute that in *totidem verbis* declares the note to be void, or one that makes the contract illegal, and, expressly or by necessary implication, declares that this illegality shall avoid the contract and all securities given in fulfillment of such illegal contract into whosoever hands they may come, and thus render them unenforceable in the courts. Story, *Prom. Notes*, § 192; *Converse v. Foster*, 32 Vt. 828. In sections 807 and 808 of Daniel on Negotiable Instruments, it is said that, "in many localities, negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations,—that is, void between the parties, but valid in the hands of a bona fide holder;" and that "where the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving bona fide ownership for value; . . . and in all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover." The reason of this rule is well stated in *Pickaway County Bank v. Prather*, 19 Ohio St. 497, as follows: "The cardinal principle of the commercial law which protects commercial paper regular upon its face, and negotiated before its maturity, cannot be otherwise vindicated; and this is of 24 L. R. A.

much more importance than that one who has received the benefits of the paper should be compelled to perform an engagement which he voluntarily made." In *Converse v. Foster*, *supra*, the rule, as I conceive it to be, is thus expressed by Poland, *J.*: "The English statutes against usury and gaming not only impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds, and other securities given for such illegal considerations, shall be utterly void. All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff, or some other party between him and the defendant, took the bill or note bona fide, and gave a valuable consideration for it; but, unless it has been so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a bona fide holder for value, without notice of the illegality." A recognition of the principle thus well expressed may be seen, I think, in the chapters of the Revised Code that relate to usury and gaming, and in the Act of 1874-75, above referred to. In *Moore v. Woodward*, *supra*, the learned justice who delivered the opinion says: "Under our present statute, while the contract is valid as to the principal, a stipulation for usurious interest, secured by a separate bond and mortgage therefor, ought, as between the parties at least, on plea of the illegality, to bar the direct collection of the same by an action therefor." In a former part of the opinion he had remarked that, under the provision of the Revised Code, a usurious contract was void, "in whosoever hands it might come." His subsequent statement, quoted above, seems to indicate that he thought that contracts made in contravention of the provision of the present law, which he was discussing, were illegal, and were void as between the parties, but, being only illegal, were not void in whosoever hands they might come; evidently having in mind the rule laid down by Justice Rodman in *Glenn v. Farmers Bank of North Carolina*, *supra*. The Act of 1876-77 (Code, § 3836), which we are construing, is in all essential particulars copied from the National Banking Act, Rev. Stat. § 5198. The words are almost identical. The forfeitures and penalties are the same. The Supreme Court of the United States has held, in *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580, that that act "does not declare the contract, under which the usurious interest is paid, to be void;" and it is to be noted that this language is used by that court in drawing a contrast between the act it was construing and the law of Maryland, which did declare all usurious contracts void, and therefore not enforceable, even in the hands of bona fide indorsees. We therefore have an adjudication of the point under discussion from the highest court. In conclusion, our statute does not expressly make void notes given for a usurious consideration. It is not a necessary inference from its provisions that the legisla-

ture intended they should be so. I think, therefore, that, though the note here in suit is founded upon an illegal consideration, it is re-

coverable in the hands of a bona fide holder for value and without notice.

TEXAS SUPREME COURT.

INTERNATIONAL BUILDING & LOAN ASSO.

v.

William S. HARDY

(.....Tex.....)

Constitutional provisions against impairing the obligations of contracts and taking away vested rights prevent the application to the remedy for the enforcement of a trust deed which is provided in the contract, of the rule which permits the legislature to change at any time the ordinary remedies prescribed by law.

(April 19, 1894.)

QUESTION CERTIFIED by the Court of Civil Appeals for the Fourth Supreme Judicial District for the opinion of the Supreme Court arising on an appeal by plaintiff from a judgment of the District Court for Bexar County in favor of defendant in an action to try title to real estate claimed by plaintiff under a sale in accordance with a certain deed of trust. *Question answered in plaintiff's favor.*

The facts sufficiently appear in the opinion.

Mr. B. L. Aycock for appellant.

Mr. 8878. C. A. Keller and Leo Tarleton for appellee.

Stanton, Ch. J., delivered the opinion of the court:

The question certified and accompanying statement are: "Plaintiff claims title to land in Bexar county under a deed of trust executed by appellee and wife on April 18, 1885; the sale by the trustee having taken place on October 9, 1890, in Bexar county, appellant being the purchaser. The trustee's deed was objected to when offered in evidence on one ground only, viz.: 'Because there was no evidence that advertisement was made by posting notice of the time and place of sale, as in sheriffs' sales, in three public places in the county, one of which being the court-house door,—which objection was sustained.' Question: "Did the Act of March 21, 1889, entitled 'An Act to prescribe the Place and Time of Sale of All Real Estate thereafter to be Sold under Power Conferred by Any Deed of Trust or Other Lien,' have the effect of requiring compliance with its provisions in cases of sales thereafter made under a power, where the contract conferring the power had been executed prior to said act, and provided differently in respect to the sale?" The act referred to requires such

sales "to be made in the county in which such real estate is situated, notice shall be given as now required in judicial sales, and such sales shall be made at public vendue between the hours of 10 o'clock A. M., and 4 o'clock P. M., of the first Tuesday in any month." The purpose of that act evidently was to make the law regulating time and place of sale under execution or other judicial process applicable to sales under powers conferred in mortgages, and to require notice of such sales to be given in the mode and for the period prescribed for notice of sales under judicial process. The law in force when the contract was made, as at the time when the sale under the trust deed was made, required that "the time and place of making sale of real estate, in execution, shall be publicly advertised by the officer for at least twenty days successively next before the day of sale, by posting up written or printed notice thereof, at three public places in the county, one of which shall be at the door of the court-house of the county." Sayles' Civ. Stat. art. 2309. The statute, however, gave a defendant the right, upon written request, to have notice of sale given by publication in some newspaper if there was one published in the county, provided this could be had for the compensation fixed by the statute; and such publication was required for three consecutive weeks. Id. 2309a. The Act of March 21, 1889, in terms applies to "all sales of real estate which may hereafter be made in this state under powers conferred by any deed of trust or other contract lien," and there can be no reasonable doubt of the intent of the legislature to make it apply to sales under contracts made before its passage, as well as to those afterwards made; and the question arises whether such legislation is violative of any part of the Constitution of the United States or of this state. If not, effect must be given to it in all cases coming within its terms.

The Constitution of the United States and the constitution of this state deny to the legislature of this state power to enact any law impairing the obligation of contract, and the latter withholds power to enact retroactive laws. The purpose of the parties in making the mortgage contract and in giving power to sell the mortgaged property, in accordance with the terms of the instrument, were twofold. The leading purpose of that contract was to give lien on the property described in it to secure debt due or to become due from one party to the other; and, if the contract had gone no further than to secure this right,

NOTE.—For remedies as part of the obligation of a contract, see *Phinney v. Phinney* (Me.) 4 L. R. A. 818, and *note*; *Best v. Baumgardner* (Pa.) 1 L. R. A. 386, and *note*; also *Hanes v. Wade* (Mich.) 2 L. R. A. 498; *People v. O'Brien* (N. Y.) 2 L. R. A. 258; 24 L. R. A.

Wimberley v. Mayberry (Ala.) 14 L. R. A. 305; *Robertson v. Vancleave* (Ind.) 15 L. R. A. 68; *Hull v. State* (Fla.) 16 L. R. A. 308; *Willis v. St. Paul Sanitation Co.* (Minn.) 16 L. R. A. 231.

See also 46 L. R. A. 860.

there is no doubt that it would have been within the power of the legislature to change the remedy then existing for the enforcement of such a right through the courts in any respect that did not essentially affect the right secured. Notice for a longer period before sale or notice to be given in some manner other than that prescribed by law in force when the contract was made might have been required, or the time and place of sale might have been changed, without violating the right of either party under the contract; for the parties contract with reference to the enforcement of rights through the courts, if this becomes necessary, and they must be understood to contract in view of the fact that the state has power to establish courts, to fix their jurisdiction and also to regulate procedure, and that this cannot be controlled by contracts persons may make. The contract, however, had in view, and by its terms gave and was intended to give to the creditor, a remedy through which it might enforce its right against the mortgaged property without resort to the ordinary remedies given by law, and it will be assumed that the contract which gave that remedy was valid when made. The constitutional provisions which forbid legislation, the effect of which would be to impair the obligation of contracts affecting property or pecuniary rights, are broad, and embrace every such contract, and, in the case stated, the question arises: Is a contract securing to a creditor right to a specific remedy, whereby he may enforce a pecuniary obligation without resort to the courts of the country, subject to such modification and changes as may lawfully be made in the ordinary remedies prescribed by law? We are of opinion that this should be answered in the negative; for, as before said, the contract in the one case secures the right of the parties as to the subject-matter of contract, but looks for remedy to laws existing, or to such laws as may be subsequently enacted,—in fact contract with reference to the known power of the lawmaking department to make such changes in remedial laws as may be deemed beneficial, provided they be not such as impair the obligation of contract,—while, in the other, the very purpose of so much of the contract as secures a remedy the law does not give is to secure the specific remedy contracted for. In one case the specific remedy is the subject of contract, and parties, one or both, thus secure it because deemed more advantageous in enforcement of right than the remedies provided by law; while, in the other, the thing or right secured by contract is that which gives right to some remedy for enforcement of contractual obligation. By reason of the right the remedy operates upon persons or things, and, in the absence of contract for remedy, in such cases, parties subject themselves and property to such remedies as exist at the time the contract is made, and to such as subsequently may lawfully be given by law. That persons may contract for a remedy, lawful in itself but not given by law for enforcement of a right, will not be questioned; but such a contract will not prevent resort to any remedy given by law. If, however, a party desires to resort to a remedy

existing only by contract, he must take it in accordance with the agreement that gives it; for the legislature has no power by subsequent law to change the contract. The existence of such a power would be, in effect, to make a contract for parties which the legislature has no power to do. While this is true, there is no doubt that parties may contract with reference to an existing law affecting the remedy; but, if the contract relates only to process and the manner of its execution, and not to something on which the process is to act, or like substantial thing, then the contract ought not to be held to affect the power of the legislature to change the remedy. It has been held that a change in the law, in such cases, if given effect, would not necessarily impair the obligation of contract. A statute in New York authorized sales of mortgaged property under a power conferred by the mortgage, upon notice being given for twenty-four weeks; and, while that law was in force, a mortgage was executed which authorized a sale under a power "according to law," but, before the sale, the law was so changed as to authorize such sales to be made on notice given only for twelve weeks. A sale made under the last law was held to be valid, on the ground that the words "according to law" meant in compliance with the law in force when the sale became necessary. *James v. Stull*, 9 Barb. 482. It was, however, held that the sale was valid if such was not the true construction of the contract, on the ground that the legislature had power to change the remedy, and that such a change as was made did not impair the obligation of the contract. In support of the last proposition, quoting from *Bronson v. Kinzie*, 42 U. S. 1 How. 811, 11 L. ed. 143, it was said: "If the laws of the state had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future." Under the construction given to the contract, the decision may not be subject to objection; for it seems reasonable, when parties do not expressly fix the terms on which such powers may be exercised, but agree that the act to be done in the future may be done according to the law governing that subject, that they consent to be governed by the law in force when, under the terms of the contract, it may become necessary to examine the power. They contract with knowledge that the legislature may change the remedy and ought not to be presumed to have intended, in case of such change, that the contract should become inoperative. It seems to us that the decision in *Bronson v. Kinzie*, does not give support to the ruling it was cited to sustain. In that case it appears that a mortgagor executed a mortgage which authorized the mortgagee to take possession of and sell the mortgaged property, and title to convey to the purchaser on default of payment of principal or interest, but instead of pursuing that remedy, as he might lawfully have done, he brought a suit to foreclose. It was contended that, under a law passed subsequently to the

execution of the mortgage, the property could not be sold unless it brought two thirds of its appraised value, and that it should be sold subject to the mortgagor's right to redeem within twelve months. The law in force when the mortgage was executed, as well as the contract, gave right to make sale absolute, and without reference to appraisal. The court simply held that to give effect to the subsequent law would impair the obligation of the contract.

The case of *Conkey v. Hart*, 14 N. Y. 23, is frequently cited as authority for the proposition that the legislature may pass laws which will annul right to remedy given by express contract. In that case Wardell had given a chattel mortgage which provided that he should remain in possession of the mortgaged property, "unless he or some other person or persons shall attempt to sell, secrete, remove, or otherwise dispose of the said chattels in any way whatever; then, or in such case, it shall and may be lawful for the parties of the second part, their heirs, etc., to take immediate possession of said chattels and keep the same until default be made as aforesaid, and then to sell and dispose thereof. Subsequently Wardell leased land from Simpson, and the contract provided that if Wardell shall fail to pay said rent or any part thereof, when it becomes due, it is agreed that the said party of the first part may distrain or sue for the same, and re-enter said premises, or resort to any other legal remedy; and, in case of distress for nonpayment under this lease, the said party of the second part hereby consents and agrees that any property upon said premises, not excepting such articles as are by law exempt from distress, may be taken to satisfy the rent in arrear." Wardell having failed to pay rent due, Simpson sued out a distress warrant, under which he caused the mortgaged property to be seized by the sheriff, whereupon the mortgagor brought replevin against him. After the mortgage and lease were executed, a law was passed which abolished distress for rent, and the contract for remedy by distress was relied upon to defeat the action of replevin. While recognizing the fact that the waiver of exemption was the substantial matter the parties had in view in making the contract, the court held that the subsequent law took away the remedy by distress which the lessee contracted might be used. The lease contract gave right to no remedy which would not have existed without it, and it may be true that it might properly have been held that the parties only intended that all such remedies as were lawful at the time of default might be used. The remedy contracted for was not one that could exist by contract. It could only exist by reason of a law, and it is clear that no person, by contract or otherwise, can prevent the lawmaking power from repealing the law which permits the use of given process, while it would not have power to deny remedy for the full enforcement of obligation imposed by contract. It is obviously true that such remedies as rest on contract alone must be exercised as provided by the contract, or not at all; and it is equally clear that the legislature has no

power to change such a contract, and, in its changed condition, to make it obligatory on either party, simply because it has no power to make contracts for parties. In a case in which a trustee in a mortgage, which gave power to sell the mortgaged property in name on terms prescribed by the instrument, was sought to be enjoined by the debtor on account of legislation subsequent to the contract, it was aptly said: "The deed established all the agencies for the execution of the trust. Unlike a mortgage, it contemplated no day in court for foreclosure or redemption, nor sale under the direction and terms of the court, and by its officers. But its design was to avoid the processes of the law, and to confide to impartial agents summary means of realizing the objects of the trust. Had the parties by the nature of their agreement, as in case of mortgage, been thrown upon the courts for redress, they might have been amenable to the control which the legislature possesses over judicial remedies. . . . Shall it be said that a sale is a remedy that may be likened to legal process, and, as such liable to be changed and modified by the legislature? If so, there is at least this material difference; that is a remedy of the parties' own appointment, and the very essence of his contract. It cannot be segregated from it, and treated as an extrinsic remedy within the pale of legislative jurisdiction. . . . To admit a subsequent act of the legislature thus to modify and essentially vary the written stipulations of the parties would concede to the legislature a power to make a new contract, and destroy the old altogether; a power not assumed by the letter of the act itself, for it only professes to operate on general remedies." *Taylor v. Stearns*, 18 Gratt. 244.

The rule is well stated by the supreme court of Pennsylvania. "But a statute strictly remedial may impair the obligation of a contract, and, when this happens, the act is unconstitutional. *Bronson v. Kinzie*, 42 U. S. 1 How. 322, 11 L. ed. 147. This always happens where the parties make legal remedies a subject of their contract and subsequent legislation conflicts with what they have expressed in their agreement. If they do not prescribe the rule of remedy in their contract, the lawmaking power is free; but, if they do, they become a law to themselves, and the legislature must let them alone. Stay laws, exemption laws, and limitation laws are ordinarily constitutional, although applied to existing and prior contracts, but the cases in which such laws have been sustained have been cases in which the parties have not contracted about the subject-matter to which the laws were applicable. . . . If the thing provided for by the legislature be within their general competence, and yet be the very thing expressly excluded by a particular contract, it is plain that, as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract." *Billmeyer v. Evans*, 40 Pa. 327. To the same effect are the following decisions: *Breitenbach v. Bush*, 44 Pa. 318, 84 Am. Dec. 442; *Lewis v. Lewis*, 47 Pa. 127; *Pool v. Young*, 7 T. B.

Mon. 588; *Boice v. Boice*, 27 Minn. 378; *O'Brien v. Krenz*, 36 Minn. 188. It appears that, under the contract, notice of sale was required to be given by advertisement in a daily paper of the city for ten days prior to sale day, and, in entering into that contract, the parties must be supposed to have determined for themselves that such notice would be more beneficial to them than notice given in some other manner. They were equally interested in that matter, and it is certainly true that power had not been given, to make the sale under any other mode of advertisement. What notice of the sale should be given was matter of contract. Had the legislature jurisdiction to declare that the power to sell should exist, and might be exercised, if notice of sale was given in some other manner than that prescribed by the contract? While the legislature has power to prescribe what powers shall be used for enforcement of rights through the courts, and what notice of judicial sales shall be given, it certainly has no power to confer on any private person power to sell the property of another at such time and place and on such notice as it may prescribe, without regard to or in violation of any contract parties may have made. If the law requiring notice to be given as in sales under execution is to operate on contracts made before its enactment, this necessarily annuls the power based solely on contract; for neither of the parties agreed that the power might be exercised at

all unless notice was given as the contract required. The contract, only permitting the power to be exercised on terms prescribed, impliedly forbade the trustee to sell unless notice was given as it required; and, if the subsequent law is to have effect, the power to sell under its terms is a power existing only by force of the law, for the parties did not confer it. The necessary effect of the law, when the period for advertisement prescribed by the law differed from that required by contract, would be to extend or shorten the period after default within which a sale could be made; and, by reason of the fact that the statute prescribes a day in each month on which such sales shall be made, this period may be extended for a longer time than the difference in time of advertisement prescribed by contract and the law. When parties, looking to all the facts bearing on their respective interests, make a contract whereby specific remedy, not given by law, is secured for enforcement of right, courts ought not to inquire as to the extent of injury which may result if a law subsequently enacted, and affecting the remedy, be given effect; for such legislation impairs the obligation of contract, takes away vested rights, and is therefore prohibited by the constitution.

The Act of March 21, 1889, cannot be given effect as to contracts executed before it was operative, in cases in which the remedy therein prescribed differs from the remedy prescribed by contract.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Walter H. WATSON

v.

Inhabitants of NEEDHAM.

(.....Mass.....)

1. A contract to supply water for a boiler to make steam to heat a greenhouse is one which a municipal corporation may legally make, where it has a municipal water supply.
2. For lack of due diligence to furnish a supply of water according to contract for steam heating in a greenhouse, a municipal corporation may be liable for the damages.
3. The full amount of damage to growing lettuce in a greenhouse, which is frozen by reason of the failure to supply water necessary for steam heating, is the measure of damages for such failure.

(May 12, 1894.)

REPORT by the Superior Court for Norfolk County for the opinion of the Supreme Judicial Court of an action brought to recover damages to a growing crop situated in a greenhouse by reason of defendant's breach of contract to supply plaintiff with water for the

boilers which generated steam to heat the greenhouse. *Judgment for plaintiff.*

The court below found that the plaintiff was entitled to recover the full amount of damage to the crop, and on that finding reported the case for the consideration of the supreme judicial court.

Further facts appear in the opinion.

Mr. Thomas H. Wakefield, for plaintiff:

The liability of a municipal corporation for the acts of its officers performed in building or maintaining sewers, waterworks, gasworks, etc., where such municipality accepts the authority granted and voluntarily acts as an agency to carry on an enterprise to some extent commercial and for profit, for the purpose of furnishing benefits to such as choose to pay for them, and where the element of consideration comes in, has been long recognized.

Oliver v. Worcester, 103 Mass. 489, 8 Am. Rep. 485; *Emery v. Lovell*, 104 Mass. 18; *Hill v. Boston*, 122 Mass. 844, 28 Am. Rep. 832; *Murphy v. Lovell*, 124 Mass. 564; *Hand v. Brookline*, 126 Mass. 324; *Neff v. Wellesey*, 2 L. R. A. 500, 148 Mass. 487.

Where the duty is voluntarily created by the act of the party such party is bound to perform it. The defendant town should have protected itself by express limitations in its contract, if it did not intend to assume all liabilities of furnishing water to the plaintiff under all contingencies consistent with its duty to the public, except those specifically reserved in reference

NOTE.—On the subject of liability for damages caused by lack of water under contract for its supply, see *Howsmon v. Trenton Water Co.* (Mo.) 28 L. R. A. 144, and note, 24 L. R. A.

to its right to exercise by its voluntary and affirmative act of option in cutting off the water at any time when deemed expedient.

2 Chitty, Cont. 11th ed. p. 107, and notes; *Mill Dam Foundry Proprs. v. Hovey*, 21 Pick. 417; *Lord v. Wheeler*, 1 Gray, 282; *Randall v. Bancroft*, 10 Allen, 348.

If this failure is assumed to have been the result of an accident, still due care is required to avoid liability.

Sweetland v. Boston & A. R. Corp. 102 Mass. 282.

If the defendant town had the right to cease furnishing water to the plaintiff at the end of any six months' term for which he had paid for it in advance, yet throughout such term for which he had paid in advance the contract and duty of the defendant under the statute and regulations or ordinances adopted was to furnish him with water for the uses applied for (which application had been accepted), not simply when it had the water, but at all times during such term, so far as such duty and the duty said town owed the public did not conflict.

Young v. Boston, 104 Mass. 95; *Merrimack River Sav. Bank v. Lowell*, 10 L. R. A. 122, 152 Mass. 556.

Within reasonable limits, and so far as would not be inconsistent with the performance by the municipality of its general public duty, cities and towns, under statutes similar to the one involved in this case, may make contracts with individuals to supply them with water for a price to be paid, and when such price is paid in advance such municipality is bound to furnish such individuals with water in the manner contemplated.

Merrimack River Sav. Bank v. Lowell, *supra*; *Mt. Hope Cemetery Proprs. v. Boston*, 158 Mass. 518.

The measure of damages is such loss as might reasonably be anticipated according to common experience and the usual course of events.

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; *Derry v. Rittner*, 118 Mass. 181; *Stock v. Boston*, 149 Mass. 410.

Messrs. Henry E. Fales and Stephen H. Tyng for defendant.

Knowlton, J., delivered the opinion of the court:

The defendant town, acting through its water commissioners, undertook to furnish the plaintiff with water, for use in a boiler, to make steam to heat his greenhouse. It is objected that this is a use for which the town had no constitutional authority to take and furnish water, and that the contract was therefore void. It is true that the right of eminent domain cannot be exercised to take property for a private use, and persons or corporations owning rights in streams or ponds cannot be deprived of their use of the water by an attempt to take it for the use of another, merely for purposes of private gain; but it has long been settled that ponds and streams may constitutionally be taken, in the exercise of the right of eminent domain, for the purpose of supplying the inhabitants of cities and towns with pure water for domestic and other similar purposes. *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487. It may be a matter of some difficulty to determine precisely what uses are included within the public purposes for which water lawfully may be taken. In regard to uses strictly domestic, there can be no doubt. We are of opinion that other uses are included, such as are fairly incidental to the ordinary modes of living in cities and large towns, and as involve the operation of motors requiring but a small quantity of water, which may reasonably be supplied from an aqueduct of such capacity as would be needed to meet the ordinary requirements of the inhabitants for domestic and other similar purposes. We are of opinion that the use in the present case was one for which the town might legally furnish water.

The terms of the contract were not expressed in full, but were left in part to implication. In construing the contract, we must consider the situation of the parties, and their relation to the subject with which they were dealing. The town was acting in the performance of a public duty, in supplying water for public use, and incidentally was making contracts with individuals, adapted to the circumstances of each particular case. It would not be expected to guarantee a supply of water against all contingencies, but only to guarantee proper effort to insure a constant supply. In the regulations, which were made part of the contract, the right to shut off the water in all cases when it becomes necessary to make extensions or repairs, and whenever the commissioners deem it expedient, was expressly reserved. Subject only to that reserved right, the town was bound to use reasonable care and diligence to have ready for delivery a sufficient supply of water for the plaintiff's use, so long as the contract remained in force. *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556, 10 L. R. A. 122.

There was evidence from which the court was warranted in finding a breach of this contract. The damage to the plaintiff did not result from the exercise of the reserved right to shut off the water. It was caused by a leak which remained undiscovered until after the standpipe had been emptied, and there was no longer any pressure in the service pipes. The testimony of the expert, and the other facts of the case, warranted the inference that due diligence was not used to discover such leaks quickly, and to shut off the flow of water to the place of the leak, and to start pumping engines, so as to prevent the standpipes from being emptied. It was not contended that the plaintiff was in fault, nor that the town should be relieved from liability on the ground that it was not accountable for the neglect of the water commissioners. *Hand v. Brookline*, 126 Mass. 824; *Neff v. Wellesley*, 148 Mass. 487, 3 L. R. A. 500.

The ruling in regard to the amount of damages recoverable was correct. *Stock v. Boston*, 149 Mass. 410.

Judgment on the finding.

SOUTH CAROLINA SUPREME COURT.

CONE EXPORT & COMMISSION CO.,

Appt.,

v.

J. T. POOLE, Resp't.

(..... S. C.)

1. A corporation has, under the law of comity, the legal capacity to sue in

states other than that from which its charter was obtained.

2. Failure of the complaint of a foreign corporation to show charter power to contract and sue is not ground for demurrer under a statute allowing a demurrer only when it appears from the face of the complaint that plaintiff has not legal capacity to sue.

3. Failure to allege capacity to sue

NOTE.—Recognition or exclusion of foreign corporations.

By a long series of decisions it has been fully established that, through an exercise of comity, foreign corporations will be recognized and allowed to enforce their rights in a state, except so far as state statutes, or clear public policy of the state, prohibit it.

So if a statute restricting the rights of foreign corporations is declared unconstitutional, until a new statute on the subject is passed, a foreign corporation can enter into any business in a state for which corporations could be created in that state, since, in the absence of statutory restrictions, comity places the foreign corporation on the same footing with the domestic corporation. *Lytle v. Custard*, 4 Tex. Civ. App. 490.

In *Re Prime's Estate*, 18 L. R. A. 713, 136 N. Y. 347, it is declared that a state statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state, and over which it has the power of visitation and control.

The question how far statutes as to corporations will be held to apply to foreign corporations will not here be treated except so far as it touches the right of a foreign corporation to do business.

As to any monopoly or special privileges it is clear that legislative authority is confined to its own state; therefore, the legislature of one state cannot authorize a corporation to build a bridge across a river forming a state boundary and give authority to demand tolls for crossing the end of the bridge which is in another state. *Middle Bridge Corp. v. Marks*, 26 Me. 326.

For the same reason also, since a foreign corporation can do business in a state only by comity, it cannot obtain an injunction from a federal court against the formation of a domestic corporation bearing the same name. *Lehigh Valley Coal Co. v. Hamblen*, 28 Fed. Rep. 225.

In *Gill v. Kentucky & C. Gold and Silver Min. Co.* 7 Bush, 635, it was said that whether a foreign corporation could exercise any power in a state depends upon the law of that state, but the question did not really arise in the case.

A congressional corporation of the District of Columbia, was held entitled to do business in Tennessee. *Hadley v. Freedman's Sav. & T. Co.* 2 Tenn. Ch. 122.

Right to sue.

The recognition of a foreign corporation to the extent of allowing it to become a plaintiff in a suit is an exercise of comity that has been universal, except when expressly prohibited.

Henriques v. Dutch West India Co. 2 Ld. Raym. 1532; 1 Strange, 612; *National Bank of St. Charles v. De Bernaltes*, 1 Car. & P. 569; *Tombigbee R. Co. v. Kneeland*, 45 U. S. 4 How. 16, 11 L. ed. 835; *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 105; *Lucas v. Bank of Georgia*, 2 Stew. (Ala.) 147; *Importing & Exporting Co. of Georgia v. Locke*, 50 Ala. 332; *Bank of Washtenaw v. Montgomery*, 3 Ill. 427; *Guano Iron Co. v. Dawson*, 4 Blackf. 302; 24 L. R. A.

Williamson v. Smoot, 7 Mart. (La.) 31, 12 Am. Dec. 494; *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 114, 38 Am. Dec. 481; *Frazier v. Wilcox*, 4 Rob. (La.) 517; *Life Association of America v. Levy*, 83 La. Ann. 1203; *Savage Mfg. Co. v. Armstrong*, 17 Me. 84, 35 Am. Dec. 227; *British American Land Co. v. Ames*, 6 Met. 391; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Bank of Edwardsville v. Simpson*, 1 Mo. 184; *Direct United States Cable Co. v. Dominion Teleg. Co.* 84 N. Y. 153; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Diamond Match Co. v. Roerber*, 106 N. Y. 473, 60 Am. Rep. 464; *Mutual Ben. L. Ins. Co. v. Davis*, 12 N. Y. 599; *Bank of Commerce v. Rutland & W. R. Co.* 10 How. Pr. 1; *Marine & F. Ins. Bank of Georgia v. Jauncey*, 1 Barb. 486; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 1 L. ed. 871; *Williams v. Bank of Michigan*, 7 Wend. 533, affirming *Bank of Michigan v. Williams*, 5 Wend. 460; *New Jersey Protection & Lombard Bank v. Thorp*, 6 Cow. 46; *Leasure v. Union Mut. L. Ins. Co.* 91 Pa. 491; *Stewart v. United States Ins. Co.* 9 Watts, 123; *Looming F. Ins. Co. v. Wright*, 55 Vt. 526; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387; *Commercial Ins. Co. of Cincinnati v. The "C. D. Jr."* 1 Woods, C. C. 72.

The institution and prosecution of a suit does not constitute doing business within the meaning of constitutional and statutory provisions against doing business in a state without compliance with certain requirements. *St. Louis, A. & T. L. Co. v. Philadelphia Fire Assn.* 55 Ark. 163; *White River Lumber Co. v. Southwestern Imp. Assn.* 55 Ark. 625; *Ginn v. New England Mortg. Security Co.* 92 Ala. 135; *Nelms v. Edinburg American Land Mortg. Co.* 92 Ala. 137; *McCall v. American Freehold Land Mortg. Co.* (Ala.) April 5, 1893; *Cook v. Rome Brick Co.* 98 Ala. 409; *Boulden v. Estey Organ Co.* 92 Ala. 182; *Christian v. American Freehold Land Mortg. Co.* Id. 130; *American Buttonhole & Overseaming Sewing Mach. Co. v. Moore*, 2 Dak. 280; *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. 17; *Orange Nat. Bank v. Traver*, 7 Sawy. 120; *Fuller & J. Mfg. Co. v. Foster* (Dak.) Oct. 4, 1886; *Probst v. Presbyterian Church Trustees in U. S. A.* 3 N. M. 237; *Texas Land & Mortg. Co. v. Worsham*, 76 Tex. 556; *Utley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369.

The absence of the certificate, which the foreign corporation is required to have by N. Y. Laws 1892, chap. 687, § 15, in order to maintain an action on a contract, will not prevent the corporation from maintaining an action of replevin, as that is purely *ex delicto*. *American Typefounders Co. v. Conner*, 6 Misc. 391.

To the same effect it is held in *Smith v. Little*, 87 Ind. 549, that the right of a foreign corporation to bring a replevin suit is not precluded by its failure to comply with statutory conditions of doing business in the state.

So on the ground that the transaction was void, where a foreign corporation had made a conditional sale of the piano, it was allowed to maintain an action of replevin for its recovery. *Boulden v. Estey Organ Co.* *supra*.

does not render a complaint demurrable as not stating a cause of action.

4. **A complaint for the recovery of money** alleging that plaintiff sold and delivered certain goods to defendant at prices named which were reasonably worth the amount charged therefor, and that defendant promised to pay that amount a certain number of days after the sale and delivery, but that such time had elapsed and no payment has been made and the amount is still due,—states a cause of action.

(August 15, 1894.)

The failure of a foreign corporation to file articles of incorporation, for which it is denied by statute the right to make a defense in relation to its property, rents, issues, or profits does not prevent it from defending a suit to recover money for work and labor done at its request. *Weeks v. Garibaldi South Gold Min. Co.* 78 Cal. 599.

An action by a foreign corporation to recover a tax paid under protest cannot be defeated on the ground that the corporation has not complied with the statute so as to be authorized to transact business in the state. *Powder River Cattle Co. v. Custer County*, 9 Mont. 145.

Even if the failure of a foreign corporation to obtain a permit prevents it from doing business it does not exclude it from asserting rights under a contract which was lawful when made. *Middlebrook v. David Bradley Mfg. Co.* (Tex. Civ. App.) June 21, 1894.

Failure to comply with the provisions of the Massachusetts Act of 1884, chap. 330, requiring a foreign corporation to appoint the commissioner of corporations its attorney for service of process against it, and to file a copy of its charter before beginning business in the state, but expressly declaring that such failure shall not affect the validity of any contract of the corporation, will not prevent the corporation from maintaining a suit within the state. *C. B. Rogers & Co. Corp. v. Simmons*, 155 Mass. 259.

A statute prohibiting any corporation or person to maintain any action in any court of the state until after filing certain statements of capital, assets, and liabilities does not affect the right of a foreign banking company to bring a suit in the circuit court of the United States sitting in that state. *Bank of British North America v. Barling*, 44 Fed. Rep. 641; *Haley Livestock Co. v. Routt County* (C. C. D. Colo.) 2 Denver Legal Laws, 275.

So, a foreign insurance company may sue to collect a premium for insurance on property in the state, although it has not complied with the state statutes so as to be entitled to do business in the state, where the contract for insurance was made in another state in which it was valid. *Connecticut River Mut. F. Ins. Co. v. Way*, 63 N. H. 622.

A foreign corporation is not debarred from suit because it was incorporated for the illegal purpose of blockade running, if the transaction involved in the suit was legal. *Importing & Exporting Co. of Georgia v. Locke*, 50 Ala. 332.

A foreign corporation is also within the provisions of a statute allowing suit by a corporation after dissolution. *Stetson v. New Orleans City Bank*, 3 Ohio St. 174.

And a foreign bank may sue under a statute as to joint actions by banks on negotiable paper. *Lewis v. Bank of Kentucky*, 12 Ohio, 132, 40 Am. Dec. 469.

An action for a libel may be maintained in Illinois by a foreign corporation. *Jewelers Mercantile Agency v. Douglass*, 85 Ill. App. 627. A query was made as to this in *Hahnemannian L. Ins. Co. v. Beebe*, 48 Ill. 85, 95 Am. Dec. 519.

A foreign corporation lawfully appointed and

A PPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Lawrence County sustaining a demurrer to the complaint in an action brought to recover upon an account for goods sold and delivered. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Johnson & Richey*, for appellant:

The complaint is its own justification. It alleges the making of the contract, the full performance thereof by the plaintiff, and the breach by the defendant.

exercising the duties of administrator in the state of its creation may bring suit as such administrator for a debt due the decedent in another state. *Deringer v. Deringer*, 5 Houst. (Del.) 418.

The filing of its articles by a foreign corporation and the appointment of an agent before the commencement of a suit to foreclose a mechanic's lien although after the filing of the lien notice, is sufficient under Hill's Code, Wash. §§ 1525 and 1526, for the purpose of such suit. *Hutting Bros. Mfg. Co. v. Denny Hotel Co. of Seattle*, 6 Wash. 123.

Right of contract.

By the comity of nations, foreign corporations may make contracts and transact business not contrary to the laws of the place. *Bard v. Poole*, 12 N. Y. 495; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129; *Kerchner v. Gettys*, 18 S. C. 521; *Ohio L. Ins. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742; *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465; *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 114, 38 Am. Dec. 481; *Frazier v. Wilcox*, 4 Rob. (La.) 517; *Wood Hydraulic Hose Min. Co. v. King*, 45 Ga. 34; *Saltmarsh v. Spaulding*, 147 Mass. 224.

The presumption is in favor of the power of a foreign corporation to exercise the powers conferred by its charter. *Alward v. Holmes*, 10 Abb. N. C. 98.

A foreign corporation may make a note, unless prohibited by its charter or the laws of the place. *New York Floating Derrick Co. v. New Jersey Oil Co.* 3 Duer, 648.

Notes and mortgages may be taken by a foreign corporation, unless prohibited. *Williams v. Creswell*, 51 Miss. 817.

As to the power of a corporation to take mortgages on real estate, see note to *Lancaster v. Amsterdam Imp. Co.* (N. Y.) post, 322.

A note given to a foreign corporation carrying on the business of banking within the state was held a valid contract in *Tombigbee R. Co. v. Kneeland*, 45 U. S. 4 How. 16, 11 L. ed. 355.

The validity of negotiable paper purchased or discounted by the agent of a foreign banking company was declared in *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274, in the absence of any legislation restricting the business of such foreign corporation. The court said that when called upon to declare contracts thus made to be void, upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct to justify the court in sustaining the defense.

A railroad corporation which has obtained and exercised the right to extend its road into a state other than that of its incorporation must be deemed, as to contracts in the latter state, to possess the powers and be subject to liabilities of similar corporations created by that state. *Milnor v. New York & N. H. R. Co.* 53 N. Y. 383.

In the case of *Henriques v. Dutch West India Co.* 2 Ld. Raym. 1522, 1 Strange, 612, the right of a foreign corporation to take a recognizance was sustained.

Pom. Rem. & Rem. Rights, 453.

The plaintiff's primary right is to receive the price of his goods, which were sold and delivered to the defendant; the defendant's primary duty is to pay for the goods as he promised to do; the delict or wrong is defendant's refusal to pay for the goods, which constitutes a breach of such primary right and duty.

Mr. W. H. Martin, for respondent:

Does the complaint show legal capacity in plaintiff to sue? This could only appear by

express authority in its charter, or by necessary implication from the nature of the business it had authority to engage in. The complaint is silent as to both, and in the absence of these affirmative facts appearing on the face of the complaint, the demurrer was properly sustained.

Head v. Providence Ins. Co. 6 U. S. 2 Cranch, 127, 2 L. ed. 229; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 636, 4 L. ed. 659.

The complaint does not show that plaintiff

For validity of contracts by foreign corporations which have not complied with statutory requirements, see *note* to *Edison General Electric Co. v. Canadian Pacific Nav. Co.*, *post*, 315.

Ownership of property.

A foreign corporation may take a bequest of personal property. *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 227; *Brown v. Thompkins*, 49 Md. 423.

Even when domestic corporations are not allowed to do because the trust involved is prohibited by the statutes of that state. *Presbyterian Church Trustees in United States v. Guthrie*, 6 L. R. A. 821, 86 Va. 125; *Vansant v. Roberts*, 3 Md. 119.

Bequests to foreign corporations are upheld in *Hollis v. Drew Theological Seminary*, 95 N. Y. 166, and *Chamberlain v. Chamberlain*, 43 N. Y. 424, in which a will required a conversion of the estate both real and personal and a payment of legacies from the proceeds.

As to devise to and ownership of land by foreign corporations, see *note* to *Lancaster v. Amsterdam Imp. Co.* (N. Y.) *post*, 322.

Power to act as trustee, administrator, etc.

The capacity of a foreign corporation, which was a trust company, to act as committee of the estate of an habitual drunkard, under an appointment in the state of its creation, and to become and be made a party to a bill of interpleader respecting the estate, is sustained in *Glaser v. Priest*, 29 Mo. App. 1.

The power of a foreign corporation to act as a trustee was denied in *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 236, although it was entitled so to act in its own state on the ground that it could not hold real estate for that purpose in Illinois, but the law of that state is changed since by statute, July 1, 1879. *Pennsylvania Co. for Insurance on Lives v. Bauerle*, 143 Ill. 459.

And in *Deringer v. Deringer*, 5 Houst. (Del.) 416, suit by a foreign corporation as administrator was allowed.

Limitations by charter or statute of state where incorporated.

The general doctrine is that the charter limitations on the powers of a corporation follow it into every state in which it may do business. *Bank of Edwardsville v. Simpson*, 1 Mo. 184; *Ohio L. Ins. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742; *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 129.

But this doctrine that charter prohibitions are extraterritorial will not apply to defeat the title of a bona fide holder of railroad bonds issued by a foreign corporation by reason of the violation of the charter of the company in selling the bonds for less than the amount limited by the charter. *Ellsworth v. St. Louis, A. & T. H. R. Co.* 98 N. Y. 553.

And a general statute prohibiting banking does not affect the right of a corporation of that state to do banking business in another state. *Ohio L. Ins. & T. Co. v. Merchants Ins. & T. Co.* *supra*.

A statutory restriction on the amount of gifts to 94 L. R. A.

corporations by will does not apply to wills made in another state making gifts to corporations of the former state. *American Bible Soc. v. Healy*, 10 L. R. A. 766, 153 Mass. 197.

But it does apply to a gift by a resident to a foreign corporation. *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

In one case the statutory restriction on gifts by will made within one month of testator's death was held to limit the right of corporations of that state to take by will in another state. *Kerr v. Dougherty*, 79 N. Y. 327.

This seems to disagree with the doctrine that statutes of wills have no extraterritorial effect upon the capacity of corporations to take. See on this point more at large in the *note* to *Lancaster v. Amsterdam Imp. Co.* (N. Y.) *post*, —, on the subject of the power of foreign corporations to take title to land.

Good faith of foreign incorporation.

A foreign corporation which is not allowed to do any business in the state which grants the charter, but is created with power to engage in business only in other states will not be recognized in another state, but will be regarded as a fraud. *Land Grant R. & Trust Co. v. Coffey County Comrs.* 6 Kan. 245.

A corporation organized under the laws of Colorado, with a stated capital of \$1,000,000 when subscriptions had been secured only to the amount of \$42,000, in order to evade the restrictions of the laws of Missouri, where the incorporators resided, which required all the stock to be subscribed and at least 50 per cent paid up before organization, is a fraud on the laws of both states, which will not protect the corporators from liability as partners, where the business of the company was to conduct an exposition or mammoth fair at St. Joseph, Mo. *Cleaton v. Emery*, 49 Mo. App. 245.

A company incorporated in New Jersey for the purpose of carrying on the business of quarrying in New Jersey was refused recognition as a corporation by the New Jersey court and the members regarded as partners, on the ground that their incorporation was a fraud on the law of New York. *Hill v. Beach*, 12 N. J. Eq. 81.

This is a leading case on this side of the question, but can hardly be reconciled with the generally established doctrine of comity in recognizing foreign corporations unless something more is shown than the mere fact of incorporation in one state to do business in another.

The same court in *Central R. Co. of New Jersey v. Pennsylvania R. Co.*, 51 N. J. Eq. 475, declared that nonresidents might be incorporators in New Jersey under the statute which said that a majority of the directors must be residents.

In *Montgomery v. Forbes*, 143 Mass. 249, a person was liable as an individual for business in the name of a corporation where he had attempted to incorporate a company in another state but had not complied with the statute which did not allow one person to become a corporation while he in fact

had the power to do business beyond the limits of the state of its creation. The complaint does not show that plaintiff had the authority under its charter to engage in the business alleged—in other words, to sell goods, wares, and merchandise.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 586, 10 L. ed. 306; *Rece v. Newport News & M. V. R. Co.* 3 L. R. A. 572, 32 W. Va. 164, and the authorities *supra*. For aught the court knows, the plaintiff may have been created by its charter for the purpose of building and operating

a railroad as a steamship line or for other and foreign purposes to that of dealing in merchandise.

McIver, Ch. J., delivered the opinion of the court:

The question presented by this appeal arising upon a demurrer to the complaint, it is necessary to set forth the complaint, viz.: "(1) That the said plaintiff, Cone Export & Commission Co., is a corporation, created as such by and under the laws of the state of

was the only person interested. Here it is clear that the incorporation was a fraud and without regard to the residence of the incorporator he was rightfully regarded as an individual proprietor of the business.

A stockholder was held not liable as a partner in *Stafford Nat. Bank v. Palmer*, 47 Conn. 443, where an attempt to incorporate in Connecticut to continue a business in Massachusetts was made. The court did not discuss the effect in general of such an incorporation but held that the defendant at least was innocent of wrong if any had been done and that he took his stock in exchange for stock in a former corporation organized in Massachusetts and without knowing that the place of corporation had been changed.

The effect of a charter in one state, where the business of a corporation is entirely conducted in another, except its annual elections, is discussed at length in *Merrick v. Van Staivoord*, 34 N. Y. 28; *Merrick v. Brainard*, 38 Barb. 574,—in which the question directly decided was that a stockholder and director could not be held individually liable on the ground that the corporation had forfeited its charter by migration from another state. The court declared that a corporate franchise could not be revoked or annulled by the courts of another state, especially in a proceeding to which the corporation was not a party.

The fact that all the incorporators reside in another state and carry on all the business of the company there, will not make a corporation void if it complies with the laws of the state under which it is incorporated. *Moxie Nerve Food Co. v. Baumbach*, 22 Fed. Rep. 205.

A Kentucky corporation created mostly for Ohio business, but incorporated in Kentucky because the residence of the incorporators prevented them from being directors under the Ohio laws, is not a fraud on the laws of Ohio, so as to make the members personally liable, at least to one of its own officers. *Second Nat. Bank of Cincinnati v. Lovell*, 2 Cin. Sup. Ct. Rep. 397.

A corporation created in another state cannot be held to be a fraud because it has done nothing but organize in its own state. *Hanna v. International Petroleum Co.* 23 Ohio St. 622.

An Illinois corporation engaged in the business of leasing railroad cars, the entire business of which seemed to consist of periodical settlements with the leasing railroad company for the use of the cars, was held not to be falsely and fraudulently posing as a domestic corporation when it had in fact migrated, where its property was all located in the state and managed, used, and controlled there, with an office at which all its meetings of stockholders and directors were held, although it kept an office in another state, where its books were kept most of the time, and its corporators were residents of such other state. *North & South Rolling Stock Co. v. People*, 147 Ill. 234.

The incorporation in another state of a company composed of residents of New York is held not to constitute an evasion of the laws of New York, although the principal place of business is in that 24 L. R. A.

state, where there was no fraud or evasion of the law of the state of incorporation, and the certificate of incorporation was granted by the secretary of the state with knowledge of the facts. *Demarest v. Grant*, 13 L. R. A. 854, 128 N. Y. 205.

While the fact that citizens of Rhode Island go to Kentucky for the act of incorporation is one that naturally excites curiosity if not suspicion as to the motives and good faith of the concern, yet so long as it pursues a lawful business and violates no law of Rhode Island the courts of that state will not refuse to recognize it. *Oakdale Mfg. Co. v. Garst* (R. L.) 23 L. R. A. 639.

The court adds: "We can hardly deny the right of a foreign corporation to do business in this state upon considerations of public policy when our own statutes (Pub. Laws, chap. 1200) expressly provide for corporations formed in this state for carrying on business out of the state."

In *Empire Mills v. Alston Grocery Co.* (Tex.) 12 L. R. A. 366, the incorporation in Iowa of persons engaged in mercantile business in Texas was allowed to be fraudulent with intent to evade the laws of Texas, and this was found to be true, but it was also declared that the statutes of Texas prohibited the operation of such corporations in the state. The court made the further declaration,—not entirely necessary to the decision, and contrary to the doctrine of the majority of decisions on the subject,—that "a corporation cannot incorporate in one state for the purpose of carrying on all of its corporate business in another."

Statutory exclusion of or restrictions upon foreign corporations.

That discrimination against foreign corporations is lawful is decided expressly or by implication in all the decisions on the subject except so far as such discrimination may violate constitutional provisions, such as those relating to interstate commerce, and the equal protection of the laws.

That a corporation is a person within the constitutional guaranty of equal protection of the laws, but is not a citizen within the guaranty of equal privileges and immunities, see *note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 580, 585.

As to the effect of state restrictions or burdens on foreign corporations, as unconstitutional regulations of commerce, see *note to Kindel v. Beck & P. Lithographing Co.* *post*, 811.

The restrictions on the right of foreign insurance companies to do business within a state are in most states applicable to insurance companies alone, and are separately treated in a *note to STATE v. ACKERMAN*, *post*, 238.

In respect to a statute providing that no corporation should engage in mercantile or agricultural business, nor any commission, brokerage, stock jobbing, exchange or banking business, the court said "it is highly probable that it does not apply to a corporation created by and under the laws of" another state. *Graham v. Hendricks*, 23 La. Ann. 523.

But a banking company incorporated in another

New Jersey; (2) that on the days and dates, and at the prices, set forth in an itemized, verified copy of account (herein attached and made a part of this complaint), the said plaintiff, under its corporate name, sold and delivered to the said defendant, at his request, and the said defendant bought of said plaintiff, goods, wares, and merchandise of the value of one hundred and fifteen and 88-100 dollars; (3) that the said goods, wares, and merchandise sold and delivered and bought, as aforesaid, were reasonably worth the sum of one

hundred and fifteen and 88-100 dollars, and the said defendant promised and agreed to pay the said sum for same within sixty days after the sale and delivery of said goods, wares, and merchandise; (4) that said account for said goods, wares, and merchandise is past due and wholly unpaid, and the said defendant is now justly due and owing said plaintiff on said account the sum of one hundred and fifteen and 88-100 dollars,"—and a regularly itemized copy of the account was attached to the complaint. The defendant filed a de-

state was held subject to the New York statute forbidding the exercise of banking business in the state, except as authorized thereby. *Pennington v. Townsend*, 7 Wend. 276.

In Texas it was held that the repeal of a statute granting the privilege of organizing mercantile organizations was a direct prohibition against the operation of such corporation within the state, and therefore the law of comity did not require that a merchantile corporation organized under the laws of another state should be allowed to do business in Texas. *Empire Mills v. Alston Grocery Co.* (Tex.) 12 L. R. A. 386.

De facto foreign corporations.

The question whether or not a foreign corporation can be regarded as a *de facto* corporation has arisen in different phases.

In *Re Comstock*, 3 Sawyer, 218, it is declared that in respect to the validity of contracts of foreign corporations which are doing unauthorized business because they have not complied with statutory conditions the rule as to *de facto* corporations does not apply, but it is a question of corporate power. This is the necessary position of those courts which hold that prohibited contracts of foreign corporations are void.

In harmony with this it is said in *Semple v. Bank of British Columbia*, 5 Sawyer, 88, that until compliance with statutory conditions a foreign corporation was to be considered neither a *de jure* nor a *de facto* corporation.

But on the contrary it has been held in South Dakota that a foreign corporation doing business within the state, without complying with the statutory conditions, under laws declaring that it shall not do any business until it has complied with them, is to be regarded as a *de facto* corporation. *Wright v. Lee* (S. Dak.) July 29, 1893, affirming on rehearing March 16, 1892.

This case denies the right of private individuals to question the right of the foreign corporation to make contracts because of failure to comply with the statutes.

This disagreement is only another phase of the conflict among the decisions as to the validity of unauthorized or prohibited contracts by foreign corporations which have not complied with statutory requirements. As to this, see note to *Edison General Electric Co. v. Canadian Pacific Nav. Co.* post 315.

The question of *de facto* corporations arises also in respect to fraudulent incorporation in another state to evade the laws of the state in which business is to be carried on. Such an organization will be held to be a partnership with respect to individual liability of members. *Empire Mills Co. v. Alston Grocery Co.* (Tex.) 12 L. R. A. 386; *Hill v. Beach*, 12 N. J. Eq. 81.

This is another phase of the question of good faith of foreign incorporation, as to which see above under that heading.

For *de facto* domestic corporations defectively organized, see note to *Rutherford v. Hill* (Or.) 17 L. R. A. 542.
24 L. R. A.

Designation of agent and place of business.

The designation by a foreign corporation of its agent sufficiently states his "known place of business" within the meaning of the Alabama constitution, by stating the place in which he resides, without designating any particular office or other place in the city. *McLeod v. American Freehold Land Mortg. Co. of London* (Ala.) Dec. 21, 1893.

The constitutional requirement of a known place of business and an authorized agent is complied with by establishing a place of business at which a person is empowered to receive service of process, and posting a sign or placard in his office stating his character as agent. *New England Mortg. Secur. Co. v. Ingram*, 91 Ala. 387.

The agent designated need not be a person who is authorized to exercise any of the contractual powers of the company. *Neils v. Edinburg American Land Mortg. Co.* 92 Ala. 157; *McCall v. American Freehold Land Mortg. Co.* (Ala.) April 5, 1893.

The failure to give the name of its general manager in the state appointed by a foreign corporation as agent on whom process may be served does not make the certificate insufficient. *Goodwin v. Colorado Mortg. & Investment Co. of London*, 110 U. S. 1, 28 L. ed. 47.

License tax.

The exaction of a license fee to enable a foreign corporation engaged in general mining and milling business to have an office in the state for the use of its officers, stockholders, agents, and employees is clearly within the competency of the legislature. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650.

Having the absolute power of excluding a foreign corporation, a state may impose such conditions on permitting it to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent on the payment of a specific license tax, or a sum proportioned to the amount of its capital. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 184, 4 Inters. Com. Rep. 57, affirming *People v. Horn Silver Min. Co.* 105 N. Y. 76; *People v. Equitable Trust Co. of New London*, 96 N. Y. 387.

An annual tax by way of license for the exercise of a corporate franchise may be imposed upon foreign corporations doing business in a state. *State v. Berry*, 52 N. J. L. 308.

A state tax upon a corporate franchise or business of a foreign corporation, the amount of which is to be determined by the capital stock and dividends of the company is not a tax on the capital stock of property of the company, but on its corporate franchise and may be fixed at any sum that the legislature may choose. *Home Ins. Co. v. New York*, 134 U. S. 504, 33 L. ed. 1025, affirming *People v. Home Ins. Co.* 92 N. Y. 323; *People v. Horn Silver Min. Co.* 105 N. Y. 76.

A tax on the amount of capital stock of a foreign corporation, which maintains a sales agency and office in the state and keeps a bank account there for convenience of local transactions, is sustainable

murrer in writing, upon the ground "that it appears upon the face of the complaint (1) that the plaintiff had no legal capacity to sue; (2) that the complaint does not state facts sufficient to constitute a cause of action." The circuit judge, in a short order, and without stating his reasons or on which of the grounds he acted, rendered judgment sustaining the demurrer and dismissing the complaint. From this judgment the plaintiff appeals upon two grounds, substantially, the third ground set out in the record being merely the

legal consequence of the other two grounds, viz.: (1) Because of error in holding that the complaint showed upon its face that the plaintiff had no legal capacity to sue; (2) because of error in holding that the complaint does not state facts sufficient to constitute a cause of action.

As to the first ground, it is very apparent that all that the complaint shows upon its face is that the plaintiff is a foreign corporation; and, unless it can be shown that the mere fact that a plaintiff is a foreign corporation

under a statute authorizing such tax on a foreign corporation "doing business" within the state *Southern Cotton Oil Co. v. Wemple*, 44 Fed. Rep. 24.

A tax on foreign companies "having an office or place of business within the commonwealth for the direction of its affairs or transfer of shares" is no unconstitutional, although it is based on the percentage of the par of the capital stock. *Atty-Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717.

The right of the state of Pennsylvania to impose on the New York, L. E. & W. R. Co. as a condition of doing business in the state the duty of paying a state tax on corporate bonds held by resident holders, was sustained in *Com. v. New York, L. E. & W. R. Co.* 139 Pa. 463. But this case was reversed by the Supreme Court of the United States in *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 638, 38 L. ed. —, on the ground that the state having given to the railroad company upon a valuable consideration the right to extend its road into the state could not withdraw the assent after the road had been built as this would impair the obligation of a contract. There was another reason for the decision, that as to payment of interest made in New York, although on bonds held by residents of Pennsylvania the latter state could not impose any burdens by way of taxation because the property was out of the state.

A tax on the capital stock of a foreign corporation was held not to be a license tax, and to be valid only as to so much of its stock as was invested in the state. *Com. v. Standard Oil Co.* 101 Pa. 119.

A license tax imposed on any agent of a foreign express company is held constitutional in *Woodward v. Com.* 9 Ky. L. Rep. 670, where it seems to have been attacked on the ground that it discriminated against nonresidents, and it was held valid on the ground that a corporation was not a citizen entitled to equal privileges and immunities. No question seems to have been raised in the case as to the effect of the license tax to interfere with interstate commerce.

A statute exempting from license tax, manufacturing or mining companies carrying on business in the state is not an unconstitutional discrimination against those which carry on business outside the state. *State v. Under-Ground Cable Co. (N. J.)* Nov. 8, 1899.

A foreign corporation cannot object that a license tax imposed upon it is the same that should have been demanded of a home corporation. *State v. Liverpool, London & Globe Ins. Co.* 40 La. Ann. 463.

The payment of a percentage on the capital stock of the corporation at or before filing its articles of incorporation, under Minn. Gen. Laws 1899, chap. 225, is required of an Iowa railroad company on filing its articles, as required by Minn. Gen. Laws 1877, chap. 14, in order to extend and build its road into the state. *State v. Sioux City & N. R. Co.* 43 Minn. 17.

The subject of taxation of foreign corporations is not here considered except so far as it is in the nature of a license tax imposed as a condition of

permission to do business in the state. The same question so far as it relates to burdens on interstate commerce is also presented in other cases as to taxation.

Conditions against invoking federal jurisdiction.

A state statute denying the right of a foreign corporation to do business in the state, unless it stipulates in advance that it will not remove to a Federal court any suit brought against it by a citizen of the state, is repugnant to the constitution and laws of the United States. *Home Ins. Co. of New York v. Morse*, 87 U. S. 20 Wall. 445, 22 L. ed. 65; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Intera. Com. Rep. 295, reversing *Goodrel v. Kreichbaum*, 70 Iowa, 363; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 38 L. ed. 942; *Texas Land & Mortg. Co. v. Worsham*, 76 Tex. 556; *Railway Passenger Assur. Co. of Hartford v. Pierce*, 27 Ohio St. 155; *Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 208; *Rece v. Newport News & M. V. R. Co.* 3 L. R. A. 572, 32 W. Va. 164.

The case of *Barron v. Burnside*, *supra*, was one of three decided together by the supreme court of Iowa, and reported under the title of *Goodrel v. Kreichbaum*, 70 Iowa, 363, in which, the court being doubtful as to the constitutionality of the state statute, upheld it "to the end that the questions presented may be determined by the Supreme Court of the United States," by which the decision of the state court was reversed. The Iowa statute involved in that case made it a misdemeanor for an agent, officer, or employé of any foreign corporation "for pecuniary profit other than for carrying on mercantile or manufacturing business," to transact business for such corporation when it has no valid permit to do business. And the petitioners in the three cases above mentioned were arrested for performing services as employés of an interstate railroad.

Before the question had been settled by the above decision of the United States Supreme Court several state courts held that a statute prohibiting the removal of a suit against a foreign corporation to a federal court, when the corporation had accepted its provisions, was valid. *People v. Judge of Jackson Circuit Ct.* 21 Mich. 579, 4 Am. Rep. 504; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Goodrel v. Kreichbaum*, *supra*.

So in Ohio a statute requiring a waiver of the privilege of invoking the federal jurisdiction by a foreign corporation was held valid. *New York L. Ins. Co. v. Best*, 23 Ohio St. 105.

These decisions are of course rendered obsolete by the decisions above.

A state statute providing a penalty for removal by a foreign corporation of a suit to a federal court is unconstitutional. *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep. 849.

Since a statute requiring a foreign corporation to agree not to remove a case against it into a federal court as a condition of a permit to do business in the state is void, it was held in *Texas* that the corporation may lawfully do business in the state without such permit, at least to the extent of asserting rights and recovering property already ac-

deprives such plaintiff of the capacity to sue in the courts of this state, it is quite certain that the demurrer cannot be sustained on the first ground. No authority to sustain such a proposition has been, and, we may venture to say, can be cited. On the contrary, the authorities are abundant to show that a foreign corporation does have the capacity to sue in states other than the state from which its charter has been obtained. *Bank of Augusta v. Earle*, 88 U. S. 13 Pet. 519, 10 L. ed. 274, in which *Mr. Chief Justice Taney*, in delivering

the opinion of the court, uses this language: "We think it is well settled that, by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union." See also *American & Foreign Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 838, and in our own state see *Bank of Cape Fear v. Stinemets*, 1 Hill, L. 44; *Kerchner v. Gettys*, 18 S. C. 531. It is clear, therefore, that the de-

quired. *Texas Land & Mortg. Co. v. Worsham*, 76 Tex. 556.

But the Supreme Court of the United States held that while a state statute prohibiting a foreign corporation from removing a case against it from a state to a federal court is invalid, the state officers cannot be prevented by injunction from canceling the license of a foreign corporation to do business in the state when required to do so by state statute, because the corporation has made such removal of suit. *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 535, 24 L. ed. 148. This decision proceeds on the theory that a state has an absolute right to exclude a foreign corporation or revoke a license when given to it, for any cause whatever, or without any cause, and that the motive or intention of the state in so doing is not open to inquiry.

The case of *Doyle v. Continental Ins. Co. of New York*, *supra*, overrules, without mentioning it, the case of *Hartford F. Ins. Co. v. Doyle*, 6 Biss. 461, in which the circuit court had granted an injunction restraining the secretary of state from attempting to forfeit the license of a foreign insurance company because of an attempt to remove a case to a federal court.

In *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 235, no agreement by the foreign corporation that it would not remove a case to the federal court had been made, but an agent of a foreign corporation arrested for transacting business for it without a permit was held entitled to his discharge on *habeas corpus*, because the statutory provisions to permit were void. It is said in this case that the point of the decision in *Doyle v. Continental Ins. Co. of New York*, "seems to have been that, as the state had granted the license, its officer would not be restrained by injunction by a court of the United States from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Home Ins. Co. of New York v. Morse*, 87 U. S. 20 Wall. 445, 22 L. ed. 365, must be regarded as not in judgment."

A state statute making appearance, even for the purpose of objecting to jurisdiction, a waiver of immunity from jurisdiction by reason of nonresidence, does not apply to a foreign corporation when sued in a federal court. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57.

So a statute requiring a foreign insurance company to assent to service in a certain manner was held not to prevent removal to a federal court. *Hobbs v. Manhattan Ins. Co.*, 56 Me. 417, 36 Am. Dec. 472; *Western U. Tele. Co. v. Dickinson*, 40 Ind. 444, 18 Am. Rep. 235.

And a contract with the foreign corporation to be amenable to suits in the state did not prevent it from bringing suit in a federal court. *Metropolitan L. Ins. Co. v. Harper*, 3 Hughes, C. C. 230.

A foreign insurance company is not precluded from removing to a federal court a case brought "therein" in a state court because it has not com-

plied with Mass. Gen. Stat., chap. 58, § 63, and appointed a general agent on whom process may be served "with like effect as if the company existed in the state," and stipulated that process served on him "shall be of the same legal force and validity as if served on said company." *Morton v. Mutual L. Ins. Co. of New York*, 105 Mass. 141, 7 Am. Rep. 505.

Remedies against.

Quo warranto is a proper remedy to oust a foreign insurance company from the exercise of franchise and privileges without authority of law. *State v. Fidelity & Casualty Ins. Co.* 16 L. R. A. 611, 49 Ohio St. 440; *State v. Western U. Mut. L. & Acc. Soc. of United States*, 8 L. R. A. 129, 47 Ohio St. 187; *State v. Fidelity & Casualty Co.* 39 Minn. 538; *Wright v. Lee* (S. Dak.) July 29, 1893, affirming on rehearing (S. Dak.) March 16, 1892.

Information in the nature of quo warranto is also the proper remedy for eachest of lands unlawfully acquired by a foreign corporation. *Com. v. New York*, L. E. & W. R. Co. 114 Pa. 340.

A foreign corporation doing insurance business in the state unlawfully without license, under a name which is liable to be confused with that of another corporation, may be enjoined on application of the latter against continuing the business. *Employers Liability Assur. Corp. v. Employers Liability Ins. Co.* 61 Hun. 553.

What constitutes "doing business" prohibited by statute.

The making in Colorado of a single contract by which an Ohio corporation, having no place of business in Colorado, agreed to build and deliver in Ohio certain machinery for which the other party agreed to pay, did not constitute a carrying on of business in Colorado within the meaning of a statute requiring foreign corporations to comply with certain conditions in order to be authorized "to do business" in the state. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 23 L. ed. 1137.

A foreign corporation which makes a contract in the state for machinery to be manufactured and erected in another state does not thereby engage in business in the state, within the meaning of a statute prescribing conditions for doing business, although it may be sufficient to render the corporation amenable to jurisdiction, if it can be obtained, as provided by the laws of the state by serving process on an agent or representative. *Colorado Iron Works v. Sierra Grande Min. Co.* 15 Colo. 499.

A sale of goods in another state by a foreign corporation, and a suit within the state for the purchase price, do not come within the provisions of the Texas Act of April 3, 1890, requiring a foreign corporation for pecuniary profit desiring to transact business in the state to file its articles and obtain a permit and declaring that "thereafter no such corporation can maintain any suit . . . upon any demand," unless it has thus filed its articles. *Reed v. Walker*, 2 Tex. Civ. App. 92.

Notes executed in the state to a foreign corporation for goods furnished in another state are not invalid, under Dak. Civ. Code, § 587, providing that

murrer cannot be sustained on the first ground.

We infer, however, from the argument here, that respondent's counsel did not intend to question the general proposition which we have been considering,—whether a foreign corporation has capacity to sue in the courts of this state,—but that his real point is that, unless a complaint brought by a foreign corporation contains allegations showing that such corporation has, by its charter, been invested with the power to contract and to sue, it cannot maintain an action in the courts of this

state. But this point cannot be raised by a demurrer, upon the ground that the complaint shows on its face that the plaintiff has no capacity to sue, for the complaint does not show anything of the kind. The most that can be said is that the complaint fails to show that the plaintiff has been invested with power to sue; but such omission affords no ground for demurrer, as it is based upon a defect (if defect it be) in the complaint, and not upon what it shows on its face. The Code, in section 165, allows a demurrer only when it appears upon the face of the complaint "that

no foreign corporation shall "transact any business" until it has complied with the conditions of the statutes. *Fuller & J. Mfg. Co. v. Foster* (Dak.) Oct. 4, 1886.

For transactions of foreign corporations which are protected as interstate commerce, see note to *Kindel v. Beck & P. Lithographing Co.* (Colo.) post. 311.

The fact that a foreign corporation may be conducting a banking business in violation of the laws of the state will not prevent a loan by it on mortgage security from being valid, when not connected with its banking business. *Bard v. Poole*, 12 N. Y. 496.

The violation by a foreign corporation of the restrictive law of New York as to banking business does not make invalid a loan by the company on bond and mortgage, unless it is shown that this particular contract was entered into in violation of the law. *Mumford v. American L. Ins. & T. Co.* 4 N. Y. 468.

The mere taking of a bond and mortgage by a foreign insurance company, not in the course of transacting the business of insurance, is not a violation of the statute providing that no agent of a foreign company shall transact any business of insurance in the state, except on specified conditions. *Bouliware v. Davis*, 9 L. R. A. 601, 90 Ala. 207.

A loan of money by a foreign corporation is not doing business within the state, if the agreement was made, the notes and securities delivered, and the money paid in another state. *Sorrigs v. Sootish Mortg. Co.* 54 Ark. 566.

A single loan made in good faith by a foreign banking company, which has an office for exchange business in the state, is not a violation of a statute prohibiting the keeping of an office of discount and deposit. *Suydam v. Morris Canal & Bkg. Co.* 6 Hill, 217, affirming 5 Hill, 491, note.

The fact that officers of a foreign moneyed corporation came into the state and purchased mortgages, for which they paid partly by a draft and partly by circulating notes of the foreign corporation, with an understanding that they should be put into circulation, does not violate the New York statute prohibiting the foreign corporation from keeping any office for receiving deposits or discounting notes or bills, or issuing any evidence of debt to be loaned, or put into circulation as money. *Western Reserve Bank v. Potter*, Clarke's Ch. 451, 7 L. ed. 163.

A corporation which is shown to be merely engaged in loaning money upon note and mortgage is not thereby shown to be a banking corporation within the restrictions of the Oregon Act of November 21, 1884, against foreign insurance and banking corporations, etc. *Oregon & W. T. & I. Co. v. Rathbun*, 5 Sawy. 82.

The purchase of railroad securities secured by a mortgage upon property is not "doing business" in the state within the meaning of Mont. Comp. Stat. 1888, § 442, p. 720, prescribing conditions for a foreign corporation to perform before doing business in the state. *Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. Rep. 538.

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Compliance with statutory conditions of doing business by a foreign corporation is not necessary to allow it to take security for debts due. *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387.

That bringing a suit is not "doing business," see *supra*, heading "Right to sue."

The Indiana statutory provisions (Rev. Stat. 1881, §§ 3022, 3023), requiring agents of a foreign corporation to file evidence of authority with the clerk of the county in which they propose to do business, do not apply to a person coming into the state to appoint local agents. *D. S. Morgan & Co. v. White*, 101 Ind. 413.

A corporation formed under the laws of Maryland for the manufacture and sale of canned goods as a general agent for all its members, some of whom resided in Pennsylvania, is not, by reason of its contracts with them, doing business in Pennsylvania within the meaning of the constitutional and statutory provisions prohibiting any business by foreign corporations without compliance with certain conditions; and Pennsylvania stockholders cannot on that ground question the title of the corporation to goods which they had transferred to the corporation for sale. *Kilgore v. Smith*, 122 Pa. 48.

An act of agency for a foreign corporation must be performed within the state in order to bring it within the penalty of a statute which makes it an offense to act as agent for a corporation which has no right to do business in the state. *Collier v. Davis*, 94 Ala. 456.

A restraint on banking by foreign companies does not apply to business with a foreign corporation in another state. *Bank of Marietta v. Pindall*, 2 Rand. (Va.) 465.

Sending an insurance policy from another state is not carrying on business in the state. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 643; *State v. Williams*, 46 La. Ann. —; *New Orleans v. Virginia F. & M. Ins. Co.* 33 La. Ann. 11; *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 781.

But it is otherwise where the policies are transmitted to an agent in the State and delivered by him on receipt of the premium. *Berry v. Knights-Templar & Masons' Life Indemnity Co.* 46 Fed. Rep. 439.

A person in the insurance business who writes a letter to the office of a foreign corporation in another state, forwarding an application for insurance, and receives a policy which he delivers on receipt of the premium, retaining a part of it as commission, must be regarded as in some manner "aiding in transacting the insurance business" of a foreign corporation within the penal provisions of the Illinois statute, Insurance Act, § 22. *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683.

An agent of a foreign insurance company, who has no authority to make an insurance but merely to receive an application, and who transmits an application to the company which is passed upon in the state of incorporation, from which a policy is sent to the applicant by mail, does not violate the Ohio statute prohibiting the sending, issuing,

the plaintiff has not legal capacity to sue;" and, as that does not appear upon the face of the complaint in this case, it is clear that the demurrer cannot be sustained on the first ground, as the code does not provide for a demurrer on the ground of any omission in the complaint, except an omission to state facts sufficient to constitute a cause of action.

This brings us to a consideration of the second ground of demurrer, based upon subdivision 6 of section 165 of the Code. Taking up, first, the omission to allege in the complaint that the plaintiff was invested by its

charter with the power to sue, that fact could relate only to the capacity to sue, and was not one of the facts necessary to constitute plaintiff's cause of action, and hence would afford no ground for a demurrer under subdivision 6 of section 165 of the Code, as was distinctly held in the recent case of *G. Ober & Sons Co. v. Blalock* (S. C.) 18 S. E. Rep. 264. Next, as to the allegations which do relate the facts constituting plaintiff's cause of action, we are unable to discover any omission there. It is distinctly alleged in the complaint that the plaintiff sold and delivered to the defend-

or delivery of a policy except by a domestic corporation, or its authorized agent. *Hyde v. Goodnow*, 3 N. Y. 233.

But the agent is "doing business" when he takes a premium note for the foreign company, although not by merely forwarding an application. *Hachey v. Leary*, 12 Or. 40.

See also as to place of insurance contract, the note to *Phenix Ins. Co. v. Pennsylvania Co. (Ind.)* 20 L. R. A. 405.

The adjustment of a loss on behalf of a foreign insurance company, which has not complied with the requirements of the New York statute so that it can lawfully do business, is not a transaction of the business of insurance within the meaning of that statute, and an agent is not liable to the penalty of the act for adjusting such loss. *People v. Gilbert*, 44 Hun. 523.

In respect to the defense that plaintiff was a foreign corporation doing business in the state without having complied with statutory requirements, the court said "there is nothing in the objection," reciting that the only business done related to a policy of insurance on which suit was brought. *Tabor v. Goss & Phillips Mfg. Co.* 11 Colo. 413.

But the doing of a single act of business, as if it be in the exercise of a corporate function, as in the case of a loan of money on a mortgage by a mortgage security company, is within the prohibition of the Alabama constitution against doing "any business" by a foreign corporation in the state without a known place of business and authorized agent. *Farrior v. New England Mortg. Secur. Co.* 85 Ala. 275; *Dundee Mortg. Trust & Investment Co. v. Nixon*, 95 Ala. 318; *Christian v. American Freehold Land Mortg. Co.* 89 Ala. 128.

The conditional sale of a piano by a foreign corporation, which retained title to the instrument as security for the purchase price, was held to be within the prohibition of the Alabama constitution against doing business without conforming to the requirements of the law. *Boulden v. Estey Organ Co.* 92 Ala. 123. It would seem that the piano must have been within the state when sold, as nothing is said in the opinion about interstate commerce. See as to this note to *Kindel v. Beek & P. Lithographing Co. (Colo.)* post, 311.

A foreign corporation receiving land in a state by devise as trustee with power to sell, lease, or dispose of it, and asserting its ownership, assuming to sell and convey the land, and bringing suits in the state respecting it, must be held to be doing business within the state within the purview of Illinois Act concerning corporations, § 23, 1 Starr. & C. chap. 32, par. 22. *Pennsylvania Company for Insurance on Lives v. Bauerle*, 143 Ill. 449.

The ownership of interests in individual partnerships constitutes doing business in the state within the meaning of statutes relating to foreign corporations; but it is otherwise with the ownership of stock in corporations or limited partnerships. Neither does the purchase in the state by brokers of oil to be shipped to refineries outside 24 L. R. A.

the state constitute doing business in the state. *Com. v. Standard Oil Co.* 101 Pa. 119.

A tax on the capital stock of the American Bell Telephone Company to the extent that it was alleged to be doing business within the state of Pennsylvania was held invalid in *Com. v. American Bell Teleph. Co.*, 129 Pa. 217, on the ground that it was not transacting any business in the state, although it owned telephone instruments which were leased to Pennsylvania corporations, and under some circumstances might be doing business in the state in enforcing rights under contracts with such lessees.

A foreign corporation does not do business within a state because it has an interest in the property rights and business of a local corporation which is equivalent to a partnership. *United States v. American Bell Teleph. Co.* 20 Fed. Rep. 17.

A foreign corporation which had not complied with the Pennsylvania statutes so as to be authorized to do business was refused the right to bid for a contract to furnish supplies to the state. *Office Specialty Mfg. Co. v. Trenton Mfg. Co.* 1 Pa. Dist. Rep. 573.

See further as to what constitutes "business" in note to *State v. Ray* (N. C.) 14 L. R. A. on page 530.

Estoppel to deny character or powers.

A borrower from a foreign corporation is estopped to deny its authority to loan money in the state, without showing that the loan violated its charter or some express prohibition of law. *Pan-coast v. Travelers Ins. Co.* 79 Ind. 172.

And in general the other party to a contract with a foreign corporation is estopped to deny the power of the corporation to make it. *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343.

But not to deny that the so-called foreign corporation is a fraud and not a legal corporation but that the members are partners. *Empire Mills Co. v. Alston* (Tex.) 12 L. R. A. 333.

It would seem that the question of estoppel against denying the corporate character or powers of a foreign corporation would in general be the same as in case of a domestic corporation, but as to denying the right of a foreign corporation to enforce a contract in a state in which the statutes prohibit it to do business, because it has not complied with specified conditions, see note to *Edison General Co. v. Canadian Pacific Nav. Co.* post, 315.

As to who may be served with process against foreign corporations, see note to *Foster v. Charles Betcher Lumber Co.* (S. Dak.) 23 L. R. A. 490.

This note does not touch the question how far the exercise of the charter powers of foreign corporations is subject to general laws of the state, as for instance the usury laws, nor does it touch the validity of acts done by a corporation at its domicile when questioned in another jurisdiction, but is intended to include only matters as to exclusion or recognition of foreign corporations and the conditions on which they may be admitted to a state.

B. A. R.

ant, at his request, the goods specified at the prices named; that said goods were reasonably worth the amount charged; that the defendant promised and agreed to pay the sum charged within 60 days after the sale and delivery of said goods; and that, though the time limited for such payment has elapsed, no payment has been made, and the said sum is still due. If these allegations are not sufficient to constitute a cause of action in favor of the

plaintiff against the defendant, we are at a loss to conceive what would be sufficient.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for the purpose of enabling the plaintiff to recover judgment for the amount which the defendant has, by his demurrer, admitted to be due by him to the plaintiff.

McGowan and Pope, JJ., concur.

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.*, J. K. RICHARDS,
Atty-Gen.,

v.

C. F. ACKERMAN *et al.*, Transacting Business as the Guaranty & Accident Lloyds.

(51 Ohio St. —)

- *1. Foreign insurance companies and associations, whether incorporated or not, before commencing business in this state, are required to obtain a certificate of authority to do so, from the superintendent of insurance.
2. That certificate, so long as it remains in force confers on the company or association receiving it the right and privilege of carrying on its business in the state.
3. The authority so granted emanates

*Headnotes by the COURT.

NOTE.—*Restrictions on business of foreign insurance companies.*

Although foreign insurance companies are allowed to do most kinds of business without restriction, the business of insurance is generally regarded as one which needs careful regulation and supervision for the protection of those who rely on insurers for indemnity against losses; and on this account the business of foreign insurance companies is in nearly, if not all, the states restricted by statute.

That insurance is not commerce within the constitutional provisions giving congress authority to regulate commerce and preventing state interference therewith has been fully established by the decisions of the United States Supreme Court, the final authority on the subject, as well as by decisions of the state courts. *Paul v. Virginia*, 75 U. S. 6 Wall. 168, 19 L. ed. 367; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. Life & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Home Ins. Co. of New York v. Augusta*, 98 U. S. 116, 23 L. ed. 826; *People v. Thurber*, 18 Ill. 564; *Farmers & M. Ins. Co. v. Harrah*, 47 Ind. 236; *List v. Com.*, 118 Pa. 322; *State v. Phipps*, 18 L. R. A. 657, 50 Kan. 609.

Therefore to insurance companies the general doctrine fully applies, that a state may exclude a foreign corporation, or impose upon it, as a condition of doing business, any burdens or restrictions that it chooses, reasonable or unreasonable.

As to assets.

The right to exclude insurance companies of other states or as a condition of admission to require not only the payment of a license tax but the deposit of securities with the state treasurer as a condition of doing business, is established in *Paul v. Virginia*, 75 U. S. 6 Wall. 168, 19 L. ed. 367.

A statute requiring a foreign insurance company

from the state, and the privilege it confers is a franchise; and any company or association carrying on its business here, without having obtained such authority, is unlawfully exercising a franchise.

4. To come within the purview of that provision of section 6760, of the Revised Statutes, which authorizes an action in quo warranto to be brought "against an association of persons who act as a corporation within this state without being legally incorporated," it is not necessary that the association, or persons composing it, avow a purpose to act as a corporation, or assume to do so; it is sufficient if the acts are such as appertain to corporations, or are done after the manner of corporations.

5. The defendants, without being legally incorporated, associated themselves together for the purpose of transacting the business of insurance, by articles of agreement, under which they issue

to make a deposit of money to secure policy holders was construed without any question of the power of the state to make such requirement in *Lancashire Ins. Co. v. Maxwell*, 181 N. Y. 2-6.

Under *Nebraska Comp. Stat.* 1887, chap. 43, §§ 20 and 23, a foreign insurance company must possess at least \$200,000 exclusive of any assets deposited in any other state or territory for the special benefit of those insured therein, and must deposit in some of the United States or territories not less than \$25,000 for the special benefit of policy holders. *State v. Benton*, 25 Neb. 384.

Under Vermont statutes a foreign mutual or co-operative insurance company must have assets amounting to \$100,000 invested in good securities, with whatever additional amount may be necessary to balance its liabilities, in order to be allowed to do business in Vermont, or, as alternative to such addition, to have not less than 2,000 contributing members of sufficient ability to pay its stated benefits in full. *Granite State Mut. Aid Assn. v. Porter*, 58 Vt. 581.

Cash assets are not equivalent to cash capital, within the meaning of the Tennessee statute requiring a foreign fire insurance company to have at least \$200,000 of paid-up actual cash capital. *Mutual F. Ins. Co. v. House*, 89 Tenn. 438.

Under Conn. Gen. Stat. 1898, § 2914, authorizing the state treasurer to receive in trust securities which a Connecticut corporation might be required by another state to deposit as a prerequisite of transacting business in that state, such securities are held under a special trust, and cannot be lawfully demanded from the trustees by a Connecticut receiver of the company. *Cooke v. Warner*, 59 Conn. 284. See also *Employers Liability Assur. Co. v. Commissioners of Insurance*, 149 Va.

Under New York Laws 1882, chap. 367, requiring a deposit by a foreign insurance company of "not

polices in an artificial name, the "Guarantee and Accident Lloyds, New York." Insuring persons for certain amounts on payment of specified rates, "against loss of life, eye or eyes, limb or limbs at or above the wrist or ankle," by accidents other than those excepted in the policy, or in the conditions indorsed on it; each member contributed an equal amount to a common fund for the payment of losses and expenses, and each stipulates with the others that no policy shall be issued unless it is executed in behalf of all, but that his liability shall be several only, and limited to the amount contributed or authorized by him; the interest of each member in the concern is made transferable by him if he wishes to withdraw, or by his personal representative after his decease, and the assignee takes the place of a member, thus making the association capable of perpetuity like a corporation; and the defendants are carrying on the business of insurance in that mode in this state, without having obtained a certificate of authority from the superintendent of insurance. *Held*, that in so conducting their business the defendants unlawfully exercise a franchise, within the meaning of subdivision 1 of section 6700 of the Revised Statutes, and act as a corporation, within the meaning of subdivision 8 of that section, and under either, may be ousted from transacting the business of insurance within the state.

(March 13, 1894.)

QUO WARRANTO proceedings to determine by what right defendants were exercising the franchise of transacting insurance business in the state of Ohio. *Judgment of ouster.*

less than \$200,000 in stocks," any excess over that amount if deposited is not subject to withdrawal. *Lancashire Ins. Co. v. Maxwell*, 131 N. Y. 236.

License taxes.

As in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, so in many other cases the validity of a license tax in some form has been upheld against foreign corporations and their agents.

The license tax imposed on the agencies of a foreign insurance company may be higher than those imposed on domestic corporations. *Lexington v. Milton*, 12 B. Mon. 212.

A constitutional requirement of uniformity in taxation on subjects of the same class is not violated by imposing a greater license tax on foreign insurance companies than on domestic companies. *State v. Fiedick*, 21 La. Ann. 424; *State v. Ogden*, 10 La. Ann. 402; *Germania L. Ins. Co. v. Com.* 35 Pa. 513.

A foreign insurance company does not belong to the same class as domestic companies, within the meaning of a constitutional provision for uniformity of taxes on franchisees. *Hughes v. Cairo*, 32 Ill. 339; *Slaughter v. Com.* 13 Gratt. 767; *Milwaukee Fire Department v. Helfenstein*, 16 Wis. 137.

See similar point under heading as to retaliatory statutes.

A statute prohibiting a license fee or tax on insurance companies does not constitute a contract with a foreign insurance company, or give it an exemption which cannot be taken away by subsequent statute. *Atina F. Ins. Co. v. Reading*, 119 Pa. 417.

A state tax of three per cent on a foreign insurance company, under the Pennsylvania Act of 1873, was not repealed by the Act of April 24, 1874. *Germania L. Ins. Co. v. Com.* 35 Pa. 513.

A tax on the gross amount of premiums for insurance by nonresident corporations is not unconstitutional. *Tatem v. Wright*, 23 N. J. L. 420. 34 L. R. A.

Statement by Williams, J.:

The petition is filed against C. F. Ackerman and ninety-nine other persons, who are transacting the business of guarantee and accident insurance in this state, under the name of the "Guarantee and Accident Lloyds, New York," to oust them from the carrying on of that business, because they have not complied with the laws of the state, or received any authority from it to do a business of that kind.

The character of the organization, and its plan of business, are shown by the following "articles of agreement," executed by the members.

"The undersigned being desirous of entering into the business of individual guarantee and accident insurance:

"1st—Do each individually agree to deposit with an advisory committee to be appointed by the undersigned as hereinafter provided, the sum of one thousand dollars.

"2d—Such sum or sums so subscribed by each individual subscriber shall be held by the advisory committee for the individual account of each subscriber, together with all earnings thereon, as a fund to meet any loss which each such subscriber may sustain upon any policy of insurance subscribed by him beyond the net amount of premiums earned and received on said policy.

"3d—Such advisory committee shall consist of five of the subscribers to this agreement, or such further subscribers as may hereafter adopt and execute this agreement, and may be selected and appointed once in

A state may authorize municipal license taxes on foreign insurance companies. *Leavenworth v. Booth*, 15 Kan. 627.

And a city ordinance in a city of the second class in Missouri may compel the payment of a license tax by an agent of a foreign insurance company, although the foreign company is also compelled to pay a tax on its income. *St. Joseph v. Ernst*, 95 Mo. 380.

But a municipal corporation under the general statutes of Illinois has no power to impose a special license tax on a foreign insurance company. *Chicago v. Phoenix Ins. Co. of Brooklyn*, 26 Ill. App. 650.

Imposing upon the agent of a foreign insurance company a license tax of a percentage on the premiums received at his agency is not unconstitutional. *People v. Thurber*, 13 Ill. 554; *Milwaukee Fire Department v. Helfenstein*, 16 Wis. 137.

But an agent in Louisiana cannot be compelled to pay the license fee for the company. *State v. Woods*, 40 La. Ann. 177; *State v. Williams*, 46 La. Ann. —.

A foreign insurance corporation, under chapter 25 of the Tennessee Acts of the Extra Session of 1891, must pay a privilege tax of \$10, and under the Act of March 20, 1891, must also file a copy of its charter with the secretary of state in addition to the filing of such a copy with the commissioner of insurance and register abstracts thereof in each county where it does business. *State v. Phoenix Ins. Co.* 92 Tenn. 420.

Charges for fire department or firemen's fund.

Requiring the agent of a foreign insurance company, as a condition of doing business, to pay a percentage of the premiums received by him for the benefit of the fire department at the place of his agency is constitutional. *Trustees of Ex-empt Firemen's Benev. Fund of New York v. Roome*, 96 N. Y. 513, 45 Am. Rep. 217; *Fire Depart-*

each year on the Wednesday succeeding the first Monday in January, at an annual meeting of the subscribers. An annual meeting shall be called by the advisory committee, by mailing or handing to each subscriber a notice for such meeting at least five days before the time fixed therefor. The advisory committee to act until the Wednesday succeeding the first Monday of January, 1891, shall be composed of

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| (1.) | (2.) |
| (3.) | (4.) |
| (5.) | |

"Such advisory committee and every member of such committee shall continue to act as such until a new member or a new committee shall be appointed.

"All questions shall be determined by a majority of such committee, and three members thereof shall constitute a quorum. Each member attending a meeting shall be paid \$5 in gold for each attendance. Such committee shall meet at least once in each month; and oftener if they deem it necessary.

"4th—Such committee shall have the custody and management of the subscription fund above provided for, and the general charge and supervision of all the business to be done; shall supervise and direct the attorneys in fact who may be appointed by the subscribers, exact and receive accounts from such attorneys in fact, examine, audit, and pass upon the same, receive from said attorneys in fact and receipt for any earnings applicable to the several accounts of either of the undersigned, and make such use, dis-

position, and investment of the fund and earnings as they shall deem most advantageous and secure.

"5th—If any member of such committee shall cease to be an insurer under the terms of this agreement, he shall cease to be a member of such committee and the remaining members thereof shall select from among the other subscribers at the time being some person to fill the vacancy thus occasioned. Any vacancy in the committee shall be filled in the same manner.

"6th—The business management of the insurance to be effected for and on behalf of each of the individual subscribers hereto shall be in charge of Aaron H. Rathbone, Frederick W. Satterlee, Cleveland D. Fisher, and John G. Dorrance, as attorneys in fact of each subscriber hereto; such business shall be carried on at an office to be known as the office of the Guarantee and Accident Lloyds; each subscriber shall execute and deliver to them a power of attorney, in form and effect to be approved by the advisory committee, and by Messrs. Conder Brothers, counselors at law, giving to said attorneys the necessary power for the purpose indicated. The powers thus conferred on said attorneys shall be subject to and shall be exercised under the direction, supervision, and control of the advisory committee above referred to, and all policies or other instruments binding the subscribers must be signed by at least two of said attorneys. The compensation of said attorneys jointly shall be a commission of ten per cent on the amount of the premiums-

ment of *New York v. Noble*, 3 E. D. Smith, 440; *Fire Department of New York v. Wright*, Id. 458.

On the other hand, in Pennsylvania, such a charge for the benefit of an association for the relief of disabled firemen was held invalid on the ground that it was not for a public purpose. *Philadelphia Asso. for Relief of Disabled Firemen v. Wood*, 39 Pa. 73.

An act to require foreign insurance companies to pay certain premiums to counties and cities as a fireman's relief fund, and which was claimed to be a condition of permitting them to do business in a state discriminating against them in favor of domestic corporations, was held invalid in *San Francisco v. Liverpool & Globe Ins. Co.*, 74 Cal. 113, on the ground that it violated the state Constitution, article 11, section 12, denying to the legislature power to impose taxes for county or municipal purposes. It was argued that the power of the state to impose conditions on foreign corporations was not limited by general provisions of the state constitution, and that they had no rights under such constitution except such as were expressly guaranteed to them *eo nomine* as foreign corporations, but this was denied by the court.

In Illinois, such a statute providing for the payment of a percentage of premiums received at an agency of a foreign insurance company for the benefit of a firemen's benevolent association, was involved in several cases, which enforce the statute without any question of its constitutionality. *Firemen's Benev. Asso. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115; *Van Inwagen v. Chicago*, 61 Ill. 81.

And the Illinois Act of February 13, 1863, section 5, requiring two per cent of the premiums of such company to be paid to the city treasurer was repealed by the Act of March 10, 1869, section 30, allowing a tax on the net receipts of the agency in lieu of a license, with the power of the city to impose a

two per cent charge for the benefit of the fire department. *Van Inwagen v. Chicago*, *supra*.

But a municipal license tax on a foreign insurance company for the support of "its fire department" was held not to be authorized by a statute giving power to impose such a tax for the purpose of procuring apparatus for extinguishing fires and establishing reservoirs. *Alton v. Aetna Ins. Co.* 82 Ill. 45.

The provision of the Illinois Act of 1872, § 110, requiring the payment of two per cent of the net receipts of an agency of a foreign insurance company in a city to the treasurer, was repealed by the Act of 1879, chap. 73, § 30, making the net receipts of such agency taxable as other property, with a proviso authorizing a tax or license fee by a city not exceeding two per cent for the support of the fire department. *Chicago v. James*, 114 Ill. 479; *Springfield v. London Ins. Co.* 21 Ill. App. 156.

A city or town in Indiana cannot recover from a foreign insurance company for the use of its fire department a per cent of the premiums received from the risks taken upon property within the municipality, since the interior regulation of such companies belongs to the state under the Indiana statutes. *Blackmer v. Royal Ins. Co.* 115 Ind. 201.

Certificates.

A statute requiring a certificate of the right to do business before an agent of a foreign insurance company can lawfully act is constitutional. *Farmers & Merchants Ins. Co. v. Harrah*, 47 Ind. 286.

Under the Indiana Act of December 21, 1865, a foreign insurance company may file renewals of certificates at any time between January and July, and if filed before the expiration of such month the business done during the month is valid. *American Ins. Co. v. Pettibohn*, 62 Ind. 383.

received in each year; in consideration of which the said attorneys agree to defray all charges of office rent, salaries, stationery, advertising and all other expenses incident to the proper care and prosecution of the business, except agent's and broker's commissions, loss's, legal expenses, taxes and the pay of inspectors employed under the direction of the advisory committee. Such attorneys shall be entitled as further compensation for their services, to twenty-five per cent of the net profits of each year's business as found and determined by the advisory committee. Such profits may be determined and paid over quarterly.

"7th—Such attorneys shall at all times, when so required, furnish to the advisory committee full statements of all insurance expenses and premiums, whether due or collected, and every member of the committee shall at all times have access to all the books and papers of the attorneys. The attorneys shall keep separate accounts for each of the subscribers to this agreement, and each subscriber shall at all times have access to his individual account.

"8th—The advisory committee shall cause to be made up on the 31st day of December in each year all the accounts of the several subscribers hereto. If there should be any balance to the credit of the several subscribers over and above the amount of each subscription, the advisory committee shall determine how much, if any thereof, it is advisable to pay to each subscriber; and no part thereof shall be paid to or withdrawn

by any subscriber hereto, so long as he shall remain a party to this agreement, except upon the order or direction of the advisory committee. Each subscriber shall, however, be entitled to receive from such advisory committee at the end of each calendar year a certificate showing the amount to his credit at the end of such year. If account of any subscriber hereto shall show upon such annual statement that the amount to his credit is insufficient to cover the current liabilities against him, the advisory committee shall have the power and authority to call upon such subscriber for the payment of such an amount as will in the judgment of such committee be sufficient to meet the deficiency, and such amount when paid shall be credited to each individual subscriber in like manner with his original deposit and if not paid within three months from the date of such call such subscriber shall thereupon cease to be a party to this agreement except in regard to transactions already entered into on his behalf.

"9th—In case any of the subscribers hereto should desire to withdraw from this agreement, and shall give thirty days' notice in writing of such desire to the advisory committee, and in case any of such subscribers shall become insolvent or embarrassed in business or in case of any other reason, it should be deemed advisable in the opinion of a majority of the advisory committee that any subscriber should withdraw from this agreement, the attorneys aforesaid shall upon written notification by the advisory commit-

The determination of an insurance commissioner in issuing certificates to foreign corporations to do business in the state is not judicial and final, but merely ministerial. *State v. Fidelity & Casualty Ins. Co.*, 30 Minn. 538.

The revocation of a license to a foreign insurance company by the state insurance commissioner is a mere ministerial duty which may be conferred upon him by the legislature, and is not an exercise of judicial power. *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485.

But the failure of the auditor of state to furnish an agent a certified copy of papers filed with him, as required by statute, does not defeat the right of the foreign corporation to do business in the state. *American Ins. Co. of Chicago v. Butler*, 70 Ind. 1.

The failure to embrace a copy of the act of incorporation in the statement furnished by a foreign corporation to the auditor as item 14, in accordance with the statutory requirement literally construed, is not fatal, where such copy was actually furnished to him. *American Ins. Co. of Chicago v. Pressell*, 78 Ind. 442.

A premium note given to a foreign insurance company February 24, 1880, is not void on the ground that the company had no license or permission to do business in the state, where the company is required by law to send its statement for the preceding year within sixty days from the first of January in order to continue business, and an arrangement for a future examination of its affairs was made by the commissioner, who sent a license in April dated the first of January, but canceled the license subsequently because the company withdrew from the state before he fixed a date for making his examination. *Looming F. Ins. Co. v. Langely*, 62 Md. 198.

Other requirements.

A foreign corporation having furnished the Ohio 24 L. R. A.

officer a valuation made in its own state, thereby complying with Ohio Rev. Stat., § 279, need not pay the Ohio officer for making any valuation. *State v. Reinmund*, 45 Ohio St. 214.

It may be made a condition of a license to a foreign insurance company that it agree not to make any contract directly or indirectly with other companies or agents, the object or effect of which is to prevent free or open competition. *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485.

A state statute requiring agents of a foreign insurance company, when losses occur, to retain possession of moneys of the corporation coming into their hands until the losses are adjusted, or to abide the event of the suit, is not unconstitutional. *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204.

By Mass. Stat. of 1847, chap. 273, § 2, prohibiting insurance by mutual companies incorporated elsewhere, unless the provisions in chapter 37 "so far as they are applicable" have been complied with, and providing for filing a statement by such companies of the capital or reserve and the whole amount of risk, etc., the provisions of chapter 37, as to public statements in a newspaper, are applicable; and a contract of insurance cannot be made before this provision is complied with which will authorize an assessment by the company. *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray, 376.

A foreign insurance company is not within the provisions of the Arkansas Act of April 4, 1889, requiring a stipulation for service to be filed with the secretary of state as the Act of March 23, 1887, specifically provides for filing such stipulation by foreign insurance companies with the auditor of state. *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 129 U. S. 223, 35 L. ed. 154.

Other "states."

The District of Columbia is a "state" within the meaning of a statute making it unlawful for as

tee, cease to act as the attorneys for such subscriber, except in regard to transactions already entered into on his behalf, and such subscriber shall thereupon cease to be a party to this agreement, except in regard to such previous transactions. In case of the withdrawal of any subscribers for either of the reasons above stipulated, and in case of the death of any subscriber, his account shall not be closed until three months after the expiration of all risks in which he may have been concerned as such subscriber, and all sums to his credit, either in the hands of the advisory committee, or of the attorneys, shall be irrevocably pledged to the payment of any losses for which he may be or become liable, and of any amount which may be due or unpaid by him growing out of the insurance business herein contemplated; and neither such subscriber nor his assigns or legal representatives shall have the right to withdraw any part of such sum to his credit, until all such losses or other debts are fully satisfied and discharged. At the expiration of all such risks and upon payment and satisfaction of such other indebtedness, the balance remaining to the credit of such subscriber shall be paid over to him or his legal representatives or assigns.

"10th—In case, however, any subscriber who duly withdraws from this agreement, or the legal representatives of any deceased subscriber, should procure a new subscriber satisfactory to the advisory committee, then, upon such new subscriber assuming, in writing, all the liabilities and indebtedness of

the former subscriber under this agreement, or arising from any business contemplated therein, and duly executing this agreement, the former subscriber, or his legal representatives, shall be released and discharged from all responsibility as a party hereto.

"11th—At the annual meeting of the subscribers already provided for, any and all questions arising under this agreement, or in reference to the business herein contemplated, may be called up and disposed of. Special meetings may be called by a majority of the advisory committee, or by any ten subscribers, in the manner provided for annual meetings. The subscriber may waive a five days' notice, and accept in writing a shorter notice. Matters brought before any meeting shall be determined by the vote of a majority of those represented at such meeting, either in person or by proxy. At any meeting, annual or special, a quorum shall consist of the representatives of a majority of the subscribers. No change, however, can be made in the terms of this agreement except by the vote of three fourths of all the subscribers hereto at a meeting specially called for the purpose by notice stating the exact terms of the change proposed.

"12th—All claims for losses shall be disposed of by the attorneys under the supervision of the advisory committee, and shall be paid out of the funds in their hands, and when these are insufficient, then out of the funds in the hands of the advisory committee. Any suit brought upon any claim arising out of the business contemplated by this

insurance company incorporated by any other state to do business in Indiana without compliance with certain conditions. *State v. Briggs*, 116 Ind. 55.

This overrules in effect the decision or dictum in *Daily v. National L. Ins. Co. of United States*, 64 Ind. 1, to the effect that while an insurance company created by congress is a foreign corporation within the meaning of the Indiana Act of June 17, 1852, restricting business by such companies without complying with statutory conditions, yet such company is not an insurance corporation of "any other state" or "any government foreign to the United States," within the provisions of the Act of December 21, 1865.

The Michigan act requiring a deposit by an insurance company of at least \$100,000 with the chief financial officer or insurance commissioner of the state where the company is organized in trust for the benefit of policy holders is not satisfied in case of a British company by a deposit in New York state. The word "state" in such statute means a state of the Union, and the word "organized" means incorporated and not merely licensed to do business. *Employers' Liability Assur. Co. v. Commissioners of Insurance*, 64 Mich. 614.

What companies within the statutes?

Under the Illinois statutes which prohibit foreign insurance companies from doing business without complying with the provisions of the statutes or obtaining a license, and which provide for only two kinds of fire insurance, namely, joint-stock and mutual companies, a foreign company which is not mutual and which has not complied with the provisions respecting the capital of joint-stock companies cannot be granted a license. *New York Mut. F. Ins. Co. v. Swigert*, 120 Ill. 36.

A mutual company is within the provisions of 24 L. R. A.

the Indiana statute against business by foreign insurance companies. *Lamb v. Lamb*, 18 Nat. Bankr. Reg. 17.

A foreign insurance company insuring lives on the plan of assessment on surviving members, but not limiting the benefits to families and heirs of the members, must comply with Ohio Rev. Stat., § 2604, and is not exempt under section 3630, as a company for the relief of members, their families and heirs. *State v. Moore*, 38 Ohio St. 7.

Mass. Rev. Stat., chap. 37, § 42, prohibiting insurance by foreign corporations, except under certain conditions as to capital, is, by chapter 273, section 3, made inapplicable to foreign companies doing business on the mutual principle. *Williams v. Cheney*, 8 Gray, 215.

A mutual company issuing certificates to members who pay an admission fee, and also assessments on the death of members, is an insurance company within the meaning of the Massachusetts Statute of 1867, chap. 267, § 5, prohibiting, under a penalty, acts of agency for unauthorized foreign insurance companies. *Com. v. Wetherbee*, 105 Mass. 149.

A corporation of Illinois called the "Fraternal Alliance" which consists of a secret order, under the supervision of a grand or supreme lodge, securing members through the lodge system exclusively, is excepted by Mich. Act 1887, § 25, from the control of the insurance commissioner. *Rensselaer v. Seeley*, 72 Mich. 608.

The Knights Templars' & Masons' Life Indemnity Co., incorporated under the laws of Illinois to furnish benefits to widows, relatives, legatees, etc., of deceased members on policies issued in amounts ranging up to \$5,000 and paid by assessments on members, is a life insurance company subject to the Missouri laws, and not a "co-operative benevolent insurance society" nor a "fraternal brotherhood" having a community interest, but is an in-

agreement, and any questions arising as to any legal liability upon any such claims, shall be referred to Messrs. Coudert Brothers, as counsel, under the supervision of the advisory committee, and such committee, with the advice and concurrence of said counsel, shall have power to settle, compromise, or contest any such suit or claim as to them shall seem expedient, and are authorized, upon the advice and concurrence of said counsel, to stipulate for and on behalf of each several subscriber hereto, that such subscriber will abide by the event of any such suit, whether at the time of such stipulation such subscriber be or not a party to this agreement.

"13th—In the policies issued under the present arrangement, neither of the subscribers shall be made jointly liable with the others, nor with either of the others, but each subscriber shall only be made severally and separately liable to the amount authorized by him individually in the power of attorney, given by him to the attorneys above mentioned. Nor shall any joint liability be created on behalf of the subscribers hereto, in any matter arising out of the business to be carried on under this agreement, but only a several liability on behalf of each individual subscriber. No policy, however, shall be issued on behalf of any individual subscriber hereto, unless each of the individual subscribers insures for a like amount on said policy.

"14th—All receipts or earnings of the business contemplated by this agreement shall

be kept by the attorneys in fact in a separate bank account, in their name as such attorneys, and not in any way mingled with their own funds. They shall render accounts to the advisory committee at least once in each month, or oftener if required, and shall make returns and payments of balances to such advisory committee at least once in every three months, and oftener if required by the said committee.

"15th—All funds in the hands of the advisory committee shall be kept separately, and a separate bank account shall be kept by the committee for all uninvested funds, which bank account shall be in the names of such committee.

"Each of the undersigned, in consideration of the premises and of the execution of this agreement by the others, does hereby severally agree for himself, individually, to and with the others, and with each of them, that he and his representatives and assigns, will faithfully abide by and carry out his obligations and covenants hereunder.

"In testimony whereof, each of the subscribers has hereto set his hand and seal, on the day and year set opposite his name.

"Each member of the association also executed a power of attorney in the form following, viz.:

"*Know all men by these presents*, That I do hereby constitute Aaron H. Rathbone, Frederick W. Satterlee, Cleveland D. Fisher, and John D. Dorrance, my attorneys, in fact, for me and in my name, place, and stead to insure individuals, firms, or corporations

insurance company on the co-operative assessment plan. *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. Rep. 439.

The Pennsylvania Act of 1849 allowing any mutual fire insurance company of an adjoining state to become insurer, with certain exceptions, subject to the laws of the commonwealth, was held in *Huntley v. Merrill*, 32 Barb. 628, by the supreme court of New York, to repeal, so far as it affected mutual companies, the Act of 1810, prohibiting insurance by foreign companies.

The character and the nature of the business of domestic companies has been considered in cases not here collected but which by way of comparison and analogy have some bearing on the question what companies of other states are excluded?

As to the nature of "assessment" insurance, see *State v. Root* (Wis.) 19 L. R. A. 271.

As to benefit certificates as policies of insurance, see *Brace v. Chartrand* (Colo.) 12 L. R. A. 209, and *note*.

As to business by unincorporated associations, partnerships, or individuals, see *State v. Stone* (Mo.) 25 L. R. A. 243, and *Noble v. Mitchell* (Ala.) 25 L. R. A. 238, and *note*.

Violation of statute.

A foreign insurance company is not liable to the penalties prescribed by *Wagner's Mo. Stat.*, p. 777, art. 3, § 43, for doing business without the requisite certificate, as these penalties are imposed on the resident agents of the company. *State v. New York L. Ins. Co.* 51 Mo. 80; *State v. Charter Oak L. Ins. Co.* 9 Mo. App. 364.

A person pretending to act only as agent of the applicants may be found to be in fact an agent of a foreign insurance company to which he sends the applications contrary to a statute prohibiting acts as agent for foreign insurance companies who have 24 L. R. A.

not complied with the statute. *People v. Imlay*, 20 Barb. 68.

A state may make it a misdemeanor to act as agent of a foreign insurance company which has not complied with the laws of the state so as to be entitled to do business therein. *Moses v. State*, 65 Miss. 60.

Insuring one's own property in an unauthorized foreign company is not criminal under the Pennsylvania Act of 1887, subjecting to a penalty any person "paying, or receiving, or forwarding any premiums, applications for insurance, or in any manner securing, helping, or aiding in the placing of any insurance, or effecting any contracts of insurance" in such companies. *Com. v. Biddle*, 11 L. R. A. 561, 139 Pa. 610.

As to what constitutes "doing business" within the state, see *note* to *Cone Export & Com. Co. v. Poole* (S. C.) *ante*, 289.

Retailatory statutes.

A statute imposing on an insurance corporation of another state the same burdens by taxes, fines, fees, and otherwise (if greater than those charged in that state upon domestic corporations), which are imposed by the state in which the foreign corporation was created on similar corporations of the former state, is not unconstitutional as a denial to the foreign corporation of the equal protection of the laws. *Fire Assn. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 942.

Nor is such a statute unconstitutional as an unlawful delegation of legislative power. *People v. Fire Assn. of Philadelphia*, 93 N. Y. 311, 44 Am. Rep. 380; *Phoenix Ins. Co. of New York v. Welch*, 29 Kan. 672; *contra*, *Clark v. Port of Mobile*, 67 Ala. 217.

And it is not void for uncertainty. *State v. Insurance Co. of North America*, 115 Ind. 257.

Such burdens are regarded generally as in the

against all lawful risks, injuries, losses, and liabilities, excepting marine losses, losses by fire and death from natural causes, upon such conditions as they may deem to my interest; for such purpose to make and issue all binding contracts and policies of insurances; to subscribe such policies in my name, with the amount insured by me thereon, which shall in no case exceed the sum of five hundred (500) dollars on any one risk, unless such excess shall have been provided for by re-insurance; to change or modify the terms of any policy so issued; to annul or cancel the same; in their discretion to re-insure any and all such risks so taken and insured in such manner as shall be deemed by them most advantageous to my interests; provided always, that no such insurance or policy or re-insurance shall be made in my name or for my account unless a like insurance policy or re-insurance on the same risk be made at the same time and on the same terms, for and in the name of each and every other person for whom they shall at the time be acting as attorneys under power similar to this, severally and not jointly, for an equal amount, as provided in the articles of agreement entered into by me with various other persons on the _____ day of _____, 189-, of which agreement copy has been furnished to said attorneys.

"This power is given, and the exercise of all faculties thereunder is subject to the control and direction of the advisory committee acting under the provisions of the articles of agreement hereinabove referred to, and the

said attorneys are instructed and directed to turn over to such advisory committee all premiums, notes, moneys, or things of value belonging to me which shall come into their possession in the premises at least once in every three months, and as much oftener as they may be thereto required by said advisory committee.

"To demand, collect, sue for, receive and receipt for all premiums which may at any time become due to me.

"Also to receive notices and proofs of loss and interest, and all other notices and proofs under any policy issued by virtue hereof, and in all respects to manage and do in and about such insurance and all notices or claims thereunder, as they shall deem best for my interests.

"Also to adjust and pay out of any moneys in their hands belonging to me any loss, claim, or demand that may arise from or under any policy issued in my name under this power. And in case of suit being brought against me on any such loss, claim, or demand, to appear for me and in my name to defend or compromise such suit. Also, with the advice and concurrence of the advisory committee, to stipulate in my name that I will abide by the event of any suit which may be brought against any other party to the articles of agreement already mentioned, upon any policy which shall have been likewise subscribed in my name by virtue hereof.

"Also to do and perform for me and in my name every other act and thing, in relation

nature of a license and not as taxes, and therefore not within the constitutional provision of uniformity of taxation. *Goldsmith v. Home Ins. Co.* 62 Ga. 379; *State v. Ins. Co. of North America*, *supra*; *Blackmer v. Home Ins. Co.* 115 Ind. 596; *Blackmer v. Royal Ins. Co.* Id. 291; *contra*, *Clark v. Port of Mobile*, *supra*.

Or, if it is a tax, that the requirement of uniformity does not prevent classification, and that foreign insurance companies are not necessarily in the same class so as to prevent a difference in burdens according to the laws of their own states. *Home Ins. Co. v. Swigert*, 104 Ill. 653.

A retaliatory statute was also enforced in New Hampshire in respect to a Massachusetts company doing business in that state, but its constitutionality was not discussed. *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123.

The fact that a foreign corporation comes into the state on payment of a certain annual license tax does not prevent it from being charged a greater license in subsequent years by virtue of the provision as to equal protection of the laws when such greater tax is imposed by its own state on similar corporations of other states. *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 80 L. ed. 342.

A retaliatory statute imposing on insurance companies of another state or nation the same obligations and prohibitions that are imposed in such other state or nation upon corporations of the former state must be confined to cases fairly within its letter. *State v. Fidelity & Casualty Ins. Co.* 16 L. R. A. 611, 49 Ohio St. 440.

In construing the retaliatory statute of Minnesota respecting foreign insurance companies, it was held that, as against a New York corporation which had complied with the state statutes, a judgment of ouster would be refused, where it was

doubtful whether the New York statutes would be given effect to exclude a Minnesota corporation in such a case. *State v. Fidelity & Casualty Ins. Co.* 30 Minn. 538.

The retaliatory law is held to apply only when it is shown that the statute of a state which created a foreign corporation imposes greater burdens on Ohio corporations than the Ohio statute does. *State v. Reinmund*, 45 Ohio St. 214.

To make a case for the retaliatory provision of Ohio Rev. Stat., § 223, as to insurance companies of a state which imposes prohibitions upon Ohio companies "doing business in such state," it must appear at least that an Ohio company has been formed to do substantially the same kinds and lines of insurance as the foreign company wishes to do in Ohio. *State v. Fidelity & Casualty Ins. Co.* *supra*.

The question whether or not an Illinois company is actually engaged in business in another state in which there are restrictions on the business of foreign companies is immaterial in determining the application and operation of an Illinois statute requiring a foreign insurance company doing business in Illinois to make a deposit or payment of taxes and license fees, etc., at least equal to that which would be required by the laws of the state of its incorporation of Illinois insurance companies "having agencies in such other state." *Germania Ins. Co. v. Swigert*, 4 L. R. A. 473, 128 Ill. 287.

Whether or not the state of New York had ever enforced against an Iowa corporation its law prohibiting an insurance company to do more than one kind of business is immaterial in respect to the right to prevent a New York corporation in Iowa from transacting more than one kind of insurance business under the Iowa retaliatory statute, imposing on insurance companies of other states the same prohibitions that are or would be imposed on Iowa companies in such other states under their

to any policy made by virtue hereof, as fully as I could personally do.

"Provided always, that my said attorneys shall in no case make any policy of insurance by virtue of these presents, by which I shall be made to insure jointly with any other person or which shall in any way make me liable for the acts of any other person or insurer, or which shall bind or affect me otherwise than by a several and individual liability to the amounts insured or subscribed by me individually or in my name.

"In testimony whereof I have hereunto set my hand and seal in the city of New York, on the ____ day of ____, 189-.

"Sealed and delivered in presence of _____"

The form of policy used by the association, and issued to those whom it insures, is as follows:

CLASSIFICATION A.

No. _____ \$ _____
GUARANTEE AND ACCIDENT LLOYDS.
NEW YORK.

Age _____ Weekly Indemnity \$ _____

In Consideration of _____ dollars paid, and of the warranties and agreements contained in the application for insurance, which application is made a part of this contract, each of the subscribers hereto, as a separate underwriter, does for himself and not one for the other, hereby *insure* (subject to the conditions hereon) _____ of _____ by occupation a _____ from 12 o'clock noon of the ____ day of _____ 189-, to 12 o'clock noon of the ____ day of _____ 189-, and for such further period of time as may be

covered by duly authorized renewal receipts subject to the conditions and provisions expressed therein.

Against Loss of Life, Eye or Eye, Loss (separation) of Limb or Limbs at or above the wrist or ankle, provided such loss occurs within ninety days of the happening of the accident causing the same, also against loss of time while immediately, continuously and wholly disabled and prevented from transacting any and every kind of business pertaining to the occupation above stated, not to exceed sixty-five consecutive weeks (except when so disabled for life), provided the loss for which any claim is made is not caused or contributed to by any form of disease, but is caused exclusively by bodily injuries leaving external and visible marks of contusion or wounds upon the body, effected by external, violent, and accidental means during the continuance of this insurance, in the following sums, to wit:

1. For loss of life as aforesaid.....\$5,000 00
2. For loss of both hands as aforesaid..... 5,000 00
3. For loss of both feet as aforesaid..... 5,000 00
4. For loss of one hand and one foot as aforesaid..... 5,000 00
5. For loss of both eyes as aforesaid..... 5,000 00
6. For permanent total disability for life as aforesaid..... 3,000 00
7. For loss of the right foot as aforesaid..... 2,500 00
8. For loss of the left foot as aforesaid..... 2,500 00
9. For loss of the right hand as aforesaid..... 2,500 00
10. For loss of the left hand as aforesaid..... 1,500 00
11. For loss of one eye as aforesaid..... 650 00
12. For loss of time per week, as aforesaid (in lieu of all other benefits)..... 25 00
13. The loss in subdivision 1 is payable to

if surviving, if not, to the legal representatives of the assured. Other loss to the assured.

14. The assured shall have the privilege of traveling in any of the civilized portions of the globe,

existing laws. State v. Fidelity & Casualty Co. 77 Iowa, 648.

A Maryland statute imposing on insurance companies of other states the same obligations and prohibitions imposed in such other states upon Maryland companies will authorize the refusal of a license in Maryland to a company from another state on the ground of discretion of the insurance commissioner, although there is no express authorization or refusal on such ground, where a Maryland company has been refused a license on that ground in the other state. Talbott v. Fidelity & Casualty Co., 18 L. R. A. 584, 74 Md. 538.

A prohibition by a statute of another state, applicable to foreign as well as domestic insurance companies, against issuing policies to persons more than sixty years old, will not, by virtue of the New York Act of 1883, chapter 175, imposing on the corporations of another state the same obligations that are imposed on New York corporations by the laws of such other state, make a policy issued in New York by a company of the other state invalid because issued to a person more than sixty years old, since the retaliatory enactment of New York imposes obligations and not prohibitions upon such foreign corporations. Griesa v. Massachusetts Ben. Asso. 39 N. Y. S. R. L.

A New York corporation not being permitted in Ohio to do business on the assessment plan, except when benefits are limited to members, their families and heirs, the New York commissioner would have the right to exclude Ohio companies, and therefore a New York company must be excluded from Ohio, under the Act of April 18, 1883, § 8630e, excluding corporations of a state in which Ohio corporations are not permitted to do business on substantially the same basis and limitations as in Ohio. State v. Moore, 36 Ohio St. 493.

Inasmuch as Michigan statutes allow life policies 24 L. R. A.

only when they specify a fixed amount and do not permit endowment policies by assessment companies, while such companies in Ohio are allowed to issue endowment policies at a fixed sum, if they have complied with the statutes relating to mutual life companies, the Ohio companies are not allowed to do business in Michigan on substantially the same basis and limitations as in Ohio, and therefore under the proviso of Ohio Rev. Stat., section 3630e, Michigan assessment insurance corporations are not entitled to a license to do business in Ohio. State v. Western Union Mut. L. & Acc. Soc. 8 L. R. A. 129, 47 Ohio St. 167.

The New Hampshire retaliatory statute requires the court to hold that a Massachusetts company cannot recover on a premium note in New Hampshire until it has complied with the statutory conditions where Massachusetts statutes restricting foreign companies are construed in that state to defeat the recovery by a foreign company in a similar case. Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123.

For unconstitutional provisions as to waiver of the right to invoke the jurisdiction of federal courts as a condition of a license to a foreign corporation to do business, in respect to which insurance companies stand on the same footing as other corporations, see the note to Cone Export & Commission Co. v. Poole, ante, 250, as to exclusion or recognition of foreign corporations and the conditions imposed.

For the validity of contracts of insurance made by foreign corporations, see note to Puenix Ins. Co. v. Pennsylvania Co. (Ind.) 20 L. R. A. 405.

And generally as to validity of contracts made by foreign corporations that have not complied with statutory conditions, see note to Edison General Electric Co. v. Canadian Pacific Nav. Co. (Wash.) post, 315.

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by confining himself to the usual routes and the ordinary means of conveyance.

15. The loss of one or both eyes, feet or hands, or failure duly to pay any premium, will immediately terminate this insurance.

16. Each of the subscribers hereto shall be and is individually liable for one-hundredth part of the amount insured hereunder.

17. Affirmative proofs of loss and proof of insurable interest under subdivisions, 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11 shall be furnished to the attorneys of the subscribers within four months of the happening of the accident causing the same, and under subdivisions 6 and 12 within one month after termination of total disability, and no proceeding in law or equity shall be brought to recover payment under this policy unless such suit or proceeding shall be commenced within six months of the filing of such affirmative proofs and against only one of the underwriters at one time. A final decision in any suit so brought shall be decisive of such claim against each of the underwriters, and each underwriter hereto waives any limitation as to costs, and agrees to abide, by the event of any such suit, and authorizes the attorneys to pay the assured out of any funds in their hands the amount due under this policy. Each of the underwriters hereby authorizes the attorneys to receive and admit service of process for him in any suit brought as aforesaid.

18. If the assured shall be fatally or nonfatally injured, while temporarily or otherwise exposed to a hazard pertaining to an occupation or employment classed by the subscribers as more hazardous than that here given, the liability hereunder shall be only for such amount as is provided for the class in which such more hazardous occupation or exposure is rated, in the manual of the Guarantee and Accident Lloyds.

19. All losses under this policy are payable at the Home Office in New York, ninety days after receipt of proofs of loss satisfactory to the attorneys of the subscribers.

Each of the present subscribers as a separate underwriter binds himself severally and not jointly with any other for the true performance of the premises for the amount expressed to be insured by him.

In witness whereof the subscribers, as separate underwriters do severally subscribe their names at the City of New York, this _____ day of _____, 189__.

Here follow the names of the members:

Signed "by _____, Attorneys."

CONDITIONS.

Not Writable by Agents.

"The conditions under which this policy is issued and accepted by the assured are as follows:

"This insurance shall not be held to extend to or cover disappearances, nor to any injuries received while engaged temporarily or otherwise in any act or thing pertaining to blasting, wrecking or to the manufacture, transportation or handling of gunpowder, or any explosive substance or article in any way, shape or manner, except the use of firearms by sportsmen, nor while riding on a railroad train in any place or places except those provided for the transportation of passengers, or while walking or being upon any bridge or road bed of any railway.

"The assured suffering a loss for which a special sum is stated herein, shall not be entitled to any other indemnity, for the same injury, and the total amount of indemnity hereunder in any one year (twelve months) shall not exceed the sum named herein as death indemnity.

"In the event of an accident or injury for which or from which, directly or indirectly, any claim may be made under this policy, notice shall be given in writing signed by the assured, his attending physician, or beneficiary, mailed within ten days of the happening of such accident, and addressed to the Manager of the Accident Department of The Guarantee and Accident Lloyds at New York, stating the full particulars as to when and where and how it occurred, and the occupation of the assured at the time, his policy number and his address.

"A representative of the subscribers shall be allowed to examine the person or body of the assured in reference to any injury or cause of death, when and as often as may be reasonably required in their behalf.

"The subscribers or their attorneys shall have a right to terminate this policy and insurance, by mailing to the assured at his address as furnished,

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a notice of such termination, and a check or draft on New York for all unearned premiums standing on the books of the Lloyds to his credit.

"This insurance shall not be held to extend to or cover injuries received, whether fatal or nonfatal, that are caused wholly or in part, directly or indirectly, by or in consequence of disease; fighting, scuffling, lifting or over-exertion, unnecessary exposure to danger (voluntary or otherwise); war, riot, or in consequence of violating the law, by inhalation or otherwise (voluntary or involuntary) of any form of gas or gasses; injuries intentionally inflicted; injuries received while under the influence of intoxicating drinks, or narcotics or in consequence thereof; sunstroke, freezing, suicide (felonious or otherwise, sane, or insane); contact with any poisonous substance.

"In the event that a claim shall be made under this policy for loss of one hand or one foot, and the assured shall have more than one other policy of accident insurance covering such loss, the liability hereunder shall be only for such proportionate part of the amount of such loss of hand or foot named herein as one policy bears to the total number of policies held by the assured.

"By the acceptance of this policy the assured absolutely agrees and consents that in any action, proceeding or investigation in which this Lloyds is interested, any physician who has been or may be at any time consulted by him professionally, may testify under oath, before any court, tribunal or officer, concerning any ailment, disease, injury or affliction, bodily or mental, constitutional or otherwise, that he is or has been or may be suffering from.

"Should the assured engage in an occupation more hazardous than that named herein, it shall operate immediately to reduce the indemnity named herein to that provided for such more hazardous occupation according to the manual of the Guarantee and Accident Lloyds then in use, with the same effect as if the policy had been canceled and a new one issued accordingly, the premiums however remaining the same.

"DIVIDEND BOND NOTICE.

"This policy participates in the benefits of the dividend bond class, when the premiums are paid annually in advance.

"NOTICE.

"In case of injury notice must be given immediately to

"W. D. CHASE,

"Guarantee and Accident Lloyds."

In addition to the foregoing facts, the petition alleges that:

"Prior to the third day of May, 1891, the defendants, acting in pursuance of the articles of agreement and power of attorney aforesaid, and under the name of the 'Guarantee and Accident Lloyds,' carried on the business of guarantee and accident insurance in states of the United States other than Ohio; and on said third day of May, 1891, they made application to the Hon. W. H. Kinder, superintendent of insurance of the state of Ohio, for a license or certificate of authority to carry on in said state, the business of guarantee and accident insurance, in accordance with the articles of agreement above set forth. The license and authority to do such insurance business was refused by the said superintendent of insurance; whereupon the defendants in this suit, acting as relators, instituted proceedings in mandamus in this court, asking the court to compel the superintendent of insurance of the state of Ohio to issue such license and authority.

"Upon the final hearing of said action in mandamus, this court denied the application and refused the writ of mandamus prayed for, and rendered judgment against the relators for costs; but notwithstanding the refusal of the superintendent of insurance to

issue to the defendants a license or certificate of authority as requested, and notwithstanding the decision of this court sustaining the superintendent in so refusing, the defendants, acting under and in pursuance of the articles of agreement and powers of attorney aforesaid, and while so associated, have been and are transacting the business of guarantee and accident insurance in the state of Ohio, without having complied with the requirements of the laws of the state of Ohio regulating insurance, and without having been licensed or authorized to do such business by the superintendent of insurance of Ohio. A sample copy of the policies which are being issued by the defendants, while thus associated as the Guarantee and Accident Lloyds, is attached to and made part hereof, marked 'Exhibit A.'

"The defendants are citizens of the state of New York, and the articles of agreement and powers of attorney aforesaid, were entered into in that state; and said agreements constituted and constitute the defendants an association, under the name of the Guarantee and Accident Lloyds, with a principal office and place of business in the city of New York, under which style and name, and from which point the said association has been and is operating in the transaction of the business of guarantee and accident insurance.

"In thus transacting the business of insurance in the state of Ohio, without having complied with the laws of Ohio regulating insurance and without license or authority from the superintendent of insurance of Ohio to do so, the defendants have been and are usurping and unlawfully exercising a franchise of public concern, which has been reserved by the state for its control.

"Plaintiff prays for the advice of the court in the premises and that the defendants be compelled to answer to the state of Ohio by what warrant they claim to have, use, and enjoy the liberties, privileges and franchises aforesaid, and that they be ousted from using and exercising the same."

The defendants have interposed a general demurrer, and upon that the parties have submitted the case for final determination.

Messrs. Hiram D. Peck and Franklin T. Cahill, for defendants, in support of demurrer to information:

A franchise is a special privilege conferred by government upon individuals, and which does not belong to the citizens of the country of common right.

2 Bl. Com. 37; *California v. California Pao*. R. Co. 127 U. S. 40, 82 L. ed. 157, 2 Inters. Com. Rep. 158; Anderson, Law Dict.; Bouvier, Law Dict. 611.

Quo warranto has always been the proper remedy where an individual usurps a franchise.

The right to be a corporation is a franchise, and all the powers the corporation is vested with are but part of its franchise, and were it to enter into insurance contracts without having the right so to do, it would be usurping a privilege not granted to it, and would be subject to an action in quo warranto. But this does not apply to an individual.

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High, Extr. Legal Rem. § 592; 3 Bl. Com. 262; 2 Spelling, Extraordinary Relief, § 1778.

To make contracts of insurance is but one of those natural rights which every citizen is at liberty to exercise at will. The liberty to enter into contract or agreement is one of the most important natural rights that are secured to the citizens of this and of the several states.

Cooley, Const. Lim. 6th ed. 744; *People v. Gillson*, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Godcharles v. Wigeman*, 113 Pa. 431; *State v. Goodwill*, 6 L. R. A. 621, 38 W. Va. 179.

Individual insurance is but a private contract. Every contract of guaranty, of indorsement, every bond is but a species of insurance.

Lucena v. Craufurd, 2 Bos. & P. N. R. 800; 1 May, Ins. § 27; Marshall, Ins. pp. 1, 39, 40.

In Georgia our position was sustained.

Fort v. State (Ga.) July 8, 1893.

Mr. J. K. Richards, Atty-Gen., for plaintiff, *contra*:

Where the owner of property diverts it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, quoted and approved in *State v. Columbus Gas-Light & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Zanesville v. Zanesville Gas-Light Co.* 47 Ohio St. 1.

That the business of insurance is one of public interest and concern, is apparent from the amount and character of the legislation on the subject, not only in this state, but in all the states, and in all countries.

Special laws have been passed for their organization, and no insurance company can be organized in this state under the general provisions of section 3235.

State v. Pioneer Live Stock Co. 38 Ohio St. 347.

Foreign companies, whether incorporated or unincorporated, are required to make application to the superintendent of insurance, submit to him a statement of the condition of the company, satisfy him that it is sound and complies with the laws of Ohio both in the securities it furnishes and the mode of business it does, and procure from him a certificate of authority.

Foreign companies also pay a special tax in the nature of a franchise tax on the amount of business done in this state. Section 2745 as construed in *State v. Reinmund*, 45 Ohio St. 214.

The Michigan statutes are similar to ours.

In *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, the supreme court of Michigan holds that this law applies to corporations organized within the state and "against the representatives of foreign incorporated and unincorporated interests."

American Ins. Co. v. Stoy, 41 Mich. 335; *People v. Howard*, 50 Mich. 239.

The privilege of doing insurance in Ohio is a franchise, for the unlawful exercise of which quo warranto will lie.

2 Spelling, Extraordinary Relief, §§ 1806-1808; *California v. California Pacific R. Co.* 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 173; *People v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *State v. Tyekeba*, 80 Kan. 653; *Ensinger v. People*, 47 Ill. 384, 95 Am. Dec. 495; *Swarth v. People*, 109 Ill. 621; *People v. "Golden Rule"*, 114 Ill. 35; *Farmer v. State*, 69 Tex. 561; *State v. Western Union Mut. L. & Acc. Soc. of United States*, 8 L. R. A. 129, 47 Ohio St. 167; *State v. Fidelity & Casualty Ins. Co.* 89 Minn. 538; *State v. Reinmund*, *supra*; *Connecticut Mut. L. Ins. Co. v. Com.* 183 Mass. 161; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 522.

Williams, J., delivered the opinion of the court:

The action of quo warranto may be maintained under our statute (1) against a person who unlawfully exercises a franchise, and (2) against an association of persons who act as a corporation within the state without being legally incorporated; and the present action is prosecuted on both of these grounds. The position taken in support of the demurrer is, that the defendants, in transacting the business of insurance in the manner alleged in the petition, do not exercise a franchise, or act as a corporation, but are pursuing as individuals, an occupation, in which any person may of natural and common right engage; which right, it is contended, cannot be abridged or controlled by legislation, and hence, the defendants are not subject to the conditions and regulations imposed by the laws of the state on companies and associations doing an insurance business.

Insurance in its early existence, when the nature of the risks assumed were few, and the amount of business small, was done chiefly, if not entirely, by individuals. But in more recent times it has been extended until it embraces almost every kind of risk, and has grown to such proportions that it enters into every department of business, and affects all classes of people, and their property; and has, in consequence, everywhere, become the subject of legislative regulation and control. The several states have enacted laws designed to place the business, within their limits, on such substantial basis as will afford adequate protection to the citizens and their property. There can be no doubt of the power of the state to do so; nor, that the power extends to the enactment of such laws as its legislative body may deem wise and proper for the purpose, not in conflict with the fundamental law; and, therefore, within the legitimate exercise of that power, foreign companies may be excluded altogether from doing business in the state, or admitted on their compliance with such terms and conditions as its legislature chooses to impose. There has been enacted in this state an extensive code or system of laws, covering the whole subject of insurance; regulating the incorporation and organization of companies and associations for the transaction of the various kinds of insurance, and prescribing their powers and duties, defining the scope and effect of their policies, and otherwise regulating their business. They are required,

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as a means of protection of those who deal with them, to deposit adequate securities and invest their capital and earnings in designated modes, in the state, make periodical reports of their financial condition and business affairs, submit to visitations, and examinations of their affairs, by a public officer charged with the duty of enforcing the insurance laws, and comply with other specified requirements; a compliance with all of which by companies and associations organized in the state is essential to their right to carry on the business. Foreign companies, before doing business in the state, are required to conform to the same regulations, and others peculiarly applicable to them, among which latter are those which prohibit any "insurance company, association, or partnership, incorporated, organized, or associated under the laws of any other of the United States, or of any foreign government," from doing an insurance business "in this state, until it procures from the superintendent a certificate of authority to do so," and forbid any person or corporation to "act as agent in this state for any such company, association, or partnership, directly or indirectly, either in procuring applications for insurance, taking risks, or in any manner transacting the business of insurance, until it procures from the superintendent a license to do so, stating that the company, association, or partnership has complied with all the requirements of," the insurance laws, "applicable to such company, and depositing a certified copy of such license in the office of the recorder of the county in which the office or place of business of such agent or agents is established." Rev. Stat. § 3650.

The chapter of the Revised Statutes which established the department of insurance, and places it under the management of the superintendent, provides, among other things, that officer shall be appointed by the governor, by and with the advice and consent of the senate. He holds his office for a fixed period, and is paid a stated salary; he is provided with an office in the state house, and is specifically charged with the duty of seeing to the execution and enforcement of all laws relating to insurance; he is authorized to investigate the business and affairs of all insurance companies, whether foreign or domestic, and employ skilled and competent persons to assist him; it is made his duty when he has reason to suspect that the affairs of any company are in an unsound condition, to cause them to be investigated, and its officers and agents are required to submit themselves to examination under oath, and their books and business to his inspection, and in every other way facilitate the investigation; and when satisfied the company is in an unsound condition, his duty is to revoke its authority to do business, and from his decision there is no appeal. *State v. Moore*, 42 Ohio St. 103. He must keep a record, and preserve in permanent form his proceedings, including a concise statement of the condition of each company, and make reports to the legislature of the conduct and condition of each company doing business within the state, with such suggestions as he may

deem expedient. In short, his department is a branch of the state government, and his functions are derived from the state, and exercised in the public interest. Every insurance company, before commencing business, is required to pay into the department certain fees and charges for filing its charter, and others for filing its preliminary statement for admission, and for its certificate of authority to do business, and for licenses to its agents; and after the company commences business, it "shall publish, at least once a year, in some newspaper of general circulation, in every county where such company has an agent, a certificate from the superintendent of insurance that such company has, in all respects, complied with the laws of the state relating to insurance." It is made unlawful for any person, company, or corporation not licensed by the superintendent of insurance, to receive or forward applications for insurance in any foreign company, or in any manner aid in the transaction of its business; and severe penalties are attached to the violation of any of the provisions of the chapter which provides for the appointment of the superintendent, including those already pointed out, all of which are made applicable expressly "to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance;" and it is further made unlawful for any "company, corporation, or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, without first having complied with all the provisions of this chapter." Rev. Stat. § 289.

These are some of the many statutory provisions, showing the extent to which the state has taken control of the business of insurance. They are reasonable and just, and were adopted for the laudable purpose of protecting the public against imposition by unreliable and untrustworthy companies and associations. Compliance with them is made the condition upon which foreign companies and associations are allowed to transact the business of insurance within the state. There is not such compliance until the company or association has obtained from the superintendent of insurance the necessary certificate of authority, and licenses to its agents. Companies and associations that have not received such certificate are denied the privilege of doing business here. The certificate of authority so granted by the superintendent, so long as it remains in force, confers on the company or association receiving it the right and privilege of carrying on its business of insurance in the state. The authority emanates from the state, and the privilege granted is a franchise.

The author of a recent and well prepared work, treating of this subject says: "Where by statute the legal exercise of a right, which at common law was private, is made to depend upon compliance with conditions imposed for the security and protection of the

public, the necessary inference is that it is no longer private, but has become a matter of public concern, that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function. In this case the legislature has done no more than was done by the court in the other instance, when it, from considerations of a public nature declared, as a principle of the common law, that facts brought to its notice, or of which it then took judicial notice, warranted the application of principles existing independently of the legislative declaration to the effect that the right claimed was matter of public and not exclusively of private concern." *Spelling, Extraordinary Relief*, § 1807. The same author further says: "There was no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals. But now by statute in almost, if not quite all the states, stringent requirements as to security of the persons dealing with insurers and the making and filing reports with public officers for public information, are provided, and must be strictly observed and complied with before any person, association or corporation, may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right." *Id.* § 1808.

It is claimed, however, that the laws of Ohio do not apply to the defendants, because they are not an organized corporation, company, or association, or acting as such, but that in making contracts of insurance each individual acts for himself. A careful consideration of their plan of business, as shown by the articles of agreement and powers of attorney executed by the defendants, has brought us to a different conclusion. They have associated themselves together in a business undertaking, under a company name, in which, viz.: "Guarantee and Accident Lloyds, New York," all of their policies are issued. Each subscriber to the articles have contributed an equal amount to the capital stock of the concern, which is placed in the control of a board of managers, called an advisory committee, to meet losses arising on the policies. This board of managers is chosen by the subscribers, like the directors of a corporation, and invested with powers quite as plenary. All the subscribers have executed powers of attorney to the same individuals, investing them with the business management of the insurance, under the supervision of the advisory board. The powers conferred on the attorneys in fact are analogous to those of the executive officers of a corporation. They execute the policies, keep accounts of the business and expenses, which are open to the inspection of the advisory board, adjust all losses, and prosecute and defend all suits growing out of the business. Each member stipulates with the others that no policy shall be issued unless it is executed in behalf of all, and yet, that his liability shall be several only, and lim-

ited to the amount contributed to the fund, or authorized by him; so that, if some of the members become insolvent, and their contribution is exhausted in losses, or otherwise, the policy shall be enforceable against the others, only for an aliquot part, equal to the proportion of the solvent to the insolvent members. The liability of a stockholder of a corporation is not more restricted. Then the interest of each member in the concern is made transferable; a member who wishes to withdraw is authorized to procure another to take his place, and the representative of a deceased member may transfer the latter's share in like manner, and in that way, the organization may be made as enduring as it is possible for any corporation to be. The association has the appearance, and some of the characteristics of a corporation formed for the purpose of doing a general insurance business in its line, and its form of policies, and mode of conducting its business are calculated to impress one who does not make a critical examination, with the belief that it is a corporation, conforming to the usages of such companies. The character of the organization under which the defendants are operating, and their method of business, bring them, we think, within the purview of that clause of section 6760, of the Revised Statutes, which authorizes an action in quo warranto to be brought "against an association of persons who act as a corporation within this state without being legally incorporated." To be within the operation of that provision it is not necessary the association, or persons composing it, should avow a purpose to act as a corporation, or assume to do so; it is sufficient that the acts are such as appertain to corporations, or are done after the manner of corporations.

Under a statutory provision identical with that of section 6760, quoted above, it was held by the supreme court of Illinois, that "an association, or number of persons, who, in conducting the business of insurance profess to limit their liability to the amount of money contributed by each, and assume 'to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, are 'acting as a corporation,' so as to authorize a judgment of ouster in quo warranto under Illinois Revised Statutes 1874, chapter 112, where they are not legally incorporated." *Greene v. People* (Ill.) 21 N. E. Rep. 605.

The case is much in point; and we fully concur in the doctrine announced by Scholfield, J., in the opinion, where it is said: "The question here is whether, under the facts presented by this record, 'any association or number of persons are acting within this state, as a corporation, without being legally incorporated.' If they are, the judg-

ment below is authorized by our statute, entitled 'Quo Warranto' (Rev. Stat. 1874, chap. 112, p. 787), and must be affirmed; otherwise it must be reversed. We think it clear that, in two respects at least, these respondents are acting as a corporation, and it is not pretended that they are actually incorporated, namely: *First*, in professedly limiting their liability to the amount of money contributed by each; *second*, in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representative. It may be, as contended by counsel, that individuals may insure property against loss by fire. They cannot limit their liability to any given amount of capital they choose to set apart for that purpose, nor can they perpetuate the business without change of capital, beyond their own lives indefinitely. These things can only be done by a corporation. Ang. & A. Priv. Corp. 9th ed. § 41; 2 Kent, Com. 8th ed. 296, 298; Parsons, Partn. 2d Am. ed. 544; Gow, Partn. 2d Am. ed. 17.

"The fact that these respondents may be legally held individually liable upon any policies they may have issued does not relieve them of the charge of having acted as a corporation. They are, if individually liable, only liable because they have no statutory authority to do what they have assumed to do, because, instead of being a corporation in fact, they have usurped the powers of a corporation. Were we to hold that these respondents can do, without any legislative authority, what they here assume to do, our insurance laws ought to be repealed; for individuals, then, by organizing in this manner, could escape both individual and corporate liability beyond the amount of assets they might choose to place in the hands of their trustee as the basis of their liability. No public officer could investigate whether the amount is in fact paid in, how it is invested, or how secured, and the public would thus have practically no protection against dishonest companies. These respondents, if they will carry on the business of insurance, must either openly act upon their responsibility, as individuals, or they must become incorporated, and subject themselves to the laws governing such corporations." The judgment below was accordingly affirmed. The grounds held sufficient for ousting the respondents in that case are present in the case before us.

The averments of the petition sufficiently show that the defendants in transacting the business of insurance in this state are unlawfully exercising a franchise within the state, and are acting as a corporation therein without being legally incorporated.

Demurrer overruled and judgment of ouster.

COLORADO SUPREME COURT.

George J. KINDEL, *Appt.*,
v.

BECK & PAULI LITHOGRAPHING CO.

(.....Colo.....)

1. The entry, by the clerk, of a judgment for a larger amount than asked for in the complaint, when the order for judgment follows the language of the prayer, is to be regarded as a clerical and not a judicial error in determining the power of the court to correct it.
2. The trial court may correct a clerical error in the amount of the judgment entered after the record has been removed to a higher court by appeal.
3. An appellant cannot insist on having clerical errors in the judgment corrected by the appellate rather than by the trial court, although the correction by the trial court deprives him of his ground for appeal.
4. Imposing a penalty on the officers, agents, and stockholders of a foreign corporation for doing business in the state without filing a certificate does not render void a contract by the corporation to manufacture articles at its domicile and deliver them to the purchaser in the state imposing the penalty.
5. Failure to pass upon a demurrer to a defense and entering judgment for plaintiff on the pleadings is not prejudicial to defendant when the defense was insufficient and the defect

such that it could not have been cured by amendment.

(December 22, 1898.)

APPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff, and from an order correcting the judgment in an action brought to recover the contract price of certain calendars which had been furnished by plaintiff to defendant. *Affirmed.*

Statement by Hayt, *Ch. J.*:

The contest in this case is over \$7.78. The controversy arose as follows: In the year 1889 the appellee, the Beck & Pauli Lithographing Company, entered in a contract with appellant, Kindel, by the terms of which appellee agreed to furnish appellant 5,000 calendars at 17½ cents each, or for a total of \$875. The calendars were duly furnished, and accepted by appellant. When the bill for the same was presented it contained a charge of \$15.27 for boxing and freight. This bill appellant refused to pay, and thereupon suit was instituted. Appellee, in its complaint, for a first cause of action alleges the furnishing of the calendars under the contract, and the payment of the sum of \$15.27 for boxing and freight upon the same, and asks for judgment for these sums, with interest. It is with the first cause of action alone that we have to deal upon

NOTE.—*Exclusion of foreign corporations as an interference with interstate commerce.*

Telegraph companies.

A foreign corporation operating a telegraph line between states, and which has accepted the Act of Congress of July 24, 1866, giving it the privilege of using post-roads, cannot be excluded from a state; and an attempt of the state to grant an exclusive franchise for telegraph business is void. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, affirming 2 Woods, C. C. 643; *Western U. Teleg. Co. v. Atlantic & Pacific States Teleg. Co.* 5 Nev. 102.

But a Pennsylvania case denied the validity of the lease of a franchise by a telegraph company to a foreign corporation so as to authorize the latter to open new lines. *Philadelphia v. Western U. Teleg. Co.* 2 W. N. C. 455.

This case, however, also decided that post-roads, which a foreign company had the right to use under the act of congress, did not include streets and highways belonging to the state, the fee of which was generally owned by individuals. But on this point the case is fully overthrown by the cases above cited.

No license fee can be demanded by a municipal corporation as a condition of doing business by a foreign telegraph company acting under the act of congress. *Bradford v. Postal Teleg. Co. (Pa.)* 11 Ry. & Corp. L. J. 54; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 81, reversing *Port of Mobile v. Leloup*, 76 Ala. 481.

But for purely private business between points in the same state, a license tax imposed on such a company is not unconstitutional, even if it is also engaged in interstate business which cannot be prevented or burdened by state authorities. *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 632, 38 L. ed.—.

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For business done by government officers and agents by a telegraph company, under the act of congress, no license fee or burden can be imposed. *Charleston v. Postal Teleg. Cable Co. (S. C.)* 9 Ry. & Corp. L. J. 449.

A foreign corporation may be given the right to build a telegraph line across the public domain, but not upon private property without just compensation. *Southwestern R. Co. v. Southern & Atlantic Teleg. Co.* 46 Ga. 42, 12 Am. Rep. 565.

A state constitutional provision requiring a known place of business and an authorized agent of a foreign corporation before it can do business in the state is a valid police regulation and is not unconstitutional as to commerce in respect to a foreign telegraph company "as it does not impede or obstruct unreasonably any right conferred on foreign telegraph corporate companies by the Act of Congress of July 24, 1866. *American U. Teleg. Co. v. Western U. Teleg. Co.* 67 Ala. 23, 43 Am. Rep. 90.

But no interstate business was involved in this case nor any business for the government, and it would seem that as to such kinds of business the decision would necessarily be otherwise in view of the federal decisions denying the power of states to interfere with commerce or government agencies.

So, such company, at least where it has not acquired any property in the state or attempted to construct any telegraph line therein, has no right to maintain suit to enjoin interference with its business. *American U. Teleg. Co. v. Western U. Teleg. Co.* *supra*.

A tax on gross receipts of a foreign telegraph company and other forms of taxation such as a charge on each pole and each mile of wire which are not made conditions of doing business within the state, although presenting questions quite similar to those respecting the lawfulness of con-

this appeal. To this first cause of action the defendant, by answer, interposed two defenses. The first consists of allegations to the effect that plaintiff was a foreign corporation, and had not complied with the laws of the state of Colorado with reference to filing a certificate as required by the statutes. The second plea to this cause of action consists merely of an offer on the part of the defendant to pay the sum of \$875, and a denial that he was indebted in any larger amount. And the defendant further says "that, as to said \$875, he is still willing to pay, and offers to bring same into court." The plaintiff filed a general demurrer to the first defense. It replied to so much of the second defense as constituted an answer to that part of the first cause of action which related to the item of \$15.27. In this state of the pleadings, plaintiff, upon notice, moved for judgment by default for the undisputed portion of his claim. The court sustained this motion, and rendered judgment accordingly on April 23, 1890. From this the defendant prayed an appeal, which was allowed, and the amount of the bond fixed by the court. An appeal bond was filed and approved on May 1, 1890. Thereafter, before the record had been lodged in this court, and at the same term of the district court at which the judgment was rendered, after due notice, plaintiff's counsel moved the court to correct the entry of the judgment by deducting therefrom the sum of \$7.73, which was accordingly done. The defendant thereupon prayed another appeal, which was allowed on the condition that he file an appeal

bond within a certain time. The entire proceedings appear in the record now before the court.

Messrs. Markham & Carr, for appellant:

This court had said in *People v. Adams*, 13 Colo. 551, in speaking of appeals "the order of the district court in relation to the appeal having been complied with, the jurisdiction of the supreme court clearly attached, unless some fatal irregularity existed."

The filing of the appeal bond within the time required by the statute perfects the appeal.

Carbonate Town Co. v. Ives, 10 Colo. 81.

After the appeal was perfected under the former system, the cause was then pending here, and the court below was without jurisdiction to enter new orders with a view to a code appeal.

Eicholtz v. Wilbur, 4 Colo. 435.

When the party appealing has entered into the appeal bond, and the same is accepted and approved, the appeal is taken.

Svensen v. Grand Fire & Marine Ins. Co. 4 Colo. 480; *Daniels v. Miller*, 8 Colo. 542.

When the appeal is perfected, the judgment or decree in the court below is thereby vacated and the case is regarded as being transferred to the court above. An appeal perfected suspends all proceedings upon the judgment appealed from.

Powell, Appellate Proceedings, § 19, p. 371.

Messrs. Riddell, Starkweather & Dixon, for appellee:

A plea of tender has always been regarded as an admission of liability to the amount of the sum tendered.

ditions on which foreign corporations may do business, are not considered here. As to this see note on the power of the state to impose burdens on interstate telegraph and telephone companies with the case of *Postal Teleg. Cable Co. v. Baltimore*, ante, 181.

Insurance companies.

That the business of insurance is not commerce which a foreign corporation has a right to engage in under federal laws is fully established in *Paul v. Virginia*, 75 U. S. 8 Wall. 163, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 506, 19 L. ed. 1029; *Home Ins. Co. of New York v. Augusta*, 93 U. S. 116, 23 L. ed. 825; *People v. Thurber*, 13 Ill. 554; *Farmers & Merchants Ins. Co. v. Harrah*, 47 Ind. 238; *List v. Com.* 118 Pa. 322; *State v. Phipps*, 18 L. R. A. 657, 50 Kan. 609.

As to restrictions on foreign insurance companies, see note to *State v. Aokerman*, ante, 298.

Packet company.

The provision of article 236 of the Louisiana Constitution requiring foreign corporations before doing business in that state to have a known place of business and an authorized agent is an unlawful interference with interstate commerce when applied to a packet company engaged in interstate transportation with vessels licensed under act of congress for the coasting trade. *New Orleans & M. Packet Co. v. James (C. C. R. D. La.)* 1 Intern. Com. Rep. 599, 22 Fed. Rep. 21.

Express companies.

In *Leloup v. Port of Mobile*, 127 U. S. 840, 33 L. ed. 31, it was said that in view of the course of decisions subsequently made, the ordinance involved in the case of *Osborne v. Mobile*, 83 U. S. 15 Wall. 479, 24 L. R. A.

21 L. ed. 470, which imposed a license tax on an express company or railroad company having a business extending beyond the limits of the state greater than that imposed on such companies whose business was confined to the state or city, and which was there held constitutional, "would now be regarded as repugnant to the power conferred upon congress to regulate commerce among the several states."

A privilege tax imposed on a foreign express company engaged in interstate transportation is invalid as to such business but valid as to business performed exclusively within the state. *United States Exp. Co. v. Hemmingway*, 39 Fed. Rep. 60.

No license tax can be imposed by a state on an express company of another state engaged in interstate transportation so far as that business is concerned, but it is otherwise as to merely local business within the state. *Wells, Fargo & Co. v. Northern Pac. R. Co.* 23 Fed. Rep. 469.

Railroad companies.

A tax upon a foreign railroad corporation for the privilege of keeping in the state an office for the use of its officers, stockholders, agents, and employees is unconstitutional as a tax upon commerce, where its railroad is a link in a through line of interstate transportation. *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Intern. Com. Rep. 178, reversing 114 Pa. 256.

To similar effect is the decision in *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Intern. Com. Rep. 181, in which a license tax imposed upon an agent of a railroad doing business between New York and Chicago for the privilege of doing business in San Francisco, which consisted in procuring passengers for that line, but not in selling tickets or receiving or paying out money for the company, was a tax upon interstate commerce.

Supply Ditch Co. v. Elliott, 10 Colo. 381; *Denver, South Park & P. R. Co. v. Harp*, 6 Colo. 424; *Brown v. Fink*, 48 N. C. 379; *Frank v. Coe*, 4 G. Greene, 555, 61 Am. Dec. 145; *Moynehan v. Moore*, 9 Mich. 9, 77 Am. Dec. 483; also note containing a full collection of authorities.

If a debt or duty be not discharged by a tender and refusal, the tender must be pleaded with a *proferat in curia*.

Spann v. Baltzell, 1 Fla. 801, 46 Am. Dec. 357; 5 Baron, Abr. title *Tender*, H 4; *Carley v. Vance*, 17 Masa. 392.

No *proferat in curia* being either alleged or proven, it was proper for the court, on the motion of the plaintiff, to enter judgment for the plaintiff, for that portion of the "first cause of action," which was admitted to be due by the averments of the "second defense."

Monroe v. Chaldeck, 78 Ill. 432; *Carley v. Vance*, and *Spann v. Baltzell*, *supra*.

A foreign corporation, although it has not complied with the requirements of the statutes, in respect to filing of the certificates, may yet carry on business in this state, acquire and hold real and personal property, and maintain suits in our courts. The only penalty thereby incurred is the rendering of the officers and agents of the corporation liable for the debts of the corporation.

Uiley v. Clark-Gardner Lode Min. Co. 4 Colo. 869; *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. 287; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 527, 28 L. ed. 1137; *Frittle v. Palmer*, 182 U. S. 282, 88 L. ed. 817.

Under these decisions, the "first defense" of the defendant would appear to have constituted

no defense at all to plaintiff's action. It was utterly and hopelessly insufficient. It presented no issuable facts. It was frivolous in the extreme. The court was justified in regarding it as a mere nullity.

Fitzgibbon v. Calvert, 39 Cal. 261; *Felch v. Beaudry*, 40 Cal. 448; *Gale v. James*, 11 Colo. 540; *Brown v. Fink*, 48 N. C. 378.

The "first defense" raised no issuable fact. It was hopelessly insufficient; it presented no defense, no bar to the action. If the court had passed upon the demurrer before entering judgment by default, it must have been sustained. Were this court to reverse the judgment and remand the cause, the district court would then be obliged to sustain the demurrer, nothing would be gained. The same judgment would again be rendered on the pleadings.

Peahine v. Shapperson, 17 Gratt. 472, 94 Am. Dec. 470; *Greel v. Brown*, 1 Rob. (Va.) 265.

During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct; but when the term is passed, then the record is of roll, and admitted no alteration, averment, or proof to the contrary. Co. Litt. 260a. Of the law thus laid down, the only part remaining unshaken to the present time is, that during the term, the proceedings remained in the breast of the judges. Not only the records, during that time, are subject to the revision of the court, but the judgment itself may be altered, revised, or revoked, as well as amended in respect to clerical errors and matters of form.

Bridge company.

A New York corporation authorized by act of congress to construct a bridge across Staten Island sound or "Arthur Kill" cannot be prevented by statute of New Jersey from constructing a bridge at that place. *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9.

The validity of a tax on a foreign corporation in any form is not here touched upon, except so far as the tax is in the nature of a license tax imposed as a condition of permitting the company to do business in the state, though very similar questions arise in cases of taxation in other forms which is alleged to constitute a burden on interstate commerce.

Trading companies.

But a foreign corporation selling its manufactured goods in a state by traveling solicitors was held, by an opinion of the attorney-general, in Pennsylvania to be bound by the Pennsylvania statute requiring the corporation to file a statement of a known place of business and a known agent within the state. *Re Goulds Mfr. Co. of New York*, 14 Pa. Co. Ct. Rep. 179. This opinion seems to be very clearly wrong in the light of the other authorities on the question.

It is held by the courts as in the main case a sale of goods in another state by a foreign corporation and a delivery of them in the state constitutes interstate commerce which cannot be affected by state statute requiring a foreign corporation to file its articles, etc., as a condition of doing business. *Lyons-Thomas Hardware Co. v. Reading Hardware Co. (Tex.)* Feb. 7, 1893; *American Starch Co. v. Bateman (Tex.)* May 31, 1893; *Bateman v. Western Star Mill Co.* 1 Tex. Civ. App. 90, 4 Inters. Com. Rep. 260; *Reed v. Walker*, 2 Tex. Civ. App. 92.

24 L. R. A.

The same doctrine was declared by two of the justices of the Supreme Court of the United States in *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, but the decision was based by the majority of the justices on other grounds without passing upon this question.

Following this decision in a parallel case but without discussing the subject of commerce, was the decision in *Fuller & J. Mfg. Co. v. Foster (Dak.)* Oct. 4, 1893.

In *Boulden v. Ester Organ Co.*, 22 Ala. 182, the conditional sale of a piano by a foreign corporation was held to be invalid because the corporation had no right to do business in the state; but nothing was said about interstate commerce and it does not appear that the piano was sent from another state.

In *Webber v. Virginia*, 103 U. S. 347, 26 L. ed. 566, a license tax on a sewing machine agent selling machines for a corporation of another state was held void as an unconstitutional interference with commerce. The statute discriminated against manufacturers of other states and was held void on this account. The fact that the manufacturer was a corporation did not affect the question.

This is established doctrine as to drummers or commercial travelers, and it is immaterial whether they are traveling for corporations or individuals. See cases on this point in note on peddlers and drummers as related to interstate commerce, with the case of *Re Spaul*, 14 L. R. A. 97, 47 Fed. Rep. 208.

And in the main case *KINDEL v. BECK & PAULI LITHOGRAPHING CO.* it is declared that to give a state constitution and statutes as to foreign corporations a construction which would not permit a foreign corporation to bring an action in the state for goods delivered in the state under a contract made in another state would make them an unconstitutional regulation of commerce.

Freem. Judgm. § 69; *Sherman v. Nixon*, 37 Ind. 154; *Hughes v. Hinds*, 69 Ind. 94; *White v. Blake*, 74 Me. 493, and cases cited; *Sidener v. Coons*, 83 Ind. 188; *Latta v. Griffith*, 57 Ind. 339; *Miller v. Royce*, 60 Ind. 192; *Mitchell v. Lincoln*, 78 Ind. 584; *Conway v. Day*, 79 Ind. 318; *Rickman v. Rickman*, 6 Lea, 455.

The court below had the undoubted right, upon motion, to correct or amend the judgment, inasmuch as the same had been entered for the wrong amount.

Doane v. Glenn, 1 Colo. 456; *Wolfley v. Lebanon Min. Co.* 3 Colo. 296.

A judgment, or any other material part of a record may be amended or corrected in the court below while the cause is pending in another court on appeal or writ of error.

Rew v. Barker, 2 Cow. 408, 14 Am. Dec. 515; Freem. Judgm. § 71, and cases cited; *Wolfley v. Lebanon Min. Co. supra*; *State v. Delafield*, 69 Wis. 268; *Morris v. Peck*, 73 Wis. 482.

Hayt, J., delivered the opinion of the court:

The first assignment of error has reference to the judgment of April 28, 1890, for \$882.73. That this judgment was excessive to the amount of \$7.73 has at all times been admitted by appellee, and the only question to be considered with reference thereto is as to the right of the court below to correct the same, as was attempted by the judgment entered June 30, 1890. It is apparent from the record before us that the excess in the amount of the first judgment resulted from a clerical mistake of the clerk in entering the same.

Therefore a statute prohibiting a foreign corporation from doing business without a known place of business and an agent in the state does not apply to a sale of goods and delivery of them in the state, and a suit for the purchase price. *Wile & Brickner Co. v. Onsel*, 1 Pa. Dist. Rep. 187.

In an action by a foreign corporation for a debt due for shoes sold and shipped from another state to the defendant, the fact that the corporation had not an agent and known place of business in the state as required in order to be permitted to do business there is immaterial (*Ware v. Hamilton Brown Shoe Co.*, 32 Ala. 145), since any attempt to interfere with such business would be an interference with interstate commerce.

And the amount due from an agent of a foreign corporation on an account for sewing machines which he had sold can be recovered by the corporation, although it had failed to comply with the requirements of a state statute imposing conditions on the right to do business, since the transaction is a commercial one which was lawful notwithstanding the statute. *Singer Mfg. Co. v. Hardee*, 4 N. M. 175.

So a sale of brick to be delivered by a foreign corporation within the state and sent from another state is an act of interstate commerce which cannot be affected by state statute prescribing conditions on the doing of business by a foreign corporation. *Cook v. Rome Brick Co.* 36 Ala. 409.

The court in *Williams v. Hintermeister*, 26 Fed. Rep. 889, inclined to the opinion that the business of a piano and organ company incorporated in another state was of a commercial nature, which the company was entitled to carry on without complying with conditions of the state laws.

The business of manufacturing and selling patented machines by a foreign corporation which owns the patents was held not subject to state re-

striction, in *Shook v. Singer Mfg. Co.* 61 Ind. 520; *Grover v. Butler*, 53 Ind. 454; *Walter A. Wood Mowing Mach. Co. v. Caldwell*, 54 Ind. 270, 28 Am. Rep. 641.

But in *Webber v. Virginia*, 108 U. S. 347, 26 L. ed. 566, it was established that the mere fact that articles were patented did not prevent a state from imposing a license tax on their sale by agents of foreign manufactures. Yet the statute was held void as an unconstitutional interference with commerce because it was aimed at manufactures from outside the state. In this case the agent of a sewing machine company of another state was held entitled to sell its machines without paying the license tax.

An agent of a foreign corporation is not exempt on the ground that he is engaged in interstate commerce from a license tax imposed on agents selling stove ranges, provided the ranges sold by him have been previously brought into the state. *Hynes v. Briggs*, 41 Fed. Rep. 488. See note as to peddlers and drummers, with *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97.

Publishing companies.

Soliciting and receiving subscriptions for a newspaper in another state is not doing business therein by a foreign corporation. *Beard v. Union & American Pub. Co.* 71 Ala. 60.

Lending companies.

That the loaning of money by foreign corporations engaged in that business is not a matter of interstate commerce, but may be subjected to conditions by a state, is declared in *Neils v. Edinburg Land Mortg. Co.* 33 Ala. 157.

For recognition or exclusion of foreign corporations generally, see note to *Cone Export & Commission Co. v. Poole*, ante, 289.

and the amended judgment certified to the appellate court, and a reversal thereby avoided. In the case before us the error was purely clerical. The motion of plaintiff was not for a judgment for \$882.78, but for a judgment for that part of the first cause of action not controverted, and the order of the court follows closely this language. It is as follows: "It is ordered by the court that judgment by default be entered herein against said defendant upon that part of plaintiff's 'first cause of action' not controverted by said defendant's answer, and let the same be recorded in the judgment book." If anything additional is necessary to establish the fact that the excess in the amount of the judgment of April 28, 1890, resulted from a mistake on the part of the clerk, it is to be found in the judgment of the district court rendered on the 30th day of June, 1890, in which it is specifically adjudged that the error in the former judgment resulted entirely from a mistake in the entry thereof. It has been held by this court that a judgment "is what is considered and ordered by the court, and not necessarily what is entered by the clerk." *Gaynor v. Clements*, 16 Colo. 209. Appellant cannot, by appealing from a judgment never rendered, compel this court to decide such an appeal, or deprive the trial court of the power of correcting the unauthorized act of its clerk. In so far as the views expressed in *Breene v. Booth*, 3 Colo. App. 470, are inconsistent herewith, they do not meet with the approval of this court. The claim of appellant to the effect that he has a right to have the first judgment corrected in this court, rather than the court below, has no foundation in logic or law. Reviews are had and appeals allowed for the purpose of correcting errors that the trial court is unwilling or unable to correct. In this case the error was fully corrected in the trial court, and the occasion for an appeal on account of the excess in the amount of the judgment was thereby avoided.

The remaining assignments of error may be considered together. They relate to the right of the court to enter judgment without first disposing of the demurrer to the first de-

fense. Undoubtedly good practice required a ruling directly upon this demurrer. But to entitle appellant to any relief in this court by reason of the omission he must not only show that error intervened, but also that he was prejudiced thereby. The first defense is based upon the failure of appellant, a corporation organized under the laws of another state, but doing business in this state, to file a certificate as required by section 10, art. 15, Const., and by sections 499, 500, Mills' Anno. Stat. Although by such failure all officers, agents, and stockholders of the company subject themselves to certain personal liabilities, it is no defense to the present action. In case of noncompliance, the penalty of personal liability of officers, agents, etc., was deemed sufficient by the legislature, and will not be enlarged by the courts. This has been decided in a number of cases. *Utley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369; *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. 287; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *Fritts v. Palmer*, 132 U. S. 283, 33 L. ed. 817. In this case appellees contracted to make the calendars at its place of business in Wisconsin, and deliver them to appellant in Colorado. To give the state constitution and statutes the construction claimed by appellant would be to permit a state to regulate commerce among the states, authority for which is conferred exclusively upon congress. U. S. Const. art. 1, § 8. See opinion by *Mr. Justice Matthews* in *Cooper Mfg. Co. v. Ferguson*, *supra*. For these reasons the first defense ought to have been held insufficient, and the demurrer thereto sustained. The same result was, however, reached upon the motion for judgment upon the pleadings. The defect in this defense was not such as could have been cured by amendment hence appellant is in no way prejudiced by the course adopted. The error in the proceeding was one of form, and not of substance, and will not avail. Civil Code 1887, § 78.

The judgment will be affirmed.

Petition for rehearing denied January 15, 1894.

WASHINGTON SUPREME COURT

EDISON GENERAL ELECTRIC CO.,
Respt.,
v.

CANADIAN PACIFIC NAVIGATION
CO., Appt.

(.....Wash.....)

1. A provision of a statute imposing a penalty "for every day that business

is done by a foreign corporation without registering" as required by law does not of itself make void contracts made by such corporation while unregistered.

2. Retaining and making use of materials and neglecting to return or offer to return them will not authorize a recovery for their price, under a contract providing for payment when the work is "in good working order."
3. That the light complies with the con-

NOTE.—Validity of contracts made by foreign corporations which have not complied with statutory conditions of the right to do business in a state.

Much confusion exists both in the reports and text-books as to the validity of a contract made by a foreign corporation which has not acquired the right to do business in the state by complying with 24 L. R. A.

conditions imposed by statute. Treatises on corporations have hardly touched the question or have stated a rule without noticing decisions to the contrary. Much of the confusion existing in the reports has arisen from the failure of the courts in some of the earlier cases to distinguish between the right of the foreign corporation to set up its

tract at the moment the equipment is completed will not entitle the seller to the price under a contract to furnish an electric light equipment of certain power which provides for payment when the work is "found to be in good working order." If a practical test within a reasonable time thereafter demonstrates that the required power has not been attained.

4. Interest from the time the action was brought may be added in case of the recovery by the seller of the contract price of an electrical equipment.
5. A contract to pay for the services of one expert in putting in an electrical equipment will not authorize a recovery at contract rates for the services of two.

(March 6, 1894.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover the contract price of a certain electrical equipment furnished by plaintiff to defendant. *Reversed.*

The facts are stated in the opinion.

own default as a defense and the right of the other party to set up such failure of the corporation, when the corporation itself attempted to enforce the contract. This same confusion has led the author of one text-book to state that the weight of authority is in favor of the validity of a contract made by a foreign corporation which has not complied with statutory conditions of the right to do business, where the statutes do not expressly declare such contracts void, but have merely prohibited such corporations from doing business until compliance with the conditions, and imposed a penalty for violation of the statute. This writer obtained a supposed weight of authority to this effect only by including among the decisions cited to support this statement, cases in which a foreign insurance company has not been allowed to defeat its own liability on a policy because of its own failure to comply with statutory conditions. These cases are manifestly based properly on the doctrine of estoppel, denying the right of the corporation to set up its own wrong as a defense against its own contract. Nevertheless, after all allowances and explanations, considerable conflict exists among the decisions.

Where a penalty is imposed.

The statutes of several states, with some differences of language, declare that foreign corporations shall not be permitted to do business until compliance with certain conditions, and further provide a penalty for violation of the statute.

Under such statutes the courts in numerous cases have held that contracts made by foreign corporations which had not complied with the statutory conditions would not sustain a right of action in favor of the corporation. *Dudley v. Collier*, 87 Ala. 431; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587; *Pennington v. Townsend*, 7 Wend. 276; *Dundee Mortgage Trust & Investment Co. v. Nixon*, 95 Ala. 313; *Boulden v. Estey Organ Co.* 92 Ala. 182.

Some of the cases are insurance cases in which the same doctrine is applied to defeat a right of action by the corporation for the premium, where the business was done without complying with the statutory conditions under statutes providing a penalty for so doing. *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 636; *Franklin Ins. Co. v. Louisville & A. Packet Co.* 9 Bush, 590; *The Manistee*, 5 Bias. 332; *American Ins. Co. v. Stoy*, 41 Mich. 386; *American Ins. Co. v.* 24 L. R. A.

Messrs. Hughes, Hastings & Stedman, for appellant:

The contract was illegal.

8 Am. & Eng. Encyclop. Law. p. 873; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Swann v. Swann*, 21 Fed. Rep. 209.

Messrs. Preston, Albertson & Donworth and Burke, Shepard & Woods, for respondent:

A corporation chartered by one state can recover in the courts of another on a contract made and performed in the latter state, in the absence of a local prohibitory statute.

Story, Conf. L. § 48; Bank of Augusta v. Earle, 38 U. S. 13 Pet. 591, 10 L. ed. 809; 2 *Morawetz, Priv. Corp. §§ 960-962*; 2 *Beach, Corp. § 614*.

The penalty provided by the statute for a failure to comply with the registration laws is exclusive of any other.

2 *Morawetz, Priv. Corp. §§ 65, 66*; 2 *Beach, Priv. Corp. § 413*; *Sedgw. Stat. & Const. L.*

Smith, 73 Mo. 368; *Stewart v. Northampton Mut. Live Stock Ins. Co.* 34 N. J. L. 433.

In Indiana, the decision under such a statute, imposing a fine upon the agent of a foreign insurance company for doing unauthorized business, and in addition declaring that the corporation shall not enforce such contracts before compliance with the conditions, hold that the contract is not void in such case, but its enforcement suspended until compliance. *Walter A. Wood Mowing Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Smith v. Little*, 67 Ind. 549; *Singer Mfg. Co. v. Brown*, 64 Ind. 543; *Domestic Sewing Mach. Co. v. Hatfield*, 68 Ind. 187.

Applying the same doctrine exactly are cases which deny the right of foreign corporation to recover on a bond of its agent where the business is prohibited under a penalty. *Thorne v. Travellers Ins. Co.* 80 Pa. 15, 21 Am. Rep. 89; *Mutual Ben. L. Ins. Co. v. Bales*, 92 Pa. 352; *Daniels v. Barney*, 22 Ind. 207; *Barney v. Daniels*, 32 Ind. 13.

The insufficiency of the statement by a foreign express company to show the entire amount of capital employed in its business, as required by such a statute, the statement being merely of the probable amount employed in the state, prevents the company from doing lawful business, and consequently it cannot maintain an action on the bond of its agent. *Barney v. Daniels, supra*.

But a foreign express company may sue its agent for money received in his business for the company, although the statutory provisions have not been complied with, and the business is illegal. The agent in such case is estopped to deny the right of the company. *United States Exp. Co. v. Lucas*, 36 Ind. 361.

So in *Thorne v. Travellers Ins. Co., supra*, holding that the agent and his sureties are not liable on his bond to a foreign corporation, where his business is forbidden under a penalty, the court remarked that it was not an action against the agent alone for money had and received, implying that the rule might be different in such a case. So the agent's own default is no defense to suit on his bond. *Manhattan Ins. Co. v. Ellis*, 23 Ohio St. 388.

All contracts made by a foreign corporation and all business transacted by it before it has complied with the conditions of the statute are illegal under the Tennessee statutes, which expressly declare that they shall be unlawful, and provide a penalty

2d ed. p. 340; *Sherwood v. Alois*, 88 Ala. 115; *Toledo Tie & Lumber Co. v. Thomas*, 83 W. Va. 566; *Fritts v. Palmer*, 132 U. S. 289, 83 L. ed. 819; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 72.

A party that has had the benefit of a contract fully performed by a corporation is estopped to plead that the contract was *ultra vires* on the part of the corporation.

2 Beach, Priv. Corp. § 424.

Petition for rehearing.

The record here shows that the verdict rendered is fully sustained by the testimony,—to such an extent indeed, that appellant has at no time sought to attack it on the ground of insufficient evidence.

The uncontradicted proof shows that all materials and labor specified in the contract sued upon were actually furnished, and there is ample evidence that the plant when completed and afterwards was in good working order and produced every result that the plaintiff contracted to bring about.

therefor. *Cary-Lombard Lumber Co. v. Thomas*, 32 Tenn. 587.

A foreign corporation which has violated the laws of a state by attempting to do prohibited banking business cannot recover upon a check which it has discounted, although the statute merely prescribes a penalty for its violation and does not expressly declare that contracts in the prohibited business shall be void. *Pennington v. Townsend*, 7 Wexl. 276.

An agent of a foreign corporation which has not complied with conditions of the right to do business under a statute declaring it "shall not be lawful" to act as agent and providing a penalty for so doing cannot recover on a contract for services in procuring a loan of money from such corporation. *Dudley v. Collier*, 87 Ala. 431.

On the other hand a few cases have decided to the contrary, that the imposition of a penalty for violation of a statute providing that a foreign corporation shall not do business until certain conditions have been complied with is to be taken as excluding an intention to make contracts in such unauthorized business void. It is argued that to do this would be to impose an additional penalty. Such was the decision in *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Toledo Tie & Lumber Co. v. Thomas*, 83 W. Va. 566; *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. 287; *Clark v. Middleton*, 19 Mo. 53.

But the case of *Toledo Tie & Lumber Co. v. Thomas*, *supra*, cites as authority a number of cases, none of which in reality support the doctrine. The one which most nearly supports it is that of *Columbus Ins. Co. v. Walsh*, 18 Mo. 229, in which the court indeed said that the agent's failure to comply with the conditions required by statute would "not disable the company to maintain an action, or render it unable to make proper defense to an action," but the action which the court upheld in that case was for the recovery back of money paid on a policy under mistake, and was therefore not based on the contract.

On this case of *Columbus Ins. Co. v. Walsh*, *supra*, is apparently based also the decision in *Clark v. Middleton*, 19 Mo. 53, in which the court holds that the agent's failure to comply with statutory conditions would not defeat the right of a foreign insurance company to recover on a premium note. This decision stands against a very large number of decisions which deny the right to recover premium

Even if this retention and use of the plant did not alone constitute an acceptance and establish the liability of the defendant the jury were not charged to that effect by the court.

Although detached expressions in the court's charge to a jury if considered as independent expressions may be technically erroneous, yet if the instructions as a whole and as considered together fairly state the law, in no wise misleading the jury, there is no prejudicial error.

Seattle Gas & Electric Light & Motor Co. v. Seattle, 6 Wash. 101.

The only effect of furnishing two experts instead of one was to lessen by half the time of completing the work, a result plainly to the advantage of the defendant. The proof showed that these two men were equally expert and that they did the work in half the time that one alone would have been obliged to expend.

Hoyt, J., delivered the opinion of the court:

This action was brought to recover for materials furnished, and labor performed, in pursuance of a written contract between the

where the foreign insurance company has failed to comply with statutory provisions. See *note* to *Phoenix Ins. Co. v. Pennsylvania Co.* (Ind.) 30 L. R. A. 406.

The case of *Dearborn Foundry Co. v. Augustine*, *supra*, was one in which a foreign corporation brought an action for the price of goods shipped into the state from Chicago, and although the contract was made within the state, it would seem to be one within the protection of the federal laws to interstate commerce (See *note* to *Kindel v. Beck & P. Lithographing Co.* (Colo.) *ante*, 811, and on this ground the decision might be upheld irrespective of the ground on which it was put by the court.

The main case, *EDISON GENERAL ELECTRIC CO. V. CANADIAN PACIFIC NAV. CO.*, is decided on the ground that the particular language of the clause imposing the penalty has no tendency to show an intent to prohibit the business, or declare it unlawful. The penalty prescribed in that case was "for every day that business is done" and in this respect was like the case of *Toledo Tie & Lumber Co. v. Thomas*, *supra*, in which the penalty was "for each month its failure so to comply shall continue." The language in such cases has some tendency to imply that the legislature contemplated the possibility of such business without compliance.

The case of *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. 287, was as to the right of a foreign corporation to take a mortgage on real estate in Colorado. This was held not to be defeated by a statute requiring foreign corporations to file a copy of their charter or other evidence of incorporation, and the failure of the corporation to comply therewith, where there was nothing to indicate that this was a condition on which a corporation might continue in business, but, on the contrary, a penalty was given for the default.

The cases in which foreign corporations have been held liable on their contracts are very clearly distinguishable from those in which the contract is held void in favor of the corporation, and are mentioned below under the heading as to estoppel.

While in the last analysis the question is one of legislative intent and may be determined by slight indications in the context, it seems absurd to say as a general doctrine that a contract will be void if it is merely prohibited by statute but will become legal if the statute in addition to its prohibi-

plaintiff and the defendant. Such contract was in substantially the following form: "This agreement, made and entered into this 24th day of December, 1890, by and between the Edison General Electric Co., hereinafter called the 'company,' and the Canadian Pacific Navigation Co., Ltd., hereinafter called the 'purchaser.' The terms and conditions of this agreement are such that the company agrees for the sum of three hundred and fifty (\$350) dollars, and in consideration of the mutual promises made below, to furnish the following apparatus and material necessary to change the existing electric light system on board the said purchaser's steamer *Islander*, to conform to the Edison system as regards lamps and sockets: 220 Edison key sockets; 220 Edison 16 c. p. lamps; the necessary fittings required to fit with Edison sockets the existing chandeliers and brackets; the necessary wire to renew circuit in stoke-room. The company will furnish the services of an expert to make the necessary changes from the existing system to the Ed-

ison system, to overhaul the wires where necessary, for the sum of five (\$5) dollars per day from the time he leaves Seattle until his return, and the necessary living expenses while employed on steamer and during time en route from and to Seattle, and traveling expenses from and to Seattle. In case any material not included in this contract is desired, the purchaser agrees to give the company a written order for the same, and a charge for said extras is to be mentioned in said order. In consideration of the above the purchaser agrees to pay the said company for all material and labor furnished under this agreement when the work has been completed and found to be in good working order." The answer of the defendant put in issue many of the allegations of the complaint, and alleged, by way of affirmative defense, that the contract in question was made and to be performed in the province of British Columbia; that, by the laws of said province, a foreign corporation may register in the manner provided, and thus secure

tion imposes a punishment for its violation. It would seem that the more penalties the statute imposed for its violation the more condemnation of the business and the more determination to prevent it were shown.

Here prohibition of business.

In numerous cases where the statutes have merely provided that foreign corporations should do no business before such compliance, but without providing any penalty for violation of the statute, at least so far as the cases show, the courts have held that the statutory prohibition, expressed or implied, made the business unlawful and that the corporation cannot recover on its contracts made before compliance with the statute. But other cases hold that the contracts are valid.

In some of these cases it may be that fines or penalties were prescribed for a violation of the statute, but if so, they are not mentioned by the court as an element in the decision.

Under the Oregon statute which provides that a "foreign corporation before transacting business in the state must duly execute and acknowledge a power of attorney," etc., a corporation has no power to make a contract, such as a loan of money, within the state until this condition is complied with. *Re Comstock*, 8 Sawy. 218.

Under section 8 of the Oregon Act of 1890, to regulate foreign banking, insurance, and other corporations, providing that a "foreign corporation before transacting business in this state must" perform certain conditions, but providing no penalty, it was held that there was an implied prohibition against business by such companies before compliance with the statute; and that an unauthorized contract was void. The argument of the court was that, unless the contract should be held void, the statute would have no effect. *Bank of British Columbia v. Page*, 6 Or. 431.

Although the statute allows for foreign corporations to do business, and merely provides that "they shall first comply" with certain conditions, the corporation cannot enforce a contract made by such agent. *Hacheney v. Leary*, 12 Or. 40.

A note and mortgage to a foreign corporation loaning money in the state without having complied with the conditions prescribed by statute as a condition of the right to do business is void. *Sample v. Bank of British Columbia*, 5 Sawy. 28; *Farrior v. New England Mortg. Secur. Co.* 88 Ala. 275.

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The same doctrine is found in a large number of insurance cases in which the right of the company to recover premiums on contracts made without complying with the statutes is denied. Thus in *Massachusetts*, *Jones v. Smith*, 3 Gray, 500; *Williams v. Cheney*, Id. 215, 8 Gray, 203; *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray, 876; *General Mut. Ins. Co. v. Phillips*, 13 Gray, 90; *Washington County Mut. Ins. Co. v. Chamberlain*, 16 Gray, 165; *Washington County Mut. Ins. Co. v. Hastings*, 2 Allen, 306. (Although later decisions in *Massachusetts* upheld the right to premium, because a later statute had expressly declared that such unauthorized policies should be valid, and the courts therefore regarded the right to recover the premium as following therefrom. *National Mut. F. Ins. Co. v. Pursell*, 10 Allen, 231; *Provincial Ins. Co. v. Lapeley*, 15 Gray, 262; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221. And to the same effect are the New Hampshire decisions on such a statute, making the unauthorized insurance valid. *Connecticut River Mut. F. Ins. Co. v. Whipple*, 61 N. H. 61; *Connecticut River Mut. F. Ins. Co. v. Way*, 62 N. H. 622.)

Decisions elsewhere also deny the right of a foreign insurance company to recover premium for unauthorized insurance. *Aetna Ins. Co. v. Harvey*, 11 Wis. 394; *Lamb v. Lamb*, 6 Biss. 420, 13 Nat. Bankr. Reg. 17; *Ford v. Buckeye State Ins. Co.* 6 Bush, 133, 99 Am. Dec. 663; *Barbor v. Boehm*, 21 Neb. 450; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 523.

Following the *Massachusetts* decisions, it was held in *Haverhill Ins. Co. v. Prescott*, 43 N. H. 547, 80 Am. Dec. 123, that by force of the New Hampshire retaliatory statute, a *Massachusetts* company doing business in New Hampshire could not recover on a premium note, because a New Hampshire company would be denied the right to do so in *Massachusetts*.

In some of the cases the denial of the right to recover premium is put on the ground that the contract of insurance is void, but whenever that question has fully arisen, almost without exception, the courts have refused to relieve the insurance company from its contract because of its own failure to comply with the statutes. See *note* to *Phenix Ins. Co. v. Pennsylvania Co. (Ind.)* 20 L. R. A. 405.

The Indiana cases in respect to the validity of premium notes taken by foreign insurance companies having no right to do business in the state

practically the rights of a domestic corporation as to the transaction of business in the province; that, if it transact business in the province without having so qualified itself, it shall incur a penalty not exceeding five dollars for every day during which business is so carried on; that plaintiff company was a foreign corporation, and had not in any manner complied with the provisions of such laws; and that, by reason of such noncompliance, the contract entered into was void. These facts were set out in detail in the answer, so that the question of the validity of the contract under the laws of said province was fully presented. The court, upon motion, struck out one of the paragraphs of said defense, and its action in so doing is the first error assigned by appellant. This ruling had no effect upon appellant's rights, and it is not necessary that we should decide as to its correctness.

The next error assigned is founded upon the action of the court in sustaining respondent's demurrer to this affirmative defense.

are declared by the supreme court of that state, in *Phenix Ins. Co. v. Pennsylvania Co.* 50 L. R. A. 406, 134 Ind. 215, to be "in the utmost confusion," adding that "it is utterly impossible to reconcile them." It repeatedly appears that some of these cases ignore prior inconsistent ones and cite still earlier ones, while the cases ignored may be the basis of a still later decision. But all these Indiana cases hold either that the premium note is void, or that the right of action thereon is suspended until the statutory conditions are complied with.

The right to recover on such a note was denied on the ground that the contract was illegal, in *Cassaday v. American Ins. Co.* 72 Ind. 96; *Farmers & Merchants Ins. Co. v. Harrah.* 47 Ind. 236; *Hoffman v. Banks.* 41 Ind. 1; while the denial of the remedy on the ground that the enforcement was suspended during failure to comply was the doctrine in *Behler v. German Mut. F. Ins. Co.* 68 Ind. 847; *American Ins. Co. v. Wellman.* 69 Ind. 413.

And these Indiana decisions are some of them based on the Act of 1852, applying to foreign companies generally, and others on the Act of 1866, applying to foreign insurance companies. But the decisions on these statutes are cited indiscriminately in the later decisions.

Under Indiana Rev. Stat. 1881, § 8080, requiring a compliance with conditions of doing business by foreign insurance corporations, and § 8763, saying it shall not be lawful for an agent to do business without compliance, neither the company nor its receiver can recover dues for an unauthorized policy. *Wiestling v. Warthin.* 1 Ind. App. 217.

Another Indiana case held that as the statute said it should not be lawful for an insurance company to do business without compliance with the statute, premium paid might be recovered back. *Union Cent. L. Ins. Co. v. Thomas.* 48 Ind. 44.

On the other hand there are a few cases which hold contracts of foreign corporations to be valid although made in the course of business which the statutes give no permission to engage in until after compliance with certain conditions.

A bona fide holder of negotiable promissory notes is not subject to a defense that the payee was a foreign corporation which had no right to do business in the state, because it had not complied with statutory conditions. *City Bank of Hartford v. Press Co. Limited.* 56 Fed. Rep. 280. But in the above case an unreported decision in the case of *Thorne Typesetting Co. v. Record Pub. Co.* by the court of common pleas No. 4 of Philadelphia County 24 L. R. A.

It held that the terms of the law therein pleaded were not such as to make void contracts of foreign corporations that had not complied with its provisions. The only provision in the statute set out in the defense which tended materially to sustain the contention of the appellant was that in which it was provided that for every day that business was done by a foreign corporation without having complied with the statute it should pay a penalty, as therein provided. There is some diversity among the cases in the construction of laws of this kind, but the weight of authority seems to establish the doctrine that it is the duty of the courts to look at the whole statute, and therefrom determine as to what was the intent of the legislature. If, by the terms thereof, the act is made unlawful, it will usually be construed to amount to a prohibition of said act, and the imposition of a penalty will also amount to a prohibition if, from the language used, such seems to have been the intent of the legislature. But in the case at

ty is referred to as sustaining such a defense to similar notes as between the original parties.

The provisions of North Dakota Comp. Laws, § 8190, that no foreign corporation shall transact any business or acquire or hold any property in the state until it has filed its articles, etc., and section 8192, requiring it to appoint an agent, do not make contracts by such corporation before compliance with the statute unenforceable and void. *Washburn Mill Co. v. Bartlett* (N. Dak.) Dec. 23, 1893.

This statute is prohibitory in form, but seems to be without penalty or expressed consequences. *Ibid.*

Under constitutional and statutory provisions of South Dakota declaring that no foreign corporation shall do business within the state until certain provisions are complied with, but not declaring any penalty for violating those provisions, a contract made by a foreign corporation which has not thus complied with the conditions is not void as between the parties. *Wright v. Lee* (S. Dak.) July 29, 1893, affirming on rehearing (S. Dak.) March 18, 1893.

The Montana statute requiring foreign corporations "before they proceed to do business" to file their charters, and providing that, in case of failure, any person should not be allowed to prove the incorporation in a suit against it, does not make the business of such a corporation, before complying with the statute, unlawful. *King v. National M. & Exp. Co.* 4 Mont. L.

A federal court also held that contracts made in Alabama by a foreign corporation are not void even if voidable because the company has not a place of business or authorized agent as required by Ala. Const., art. 14, § 4, declaring that until this condition is complied with "no foreign corporation shall do any business." *American L. & T. Co. v. East & West R. Co.* 37 Fed. Rep. 242.

But this decision was based on the doctrine declared but not necessarily decided by the supreme court of the state in *Sherwood v. Alvia*, 58 Ala. 115, which was overruled by the later decisions of that court.

Under Colorado statutes prescribing no penalty for business of a foreign corporation which has not complied with its statutes except to make officers and agents personally liable upon contracts, a conveyance of Colorado real property to a Missouri corporation, which has not complied with the statutes of Colorado is not void. *Fritts v. Palmer.* 122 U. S. 262, 38 L. ed. 217.

bar, while the company is liable to the penalty provided in the statute, there is nothing in the act which in terms prohibits the transaction of business or declares it to be unlawful, and the particular language of the clause which imposes the penalty has no tendency to establish either of said propositions. On the contrary, its language, fairly construed, would seem to contemplate that the company might do business without such registration,

but that, if it did, it should pay the penalty therein prescribed for the privilege of so doing. The cases cited by appellant, when applied to the facts of this case, have little tendency to sustain its contention. The investigation which we have been able to give to the adjudged cases tends to support the statement made by respondent, in its brief, that a provision like the one under consideration has never been held to render contracts

The language of the statute was "no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this state except as provided for in this act." Justice Miller dissented from the decision on the ground that this language was strong enough to make a conveyance to a foreign corporation which had not complied with the statutes void. *Ibid.*

It appears by consideration of all the cases that a very small part of them only have upheld contracts of foreign corporations in their favor where they have failed to comply with statutes of the kind above considered.

Contracts expressly declared void.

A foreign corporation which is expressly prohibited from keeping an office in the state for the purpose of discount or deposit cannot under 2 N. Y. Rev. Stat., § 73, § 2, recover for moneys loaned by it in the state in the course of the prohibited business, as that section expressly denies a right of action based on acts of corporations prohibited by law. *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.* 25 Wend. 648.

In Mo. Rev. Code 1855, p. 235, § 14, declaring void all notes for loans by a foreign banking company, a note in renewal of such a debt is also void. *Bank of Louisville v. Young*, 37 Mo. 398.

The Ohio Act of January 27, 1818, declaring every bank not incorporated in that state to be unauthorized, and that notes or contracts payable to or at such bank should be void, was held to apply to a bank incorporated in Michigan on territory which was in dispute between the states at that time. *Myers v. Manhattan Bank*, 20 Ohio, 281.

There is plainly no chance for conflict of decisions under statutes of this class.

Effect of foreclosure.

A purchaser at a sale under a power in a mortgage given to a foreign corporation, which had not acquired the right to do any business in the state, can enforce his title against the mortgagor. *Suerwood v. Alvis*, 33 Ala. 115.

This decision proceeds on the theory that the contract with the foreign corporation was not invalid, although the corporation had no right to do business in the state, but on this subject it is overruled by *Dudley v. Collier*, 89 Ala. 431; *Farrior v. New England Mortg. Secur. Co.* 88 Ala. 275; and other Alabama cases above cited, but is reaffirmed on a different theory in the case following.

After foreclosure by executing a power of sale of a mortgage executed to a foreign corporation, which had not acquired the right to do any business within the state, the mortgagor cannot contest the right of the mortgagee which had purchased the land, at least without first opening up the foreclosure by disaffirming the sale. *Craddock v. American Freehold Land Mortg. Co. of London*, 88 Ala. 281.

So in Indiana, the failure of the agent of a foreign corporation to comply with the conditions of the Indiana Act of June 17, 1852, will not defeat title obtained by a purchaser on foreclosure of a mortgage to the corporation, but if this was a defense it should have been pleaded as

ground of abatement to the suit. *Elston v. Pigott*, 94 Ind. 14.

On the other hand, in a federal court in Oregon it was held that a sale to a foreign corporation under a decree foreclosing a mortgage which it had taken without having acquired the right to do business in the state was also held insufficient to defeat the title of the mortgagor. *Simple v. Bank of British Columbia*, 5 Sawy. 88.

Estoppel.

On the question whether or not a party to a contract with a foreign corporation is estopped to deny that the corporation has complied with the conditions on which the statute allows it to do business in the state, the decisions are in conflict.

In several cases it is held that the other party is estopped to deny that the corporation has complied with the conditions of the statute so as to have the right to make the contract (*Wright v. Lee* (8. Dak.) March 18, 1892; *Washburn Mill Co. v. Hartlett* (N. Dak.) Dec. 23, 1893); but the contrary doctrine is expressly declared in *Re Comstock*, 8 Sawy. 213, and is necessarily implied in all the decisions above cited, in which the right of a foreign corporation to recover on a contract has been denied because of its failure to comply with statutory conditions.

A distinction, however, may be taken in respect to the right of the company's agent to deny its power to do business in the state when suit is brought against him for money received in such business. He is held estopped to deny the right of the company. *United States Exp. Co. v. Lucas*, 35 Ind. 361.

The corporation itself is estopped to deny its right to contract as a defense to an action against it upon a contract which it has made. *Phenix Ins. Co. v. Pennsylvania Co.* 20 L. R. A. 405, 134 Ind. 215; *Germania F. Ins. Co. v. Curran*, 8 Kan. 9; *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538; *Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 81 Mich. 346; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. Rep. 471; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. Rep. 430, affirmed in *Knights Templars' & Masons' Life Indemnity Co. v. Berry*, 50 Fed. Rep. 511; *Ganser v. Firman's Fund Ins. Co.* 34 Minn. 872; *Swan v. Watertown F. Ins. Co.* 96 Pa. 37; *Watertown F. Ins. Co. v. Simons*, 96 Pa. 520; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67.

The same principle of estoppel is applied to prevent a foreign corporation from setting up its own failure to comply with statutory conditions as to appointment of a person to receive service of process when process has been served on an agent in the state. *Hagerman v. Empire Slate Co.* 97 Pa. 534; *Ehrman v. Teutonia Ins. Co. supra*; *Funk v. Anglo-American Ins. Co.* 27 Fed. Rep. 336.

And to similar effect upholding service on an agent in such cases though not expressly based on the doctrine of estoppel is the decision in *Moch v. Virginia F. & M. Ins. Co.* 10 Fed. Rep. 606; and *Clews v. Rockford, R. L. & St. L. Railroad*, 49 How. Pr. 117.

As to estoppel to deny character or powers of foreign corporation irrespective of such statutory prohibitions, see *note to Cons Export & Com. Co. v. Poole* (S. C.) *ante*, 239.

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void, though entered into without the authority of the statute. Some of the cases cited by appellant contain expressions to the effect that the imposition of a penalty for the performance of an act is equivalent to declaring it unlawful; but an examination of the facts will show that the provisions which they were construing were clothed in far different language than the one under consideration. The demurrer was properly sustained.

The next error assigned is that the court erred in giving the following instruction: "If the jury believe and find from a preponderance of the evidence that the plaintiff furnished the materials, and performed the work, specified to be furnished and performed in the contract in suit, and in all respects substantially performed all the conditions on its part, and that the defendant retained said materials in its possession, and made use of the same and of the fruits of such work performed, and did not return, or offer to return, said materials to the plaintiff, then the plaintiff would be entitled to a verdict of the jury for the amount of the contract price for said labor and materials specified in said contract." This error seems to us to be well assigned. There was nothing in the pleadings or testimony which justified the court in giving any instruction as to the retention by the appellant of the materials furnished, and the fruits of the work performed under the contract, and, such being the fact, the instruction in regard thereto had a tendency to mislead the jury. By it they must have been led to suppose that there was some duty on the part of the defendant to have returned the materials if it wished to avoid liability. It is true that the first part of the instruction, which required that the plaintiff should establish the fact that it had substantially done all that was required on its part, was joined with what was said as to the retention of the materials by the conjunctive "and" instead of the disjunctive "or," and for that reason, in a technical sense, was perhaps not changed thereby to the prejudice of appellants; yet we are not prepared to hold that the jury must necessarily have so construed it. They would be much more likely to take the instruction as a declaration by the court that there was a duty resting upon appellant to return the property if it would escape liability on account thereof. They would not be likely to assume that what was said about the retention of the property was idle talk on the part of the court. Besides, when construed in the light of the contract as defined by the court in another instruction, this one is technically incorrect, for the reason that by such other instruction the jury are told that, if they find that the materials and work were furnished and performed as required by the contract, and that the work was completed, and was then found to be, or was in fact, in good working order, the plaintiff will be entitled to a verdict; from which it will be seen that the court recognized the fact that not only must the contract have been substantially complied with, but that, in addition thereto, the work must have been found to be in good working

order. Hence, the instruction under consideration, investigated in the light of the other, would warrant the jury in concluding that, under the law, the retention of the materials by appellant would be equivalent to a finding that the plant was in good working order. The jury are told, in one of the instructions, that if the work has been substantially performed, and the plant found to be in good working order, the plaintiff is entitled to recover, and, in the one under consideration, that, if the contract has been substantially performed and the materials retained, the plaintiff is entitled to recover. From the two instructions the jury may well have understood that if the contract had been substantially performed, and the benefits thereof retained, the plaintiff could recover, regardless of the question as to the plant being found in good working order. Any other construction of the language used would make the two instructions inconsistent.

The next instruction complained of was in the following language: "If the jury believe and find from a preponderance of the evidence that the materials and work specified in the contract in suit were furnished and performed as required by the contract, and that work was completed, and was then found to be, or was in fact, in good working order, then the plaintiff will be entitled to a verdict of the jury for the amount of the contract price specified in the contract, even if the light produced at subsequent times by the operation of the lamps furnished under the contract were not equal to sixteen candle power light from each lamp. The defendant is not entitled, under the issues raised upon the pleadings in this action, to any reduction or abatement from the contract price specified in the contract, merely by reason of inferior quality of the light produced by the lamps furnished at times subsequent to the completion of the work, if the jury believe and find from a preponderance of the evidence, that at the time of the completion of the work it was found to be in good working order." This instruction, in substance, told the jury that if the contract had been substantially performed, and was, at the moment of its completion, found to be in good working order, the plaintiff could recover, even although events almost immediately succeeding the completion of the work conclusively established the fact that the result accomplished was not that contemplated by the contract. In so doing it construed that clause in the contract which provided that payments should not be made until the plant was found to be in good working order, to relate to its condition at the moment of completion. This was not a fair construction of that clause in the contract. It was the evident contemplation of the parties that the work should not only be done as provided for therein, but that, after it was done, there should be reasonable opportunity given, and time allowed, to have it ascertained as a fact that the plant was found to be in such a condition as to fairly fulfill the object for which it was put in. The plaintiff occupied the position of an expert in determining what was necessary to

make the plant perform the work required of it, and upon it was cast the responsibility, not only of putting in the material provided for in the contract, but also that of requiring the defendant to furnish such additional material as was necessary to make the plant reasonably fit for the use for which it was intended. The defendant did not profess any expert knowledge as to the plant to be put in, and relied entirely upon the plaintiff as to what was required. Under these circumstances, the contract, when fairly construed, contemplated that there should be full opportunity, by actual practical test, to determine whether or not the plant was in good working order before the contract price therefor should be paid. This instruction did not put the matter to the jury in that light, and was, therefore, erroneous.

The next instruction as to which error is alleged is one in which the court instructed the jury that, if they found for the plaintiff, they might include interest. The claim of the plaintiff was for a definite, liquidated sum, and from the time the action was brought we think it would draw interest,

and that the court properly so instructed the jury.

The other errors alleged grow out of the modification by the court of one of the instructions asked by defendant, and of the refusal to give various other instructions asked by it. In modifying the instruction in reference to the services of an expert the court committed error. The contract contemplated the services of only one expert, and the plaintiff was thereby in no manner authorized to put two experts to work on the job, and recover for their services at the contract price. Some of the instructions asked by the appellant, and refused by the court, correctly stated the law; but the court, in other instructions given to the jury, substantially covered the same questions, and for that reason it was not reversible error to refuse to instruct in the language of the requests.

The judgment must be reversed, and the cause remanded for a new trial.

Dunbar, Ch. J., and Stiles, Scott, and Anders, JJ., concur.

Rehearing denied.

NEW YORK COURT OF APPEALS.

Frederick J. LANCASTER

v.

AMSTERDAM IMPROVEMENT CO.

(140 N. Y. 576.)

1. The right of a de facto corporation to transact business under a franchise which another state has attempted to confer cannot be questioned by individuals.

2. The power of a corporation created by another state to deal in the purchase and sale of real estate cannot be questioned by a party dealing with it, on the ground that such dealing is in excess of the powers granted to it by the laws under which it is incorporated.

3. A foreign corporation incorporated for the purpose of dealing in the purchase and sale of real property is not

NOTE.—Right of foreign corporations to own real estate.

The above case fully completes the recognition by New York courts of corporations of other states on substantially the same footing as citizens of other states, except so far as the statutes expressly restrict their powers. The case is also a strong one, if not the very strongest of all that have been decided in this country, in respect to the particular matter of real-estate ownership by foreign corporations, yet the doctrine of this case is very fairly sustained by the weight of authority.

It is very clear and fully established that the power of a corporation to hold real estate outside of the state in which it was incorporated, if contemplated by its charter, must depend on the assent or permission, either express or implied, of the state in which the land lies. *Bunyan v. Coster*, 89 U. S. 14 Pet. 122, 10 L. ed. 932.

But it is equally true that until a state denies the right, a foreign corporation may own real estate. *New York Dry Dock v. Hicks*, 5 McLean, 111.

That a foreign corporation having power under the laws of the state in which it was created to become the owner of lands in another state may do so, unless it is prohibited by the laws of the latter state, is declared in *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243, in which it is held that no affirmative permission by the laws of the place is necessary.

This case cites *Ives v. Bank of Lansingburgh*, 12 Mich. 361, as authority, but in that case the question was not discussed or expressly decided. 24 L. R. A.

In *Thompson v. Waters*, *supra*, the right of a foreign corporation to own lands is sustained in respect to lands taken for the satisfaction of a debt.

The general doctrine of the power of a foreign corporation to own lands is also sustained in *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 351, and is declared to follow from the right of such a corporation to sue and enforce judgment, since to obtain satisfaction of the judgment it might have to buy lands on execution sale.

Even where corporations were allowed to hold only what real property was necessary for their business, a foreign corporation could lawfully take the lease for an office. *Baltimore & P. S. B. Co. v. McCutcheon*, 13 Pa. 13.

A foreign corporation engaged in transportation has the right to occupy and hold as lessee, or otherwise, such property as is necessary or convenient for the transaction of its business. *Northern Transp. Co. of Ohio v. Chicago*, 7 Biss. 45.

In *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 114, 38 Am. Dec. 481, the right of a foreign corporation under the statute to take a devise of lands was conceded, and the decision was that it might also hold real property by mortgage or by purchase.

A foreign corporation need not be shown to have the right to hold real estate under the laws of the state of its incorporation in order to be allowed to do so in the state where the land is situated, but such power will be presumed at least in favor of its grantees. *Tarpey v. Deseret Salt Co.* 5 Utah, 495.

prevented by the statutes or public policy of the state of New York from transacting such business in that state.

4. A foreign corporation can transact any lawful business in New York state which a nonresident natural person can do.

(January 16, 1894.)

CROSS-APPEALS from a judgment of the General Term of the Supreme Court, First Department, upon a question submitted to it upon an agreed statement of facts to determine the validity of the title to certain real estate which defendant had attempted to convey to plaintiff, the plaintiff appealing from the whole of the judgment, and defendant appealing from so much thereof as held that the title conveyed was subject to the superior title of the people of the state of New York. *Reversed on defendant's appeal.*

Statement by **Gray, J.:**

This was a submission of a controversy to the general term in the first department upon agreed facts.

The Amsterdam Improvement Company was incorporated under the laws of the state of New Jersey in May, 1891, by five persons, of whom one only was a resident of that state, the others being residents of this state. Its certificate of incorporation, filed that day, contained the following article:

"Second. That the places in this state, where the business of such company is to be conducted, are Jersey City and the city of

Hoboken, in the county of Hudson. The principal part of the business of said company within this state is to be transacted at Jersey City, in the county of Hudson, and the places out of this state where the same is to be conducted and where the company proposes to carry on operations are the cities of New York and Brooklyn, in the state of New York; and that the objects for which said company is formed are the purchase and sale of real property, both improved and unimproved, the improvement of such property as may be purchased, and which, when purchased is unimproved, the exchange of property for other property, the lending of moneys upon first and second mortgages, secured by bonds, and the purchase and sale, by assignment or otherwise, of such mortgages and bonds. The portion of the business of said company which is to be carried on out of this state in the said cities of New York and Brooklyn will be such as will come under the head of the objects for which this company is formed. The principal office or place of business of said company, out of this state, is the city of New York, in the county and state of New York."

On December 21, 1892, the secretary of state of the state of New York issued a certificate, of which the following is a copy:

"State of New York.
"Office of the Secretary of State, Albany. }
"It is hereby certified that the Amsterdam Improvement Company, which appears from the papers filed in this office on the twenty-first day of December, 1892, to be a foreign

So in *Alward v. Holmes*, 10 Abb. N. C. 38, a foreign banking corporation, authorized to hold real estate requisite for its accommodation in the convenient transaction of business, and such as might be mortgaged or conveyed to it in satisfaction of debts, or bought at judicial sale, is held to be presumed to have such power outside of the state of incorporation.

The fact that a foreign corporation is not shown to carry on any business in the state of its incorporation is held in *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73, to be insufficient to defeat its right to own land in New Hampshire.

In Illinois the statutes restrict the powers of corporations generally in respect to holding real property to what is necessary to carry out the general purposes of their incorporation, and under such statutes a Connecticut land company, empowered to own and deal in lands, was denied the right to take title to land in Illinois: and a deed to such a company, and its deed to another were held not to transfer any title. *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 682.

So a trust company incorporated in another state was refused appointment as a trustee in Illinois on the ground that it was not entitled to hold real estate, although in the state where it was incorporated it was authorized to become such trustee. *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 236.

But the Illinois Act of July 1, 1877, as amended July 1, 1879, gives to corporations power to act as trustees, and therefore under the general corporation act a foreign corporation with powers of that sort may take a devise in Illinois as trustee. *Pennsylvania Co. for Insurance on Lives v. Baerle*, 143 Ill. 459.

A conveyance of real estate in Illinois to a benevolent or missionary corporation of another 24 L. R. A.

state cannot be presumed to be against the public policy of Illinois, since it allows similar domestic corporations to take title to real estate by devise or otherwise. *American & Foreign Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 888.

And as the provision of the Illinois Act concerning corporations, section 28, subjecting foreign corporations to the same liabilities imposed upon domestic corporations, and that they "shall have no other or greater powers," implies that foreign corporations shall have the same powers as domestic corporations, a Connecticut trading corporation clothed with power to take and hold real estate, for certain specified purposes may, like an Illinois corporation, acquire real estate in Illinois necessary for the transaction of its business. *Barnes v. Suddard*, 117 Ill. 237.

A foreign corporation may acquire real estate in satisfaction of debts to it under the same circumstances that a domestic corporation can do so, under the Illinois corporation act. *Columbus Buggy Co. v. Graves*, 108 Ill. 459.

A corporation created under the laws of Pennsylvania to explore, locate, and improve lands, transfer emigrants, colonize and form settlements in Utah, Arizona, or adjoining states and territories lying west of the Mississippi, was held in *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547, to have power to acquire title to land in Colorado and transfer the same to a grantee, in the absence of any affirmative legislation or expression of the policy of the laws of that place against such corporation, and that condemnation could not be inferred by the failure of the legislature to provide for such corporations, and a provision that allowed corporations to be formed only by general laws.

A foreign corporation organized prior to the passage of the Washington Act of March 23, 1890,

stock corporation, organized and existing under the laws of the state of New Jersey, has complied with all the requirements of law to authorize it to do business in this state, and that the business of such corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state, for such or similar business."

The statute under which this company was incorporated provided that: "It shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock and development of speed in horses, the transportation of goods, merchandise or passengers upon land or water, inland navigation, the building of houses, vessels, wharves or docks, or other mechanical business, the reclamation and improvement of submerged land, the improvement and sale of lands, etc."

This statute also provided that corporations shall have the power "to hold, purchase, and convey such real and personal property as the purposes of the corporation shall require, not exceeding the amount limited in its charter, and all other real estate which shall have been bona fide mortgaged to the said company by way of security, or convey to them in satisfaction of debts previously contracted in the course of dealings, or purchased at

sales upon judgment or decree which shall be obtained for such debts."

Other provisions authorized a company organized under the statute to carry on a part of its business, and to have offices out of the state, and that "they may hold, purchase, and convey real and personal property out of the state, the same as if such real and personal property were situated in the state of New Jersey, provided that the certificate of organization shall state," etc. Another provision authorized any New Jersey corporation, incorporated under any general or special act, to conduct its business outside the state.

May 23, 1891, Arthur P. Smith was the owner of a lot of vacant and unimproved land in the city of New York, which, by a deed dated that day and duly recorded May 25, 1891, he conveyed to the defendant. On the 15th day of January, 1893, the plaintiff and the defendant entered into a written contract whereby they agreed to exchange said lot of land for another lot of land owned by the plaintiff. The land of the plaintiff was valued at \$72,000, and the land of the defendant at \$49,500, and the difference, \$18,500, the defendant agreed to pay to the plaintiff at the times and in the manner specified in the contract. It was agreed that the deeds should be exchanged at a place named on or before February 15, 1893. Pursuant to said contract the defendant executed a deed in due form by which it assumed to convey the premises to the plaintiff.

It is conceded that the defendant has done

is expressly exempted from its provisions against foreign corporations dealing in land and engaged in brokerage business. *Realty Co. v. Appolonio*, 5 Wash. 457.

A foreign corporation owning a toll-bridge across a river which forms a state boundary may take a deed of the right to control passage over land in Vermont to prevent passage over it in evasion of the toll-bridge by crossing on the ice, etc. *Claremont Bridge Props. v. Royce*, 42 Vt. 736.

The federal government is denied power to take a devise of land in New York, under a statute providing that a devise may be made "to any person capable by law of holding real estate, but no devise to a corporation shall be valid, unless such corporation shall be expressly authorized by its charter or by statute to take by devise." The term "person" in this place means a natural person only, and the term "corporation" applies only to a corporation created under the laws of the state. *United States v. Fox*, 94 U. S. 815, 24 L. ed. 182.

The power of a foreign corporation to take a devise of property must depend on the laws of the state where the land lies. *White v. Howard*, 46 N. Y. 144.

It is not sufficient in such a case to show that it had power by its charter to take such gift. *Ibid.*

An educational corporation in Wisconsin, having power to acquire and hold real estate, may take a devise of land in Illinois, as a similar corporation in that state could do. *Santa Clara Female Academy v. Sullivan*, 116 Ill. 579, 56 Am. Rep. 776.

In respect to a devise to a foreign charitable corporation, which was prohibited by local statute from holding real estate directly or by any trustee, it was held that the court would raise up a trustee to support the gift who might use the corporation to distribute the income according to the intent of the donor or testatrix. *Frazier v. St. Luke's Church*, 10 Pa. Co. Ct. Rep. 53, 28 W. N. C. 307.

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So a bequest to a foreign corporation of the proceeds of both real and personal property is lawful unless prohibited by statute. *Holls v. Drew Theological Seminary*, 95 N. Y. 166; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

The right of a foreign corporation to take a bequest is also upheld in *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 227.

Limitation by charter or laws of the state of incorporation.

Comity does not require the grant of privileges to a foreign corporation beyond its charter powers. A state may tolerate but a part of the charter powers of a foreign corporation, or a limited rather than a full exertion of them, but it will never concede permission to go beyond the charter. *Diamond Match Co. v. Powers*, 51 Mich. 145.

Therefore it was held in the above case that unless the state of incorporation allowed a foreign corporation to deal in land and land titles, it could not engage in such affairs in Michigan, and could not demand access through an agent to real estate records, on the ground that it was constantly engaged in purchasing lands, where it did not show that it was entitled to engage in such business in the state of its incorporation. *Ibid.*

The right of a foreign corporation (a bank) to hold land was denied, where the act under which it was incorporated directed that some officer should be designated to whom all conveyances should be executed. *Metropolitan Bank v. Godfrey*, 33 Ill. 579.

Where the charter of a foreign corporation authorized it to take property to colonize "free people of color" in Africa, and for "no other purpose," it was held that this restriction was operative in Georgia, and that a devise of slaves for the purpose of being thus colonized did not come within the charter power respecting "free people

no business in the state of New Jersey, and that the only business or transactions in which it has been engaged since its organization have been carried on in the city and county of New York.

The following question was submitted to the general term: "Whether said defendant, the Amsterdam Improvement Company, possessed and has conveyed to Frederick J. Lancaster, the plaintiff herein, a good and sufficient title to the premises described in said contract and deed." That court has adjudged that the defendant's deed did not convey to the plaintiff a good title, and that its title was subject to the right, title, and interest of the people of the state, whose title was, at the time of the execution and delivery of the deed, superior and prior to that of the defendant.

Mr. Thomas S. Bassford, for plaintiff:

The defendant, a New Jersey corporation, cannot lawfully operate *ad libitum* in real estate located within the state of New York.

While the propositions laid down in the decision of *Merrick v. Van Stantvoord*, 84 N. Y. 208, and *Demarest v. Grant*, 18 L. R. A. 854, 128 N. Y. 218, appear broad enough to cover the present transaction, it will at once appear on an examination of the facts on which these cases were founded, that they involved merely a question of individual liability of a director for the tort of the foreign corporation, and did not in any wise involve the question how far the special restrictions relative to real estate tenure affected the transaction.

of color" and was invalid. *American Consol. Soc. v. Gartrell*, 23 Ga. 448.

The New York statutes (3 Rev. Stat. 188, 5th ed. § 3), denying the power of a corporation to take lands by devise, unless expressly authorized to do so by its charter or by statute, prevents a devise to a city incorporated in another state without any such power conferred upon it and a New York court will construe the charter for itself. *Boyce v. St. Louis*, 29 Barb. 650. This applies to a devise in trust for charity.

But the incapacity of a town in another state to take a charitable devise will not prevent it from taking in Massachusetts if subsequently authorized to do so by statute. *Fellows v. Miner*, 119 Mass. 541.

That charter restrictions follow a foreign corporation is also decided, although not with reference to real property, in *Blair v. Perpetual Ins. Co.* 10 Mo. 559, 47 Am. Dec. 122, and *Ohio Life Ins. & T. Co. v. Merchants Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742.

But see *Whitman Gold & Silver Min. Co. v. Baker*, *infra*.

While the cases seem to be unanimous in holding that the charter limitations of a foreign corporation in respect to the ownership of land follow it wherever it goes, there is a lack of uniformity as to the effect of limitations by general laws, such as a statute of wills, in the statute of incorporation, upon the power of the corporation to take lands outside of the state.

In *Starkweather v. American Bible Soc.*, 72 Ill. 51, 23 Am. Rep. 138, it was held that a New York corporation, which, under the New York statute of wills, could not take a devise of lands, was precluded by that statute from taking such a devise in Illinois, although the court recognized the fact that the decisions in other jurisdictions were to the contrary.

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All legislation is jealous, and jurisprudence exclusive as to land.

Jackson v. Ingraham, 4 Johns. 182; Story, Conflict Laws, § 68, and citations.

It would be absurd to say that it ever was the spirit of our law that a foreign corporation could come here and deal in real estate *ad libitum*. This is not the policy pursued by a sister state under like circumstances.

Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632.

Comity of states will enforce the contracts of foreign corporations, in any event, only so far as they are enforceable at home.

People v. Fire Asso. of Philadelphia, 92 N. Y. 815, 44 Am. Rep. 880; *Plimpton v. Bigelow*, 98 N. Y. 592.

Laws 1877, chap. 450, § 1, reads as follows: "Any foreign corporation created under the laws of the United States, or of any state or territory thereof, and doing business in this state, may acquire such real property in this state as may be necessary for its corporate purposes in the transaction of its business in this state, and convey the same by deed or otherwise in the same manner as a domestic corporation."

The question for the court is the construction of the clause, "as may be necessary for its corporate purposes in the transaction of its business in this state."

Is it not against the public policy of this state for a foreign corporation operating under the circumstances surrounding this defendant, frankly admitting that it has never heretofore had a single business transaction in its native

But, on the other hand, in *American Bible Soc. v. Marshall*, 15 Ohio St. 527, a prohibition by a statute of wills against a devise to a corporation was held ineffectual to prevent the corporation from taking such a devise in another state, if the terms of its charter were broad enough to authorize the ownership of lands.

To the same effect was the decision in *Thompson v. Swoope*, 24 Pa. 420, and *White v. Howard*, 38 Conn. 342.

Akin to these decisions is that of *Vansant v. Roberts*, 8 Md. 119, respecting personal property, in which it is held that accumulations of such property in the hands of a foreign corporation is a matter to be regulated by each state for itself, and that the Maryland Bill of Rights, section 34, prohibiting a devise for a religious sect without leave of the legislature had no extraterritorial effect, and would not prevent a foreign corporation from taking personal property by will in Maryland.

This case was followed in *Brown v. Thompson*, 49 Md. 423, upholding a bequest to a foreign missionary society.

And a "community" in a foreign country may be allowed to take a bequest if the laws of that country permit. *Re Huss*, 12 L. R. A. 620, 126 N. Y. 537.

So a statute prohibiting a gift by will of more than one half of a testator's estate to a religious corporation has no extraterritorial effect in reference to such a gift in another state although to a corporation of the former state. But it applies to a gift by a resident of the state to a foreign corporation. *American Bible Soc. v. Healy*, 10 L. R. A. 766, 153 Mass. 197; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Holls v. Drew Theological Seminary*, 95 N. Y. 166.

And in *Kerr v. Dougherty*, 79 N. Y. 327, it was held that the power of a Pennsylvania religious or charitable corporation to take under a New York

state, to come to this state and speculate in really *ad libitum*? Illinois has answered this question in the negative.

Carroll v. East St. Louis, supra.

In *Bard v. Poole*, 12 N. Y. 507, Denio, J., states: "I concede that it would be a violation of our sovereignty for a foreign corporation to remove from the country or state where it was created to locate itself wholly in this state."

The power of foreign corporations to hold real estate depends, first, upon the same general considerations which affect all corporations; and second, upon the laws and policy of the state where the land is situated.

American & Foreign Christian Union v. Yount, 101 U. S. 852, 25 L. ed. 888; *Binney's Case*, 2 Bland, Ch. 146.

If defendant contravened the public policy of this state in attempting to deal in real estate *ad libitum* within the state of New York, its acts were null and void, and it never became vested with any title to the plot of land it agreed to convey to plaintiff.

All contracts which contravene the public policy of the state are void. Such, for instance, as a contract in restraint of trade or a contract with an enemy of the state.

Hunt v. Knickerbocker, 5 Johns. 327.

When a corporation is prohibited from holding land it cannot buy and sell, for every purchase and sale by it involves a holding by it, and its incapacity renders the conveyance defective for lack of a competent grantee.

Spelling, Priv. Corp. § 207; *Bank of Michi-*

gan v. Niles, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575.

If defendant's act in attempting to acquire title to the land it agreed to sell to plaintiff was void, it never became vested with a scintilla of title, and, therefore, never had any to convey to plaintiff.

The defendant acquired no title through the deed taken from its grantor, but the title vested in the individual members of the corporation.

Hill v. Beach, 12 N. J. Eq. 81; Spelling, Priv. Corp. § 90, p. 110; *Eris R. Co. v. State*, 81 N. J. L. 531, 86 Am. Dec. 226; *Empire Mills v. Alston Grocery Co.* (Tex.) Jan. 17, 1891; Murrell, Foreign Corp. § 4.

Mr. Louis Marshall, for defendant:

The Amsterdam Improvement Company is a legally incorporated entity under the laws of the state of New Jersey, having the power thereunder of dealing in real estate, not only within the sovereignty of its creation, but also in this state.

But even assuming that the corporation was not organized in strict compliance with the statutory formalities it became a corporation *de facto* and a conveyance by it would pass a good title.

Smith v. Shreeley, 79 U. S. 12 Wall. 358, 20 L. ed. 430; *Fritts v. Palmer*, 132 U. S. 232, 33 L. ed. 317; *Lackensack Water Co. v. DeKay*, 86 N. J. Eq. 548.

There is nothing in the policy of this state which prohibits a corporation formed in another state, composed entirely of citizens of this state, for the purpose of transacting busi-

ness will be restricted by a Pennsylvania statute forbidding gifts by will to such corporations unless the will was made at least one month before the testator's death. This seems to proceed on the same theory as *Starkweather v. American Bible Soc.*, *supra*, and to be out of harmony with the other preceding cases as to statutes of wills.

A simple bequest of money to be paid to a foreign corporation is valid, even if the law of the state where the will is made forbids the execution of such a trust as that for which the corporation is created. *General Assembly of the Presby. Church in U. S. Trustees v. Guthrie*, 6 L. R. A. 321, 88 Va. 125.

Railroads.

Legislative permission to a foreign railroad company to come into the state need not be equivalent to a new incorporation in order to permit the exercise of corporate powers in the state. *Martin v. Mobile & O. R. Co.* 7 Bush, 116.

And a railroad corporation can exercise all its charter powers in other states or countries, if not repugnant or prejudicial to their laws. *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236.

But in Iowa it is held that a foreign railroad corporation cannot acquire or possess a right of way in that state, but is impliedly precluded therefrom by statute expressly conferring the power upon corporations of that state. *Holbert v. St. Louis, K. C. & N. R. Co.* 45 Iowa, 23.

And in West Virginia it was declared that a foreign railroad corporation cannot legally operate its road in that state except by charter or license from the state, and a lease of a railroad to a foreign corporation was regarded as insufficient to make the lessee a necessary party to a suit concerning the land. *Chapman v. Pittsburgh & S. R. Co.* 18 W. Va. 184.

A railroad company incorporated in another state was held entitled to own land in Vermont, 24 L. R. A.

where it bought fifteen acres near the abutment of a bridge which it had built across the river which formed the state boundary, although the road extended only to such boundary, and there was no evidence that it intended to run cars into the state, but the land would be convenient for its use if it did not. *State v. Boston, C. & M. R. Co.* 25 Vt. 433.

The power of railroad companies to make a lease to a corporation of another state is held to be given by statute in *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 130.

A foreign corporation owning all the stock of a domestic corporation, where the statutes allow its stock to be held by other corporations, does not thereby "acquire or hold" the real estate of the domestic corporation so as to violate the Pennsylvania Act of April 23, 1855, against acquiring or holding real estate "directly in the corporate name, or by or through any trustee or other device whatsoever, unless especially authorized," under penalty of escheat. *Com. v. New York, L. E. & W. R. Co.* 7 L. R. A. 634, 132 Pa. 591, substantially overruling *Com. v. New York, L. E. & W. R. Co.* 114 Pa. 340, in which the court submitted to the jury the question whether the ownership of stock was a "device" to own land in violation of the statute.

The title of a state railroad corporation to lands in a territory under a grant by act of congress could not be divested by a state into which the territory was subsequently formed, even if such state should interfere with such corporation. *Van Wyck v. Knevals*, 108 U. S. 360, 27 L. ed. 201.

Where congress has conferred upon a railroad corporation of a state a right of way over public lands of the United States in any one of their territories, it may be doubted whether the state subsequently created out of such territory could prevent the enjoyment by such corporation of the right conferred. It could do so only on the same

ness here from exercising its corporate powers within our jurisdiction.

Merrick v. Van Santvoord, 84 N. Y. 208; *Demarest v. Grant*, 18 L. R. A. 854, 128 N. Y. 205.

At common law any corporation had the power to take, hold, and convey real estate, for any purposes not inconsistent with those for which it was created.

1 Washb. Real Prop. 4th ed. p. 81; 1 Beach, Priv. Corp. § 377; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; *Re McGraw*, 2 L. R. A. 387, 111 N. Y. 93; *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 227; 2 Kent, Com. 288; *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 114, 38 Am. Dec. 481.

At common law any corporation could hold real property in this state. This right is inherent in a domestic corporation, and has been freely conferred upon foreign corporations thereunto authorized by their charters by the principle of comity.

Sherwood v. American Bible Soc. *supra*; *Bard v. Poole*, 12 N. Y. 506; *Silver Lake Bank v. North*, 4 Johns. Ch. 370, 1 L. ed. 871; *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 519, 10 L. ed. 274; *Mumford v. American L. Ins. & T. Co.* 4 N. Y. 463; *Alward v. Holmes*, 10 Abb. N. C. 96; *Merrick v. Van Santvoord*, and *Demarest v. Grant*, *supra*; *Stevens v. Pratt*, 101 Ill. 206.

In this state the principle of comity has been extended so far as to afford a foreign corporation relief by injunction to restrain a citizen of this state from violating a covenant not to engage in a certain business in this and other states.

Diamond Match Co. v. Roeber, 106 N. Y. 478,

terms that it could refuse a recognition of its own previously granted right, for in such matters the state would succeed only to the authority of congress over the territory. *St. Joseph & D. C. R. Co. v. Baldwin*, 108 U. S. 423, 28 L. ed. 573.

Telegraphs.

The general power of a corporation to hold property in states other than the one which incorporated it, in the absence of statutory prohibition in such states, is declared in *United Lines Teleg. Co. v. Boston Safe Deposit & T. Co.* 147 U. S. 431, 37 L. ed. 211, in respect to the ownership of a telegraph line.

A corporation organized to be a mere auxiliary and agency of a foreign corporation in operating a telegraph line is not against the policy of the laws, where they allow foreign corporations to do business and hold necessary property for that purpose. *Day v. Postal Teleg. Co.* 66 Md. 384.

In Canada by an exercise of comity a foreign corporation was held entitled to enforce a contract for the exclusive right to operate a telegraph line over a railroad. *Canadian Pac. R. Co. v. Western U. Teleg. Co.* 17 Can. S. C. 151.

As to power of state to exclude telegraph companies, see note to *Postal Teleg. Cable Co. v. Baltimore*, *ante*, 161.

Interest in mines.

A New York mining company organized for the business of mining in Montana was protected in its business in that state. *Garfield, M. & Min. Co. v. Hammer*, 6 Mont. 53.

A California mining corporation authorized to hold not more than 1440 acres, was held entitled in Nevada to hold to any extent permitted by the Nevada laws; and it is also held that no individual could be protected in trespassing on any part of the land of such company, even if it exceeded the 31 L. R. A.

60 Am. Rep. 464. See also *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *American & Foreign Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 888; *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

Statutes containing grants of power must be construed so as to include the authority to do all things necessary to make the object of the grant effectual and to enable the donee of the power to accomplish the expressed purposes of the act.

New York v. Sands, 105 N. Y. 210; *People v. Chapin*, Id. 816.

By the law as it existed prior to the passage of the Act of 1877, corporations of other states were fully empowered to acquire real estate for any of the purposes mentioned in that act, and to hold the same indefinitely, if so empowered by their charters or the laws of the respective states under which they were organized. The only change, therefore, wrought by this act was to limit the time during which such foreign corporations could hold lands so acquired.

Alward v. Holmes, 10 Abb. N. C. 96, and cases there cited.

But the effect of noncompliance with such statutory provision would not, in the absence of regulations forbidding a sale after five years, or of affirmative words imposing a penalty or forfeiture for disobedience, divest the title of the corporation, or prevent it from selling the same, and conveying a good title to the purchaser.

Home Ins. Co. v. Head, 20 Hun, 405; *Health*

amount which the corporation could lawfully hold. *Whitman Gold & Silver Min. Co. v. Baker*, 3 Nev. 386.

A coal mining company organized in another state, chiefly for carrying on business in Ohio, but having an office and annual meetings in the state of its incorporation, was held lawful in Ohio. *Second Nat. Bank of Cincinnati v. Lovell*, 2 Cln. Sup. Ct. Rep. 400.

And in *Hanna v. International Petroleum Co.* 23 Ohio St. 622, a mining corporation organized in another state to do business in Ohio was held not to be a fraud on the law, because it had done nothing but organize in its own state.

And substantially to the same effect was the decision in *Newburg Petroleum Co. v. Wear*, 27 Ohio St. 843, upholding oil land leases to a foreign corporation, which was held not to be a fraud because it had only an office in the state of its incorporation, and did its principal business in Ohio.

A corporation having its registered office in England, where it holds corporate meetings, can own mining lands in Missouri, since it is authorized to do so by the English law, and there is no Missouri statute which prohibits it. *Missouri Lead Min. & S. Co. v. Reinhard*, 114 Mo. 218.

The right of a foreign corporation organized to carry on a mining business and for other purposes not covered by the Michigan laws for incorporation of mining companies, to have a copy of its articles of association filed, under How. Stat. (Mich.) § 4098, was denied in *Isle Royale Land Corp. v. Osmun*, 78 Mich. 102, by a bare majority of the court, who did not agree in their reasons for the decision. See also *infra*, *Grant v. Henry Clay Coal Co.*

Exercise of eminent domain.

The right of a foreign corporation to exercise the power of eminent domain is not implied.

Dept. of New York v. Knoll, 70 N. Y. 536.

And so also the law was well settled before the passage of the Act of 1887 that corporations of sister states had the right to acquire real estate within this state illimitably if authorized by their charters, and to dispose of the same.

2 Kent, Com. p. 285; *Ex parte Peru Iron Co.* 7 Cow. 540; *Sherwood v. American Bible Soc.* 4 Abb. App. Dec. 237; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *American & Foreign Christian Union v. Yount*, 101 U. S. 532, 25 L. ed. 588.

Where a corporation acquires real estate without authority of law or in excess of the limitations of the law such real estate does not become liable to forfeiture by the people. The only right of the state is to claim a forfeiture of its franchises, and not a forfeiture of the property held by the corporation.

Re McGraw, 3 L. R. A. 387, 111 N. Y. 96.

This it may do against a foreign corporation carrying on business in this state as well as against a domestic corporation.

Com. v. New York, L. E. & W. R. Co. 7 L. R. A. 634, 132 Pa. 591.

Assuming that section 17 of the General Corporation Law is to receive a narrow construction, the defendant was nevertheless authorized to acquire such real property in this state as might be necessary for its corporate purposes, and nothing appearing to indicate that the property in question was not, in fact, necessary for that purpose, it is to be presumed that the transaction whereby it acquired title to this property was consistent with its charter.

A corporation of another state has no power to condemn lands for railroad right of way, under Neb. Const. art. 11, § 8. *State v. Scott*, 22 Neb. 623; *Trester v. Missouri Pac. R. Co.* 23 Neb. 242; *Koenig v. Chicago, B. & Q. R. Co.* 27 Neb. 669.

But a legislature may give the power of eminent domain to a foreign corporation. *Re Townsend*, 39 N. Y. 171; *Morris Canal & Bkg. Co. v. Townsend*, 24 Barb. 668; *New York & E. R. Co. v. Young*, 38 Pa. 175.

Under Mo. Rev. Stat. 1879, § 790, a foreign railroad corporation may obtain a right of way in Missouri by condemnation. *Gray v. St. Louis & S. F. R. Co.* 81 Mo. 123.

General language may be sufficient to confer the power. Thus a foreign corporation is entitled to the benefits of the New York statute authorizing "any company owning, operating, or leasing" any steam railroad to take property by condemnation. *Re Marks*, 6 N. Y. Supp. 105.

And the assent of the legislature to the transfer of the power of eminent domain from a domestic railroad corporation to a foreign corporation which succeeds to its rights and powers may be gathered by implication from a series of legislative acts. *Abbott v. New York & N. E. R. Co.* 145 Mass. 450.

So a foreign waterworks company can exercise its powers under an ordinance including the right to condemn lands, where the legislature has given authority to the municipal corporation to confer such power on "individuals or corporations." *Dodge v. Council Bluffs*, 57 Iowa, 560.

And in Ohio the right of a foreign corporation to condemn lands for railroad purposes and operate a railroad in Ohio is upheld. The court finds an express grant of the power in the case in hand and says that there is no legislation against the right but abundant to the contrary. *State v. Sherman*, 23 Ohio St. 433, 24 L. R. A.

Farmers Loan & T. Co. v. Curtis, 7 N. Y. 466; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Ex parte Peru Iron Co. and Alward v. Holmes*, *supra*; *Yates v. Van De Bogert*, 56 N. Y. 526; *Cowell v. Colorado Springs Co.* *supra*.

But, assuming further that under the laws of this state a foreign corporation like the present has no right to hold real property for speculative purposes yet having acquired title thereto for a valuable consideration it nevertheless could convey a good and sufficient title to the plaintiff before divestiture of its title at the instance of the state.

Leazure v. Hillegas, 7 Serg. & R. 313; *Runyon v. Coster*, 39 U. S. 14 Pet. 123, 10 L. ed. 382; 1 Washb. Real Prop. 4th ed. 79; *Moore v. White*, 6 Johns. Ch. 360, 2 L. ed. 150; *Sheaffe v. O'Neil*, 1 Mass. 256; *Fairfax v. Hunter*, 11 U. S. 7 Cranch, 603, 3 L. ed. 453; *Waugh v. Riley*, 8 Met. 294; *Bradstreet v. Oneida County Supra*, 13 Wend. 548; *Wright v. Sandler*, 20 N. Y. 824.

Before office found, an alien may convey lands acquired by him by purchase, and if the conveyance be to one capable of taking and holding his title will be good and valid.

Inglis v. Sailor's Snug Harbor of New York Trustees, 28 U. S. 3 Pet. 99, 7 L. ed. 617; 1 Lead. Cas. Am. Real Prop. p. 501; *Marshall v. Conrad*, 5 Call. (Va.) 364; *Jenkins v. Noel*, 8 Stew. (Ala.) 60; *Sheaffe v. O'Neil*, *supra*; *Montgomery v. Dorion*, 7 N. H. 475; *Forwell v. Craddock*, 1 Patton & H. 250; *Halstead v. Lake County Comrs.* 56 Ind. 338.

The policy of the law which prohibits aliens

When a foreign corporation has no power as such to condemn lands, a domestic corporation which is merely an auxiliary may do so. *Lower v. Chicago, B. & Q. R. Co.* 59 Iowa, 563.

A statute denying the right of eminent domain to corporations created under the laws of other states or of the United States does not apply to a corporation which by consolidation under state statutes has become a domestic corporation. *State v. Chicago, B. & Q. R. Co.* 2 L. R. A. 564, 25 Neb. 156; *Toledo, A. A. & G. T. R. Co. v. Dunlap*, 47 Mich. 456.

That a foreign corporation cannot condemn land in a court of the United States and cannot remove to that court a condemnation proceeding in which it is defendant is declared in *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 314.

But in that case the corporation was held to be in fact a domestic one. *Ibid.*

As to mortgages.

Almost without exception, the right of a foreign corporation to take a mortgage on real property, except when expressly prohibited by statute, has been upheld.

In *Bank of Louisville v. Young*, 37 Mo. 306, the court construed the Missouri statute holding that a loan by a foreign corporation doing business in the state was prohibited, and that bonds, notes, and securities taken therefor were void, but in *Connecticut Mut. L. Ins. Co. v. Albert*, 30 Mo. 131, it was held that a foreign corporation, not engaged in banking, might lawfully make such a loan, and that the words "foreign corporations" as used in the statute (Rev. Code 1835, § 14, p. 259), as shown by the connection, meant foreign banking corporations; and a later case holds that even foreign bankers, if they are not engaged in banking in Missouri, can make such loans. *Long v. Long*, 79 Mo. 652.

from holding title to land is to have the title in the hands of citizens who owe allegiance to the government and can be called upon to discharge the duties of citizenship.

Mars v. McGlynn, 88 N. Y. 376.

Gray, J., delivered the opinion of the court:

Before approaching the discussion of the principal question in this case, certain questions of subordinate importance may be disposed of, which have been raised upon the argument. One of them relates to the right of this corporation to recognition in our courts, as affected by the fact that the incorporators are, with one exception, citizens and residents of this state. Whatever inferences can be drawn as to the motives which took them into a foreign jurisdiction to organize a corporation under its laws, I agree with the general term that any such question has been once and for all settled by our recent decision in the case of *Demarest v. Flack*, 128 N. Y. 205, 18 L. R. A. 54. It appeared in that case that citizens of this state incorporated under the laws of West Virginia to carry on a certain business, with the principal office of the company in New York city, and where only it had been conducting its operations. It was claimed that these facts invalidated the corporation, and that there was a manifest evasion of and fraud upon the laws of the state. But it was held that they constituted no reason for refusing recognition to the corporation; that there was no essential difference between a corporation

formed under the laws of a foreign state, the members of which were its own citizens, and one so formed, the members of which were citizens of our own state. If our citizens are attracted to other jurisdictions for purposes of incorporation, because of more favorable corporation or taxation laws, I cannot see in that fact, however, and in whatever sense to be deplored, any reason that they should be prevented from employing here the corporate capital in the various channels of trade or manufacture. That, as it seems to me, would be a rather hurtful policy and one not to be attributed to the state.

Another question relates to the regularity of the proceedings for the incorporation of the defendant company under the laws of the state of New Jersey. I am unable to perceive any defect therein. I should say there had been a compliance with its statutes. But if there could be pointed out some irregularity it could not be made the subject of an objection to the defendant's title. It was a corporation *de facto*. Its incorporators had filed their certificate of incorporation as required by the laws of New Jersey, and a certificate had been filed in the office of the secretary of state of this state, as required by our laws of a foreign corporation. It was exercising a franchise attempted to be conferred upon it by the laws of New Jersey, and any question affecting its right to transact business because of alleged irregularities in organization is a matter for the government of that state to inquire into. It was said in *Methodist Episcopal Union Church v.*

It is now established in that state that a foreign corporation may make a loan on mortgage security. *Ferguson v. Boden*, 111 Mo. 208.

In Louisiana an early case held that a branch bank owned by a foreign corporation might loan money and take mortgage security. *Frazier v. Wilcox*, 4 Rob. (La.) 517.

And in Mississippi, notes and mortgages taken by a foreign corporation are valid in the absence of any prohibition. *Williams v. Creswell*, 51 Miss. 817.

A foreign corporation which is not prohibited by its charter from taking a mortgage on lands outside the state may take such mortgage, at least when it takes it merely as additional security for a lawful investment which it finds in danger. *National Trust Co. v. Murphy*, 80 N. J. Eq. 408.

So in *American Mut. L. Ins. Co. v. Owen*, 15 Gray, 491, it was held that a foreign corporation having a valid demand against a citizen can take a real estate mortgage to secure it.

So in *Farmers' Loan & T. Co. of New York v. McKinney*, 6 McLean, 4, it was held that a foreign corporation might take a mortgage on land, unless prohibited by statute or the policy of the state.

The power of a foreign insurance company to take mortgages on real estate in Illinois was declared in *Hards v. Connecticut Mut. L. Ins. Co.*, 8 Biss. 236, to be not contrary to the public policy of the state.

A mortgage to a foreign corporation is assumed to be within its general capacity. *Daly v. National L. Ins. Co. of U. S.*, 4 Ind. 1.

That a foreign bank may take a mortgage on making a loan is decided in *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, in which it is said also that it can buy the property on foreclosure.

The same doctrine as to the right of a foreign corporation to take a real estate mortgage is upheld in *Saltmarsh v. Spaulding*, 147 Mass. 224; *Ste- 24 L. R. A.*

vens v. Pratt, 101 Ill. 208; *Commercial U. Assur. Co. v. Scammon*, 102 Ill. 46, overruling *United States Mortg. Co. v. Gross*, 93 Ill. 488.

And in other cases which turn on the provisions of statutes restricting the business of foreign corporations and establishing conditions of such business the power of foreign corporations to take real estate mortgages unless prohibited by statute is assumed. *Oregon & W. T. & I. Co. v. Rathbun*, 5 Sawy. 82; *Semple v. Bank of British Columbia*, 1d. 88; *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. 287; *Fritts v. Palmer*, 122 U. S. 232, 33 L. ed. 817; *Sherwood v. Alvir*, 83 Ala. 115; *Cradlock v. American Freehold Land Mort. Co. of London*, 88 Ala. 281; *Elston v. Piggott*, 94 Ind. 14; *Reeves v. Harper*, 44 La. Ann. 516; *Bard v. Poole*, 12 N. Y. 496; *Mumford v. American L. Ins. & T. Co.*, 4 N. Y. 468; *Charter Oak L. Ins. Co. v. Sawyer*, 4 Wis. 887.

The statutory prohibition against a foreign corporation acquiring or holding real property does not prevent such corporation from taking a real estate mortgage. *Leasure v. Union Mut. L. Ins. Co.*, 91 Pa. 491; *American State Co. v. Phillipsburg Bldg. & L. Sav. Bank*, 8 W. N. C. 430.

A pending suit in a federal court by a foreign corporation to foreclose a mortgage is not affected, even if the statute is valid, by a statute making it the cause of exclusion of a foreign corporation from the state, if it invokes the jurisdiction of a federal court, and the bringing of a subsequent suit will not prevent the corporation from purchasing the land on sale under such foreclosure suit. *Elston v. Piggott*, *supra*.

It is said in *Elston v. Piggott*, *supra*, that there is no statute in Indiana to prevent a foreign corporation from taking real estate in payment of debts on an execution sale.

Enforcement of restrictions.

Until office found, the title of a foreign corpora-

Pickett, 19 N. Y. 482, with respect to the capacity of corporations to act, that "the rule established by law, as well as by reason, is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealing. As long as they are overlooked or tolerated by the state it is not for individuals to call them in question." That this principle is equally applicable to foreign corporations *de facto* was held in *Bank of Toledo v. International Bank*, 21 N. Y. 542.

With respect to the question of whether the laws of the state of New Jersey authorize the kind of business which this company was organized and proposes to transact, I think that the provisions of the statute for the formation of corporations, to which our attention is directed, are broad enough in their scope to comprehend the objects of this incorporation. They authorize incorporations for the purpose of the improvement and sale of lands. With such an authorization and, as a corporation, being vested under those laws with the authority to hold, purchase, and convey such real and personal estate, as the purposes of the corporation shall require, there is ample support for a construction that this company may deal in the purchase and sale of real estate. But, if any doubt might be entertained upon the correctness of our construction of this foreign statute, I do not think the doubt affects the question here. If

to engage in the business of buying and of selling real property is to act in excess of the powers conferred upon the corporation by the statute of New Jersey, it is for that government to inquire into the exercise by its creature of corporate powers. It is not a question which the party dealing with it can raise. As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred, and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed.

The principal question for our consideration is one of great importance, for upon its decision not only depend large interests, but a judicial definition of state policy. That question may be thus succinctly stated: Under our laws, can a foreign corporation, incorporated for the purpose of dealing in the purchase and sale of real property, come into this state and transact here such kind of corporate business? The general term put the question in somewhat different form: Whether it may "purchase and hold lands within this state which are not necessary for its business and which have not been acquired in securing the payment of a debt due to it." That is hardly exact as applied to the case of this corporation. As I have

tion to real property cannot be questioned on the ground that it has no right to own real property. *Lathrop v. Commercial Bank of Scioto*, 8 Dana 114, 33 Am. Dec. 481. See also *Whitman M. & Min Co. v. Baker*, 3 Nev. 386.

Under a statute declaring that no corporation of the state, or of any other state, can purchase lands without incurring forfeiture, unless authorized by the legislature, but can hold and retain them subject to be divested or disposed of by the commonwealth, a foreign corporation may purchase lands within the state subject to be divested by forfeiture, and until the government acts the title remains in the corporation. *Runyan v. Coster*, 30 U. S. 14 Pet. 122, 10 L. ed. 382.

Even if the title is acquired in violation of an express statutory prohibition, it is valid as against every one but the state. *Myers v. McGavock* (Neb.) March 22, 1894.

Thus the title of a foreign corporation to real estate purchased by it at a judicial sale is valid as against every one but the state, although the statutes expressly declare that a foreign corporation shall not "acquire or own, hold or possess by right of title or descent accruing hereafter any real estate in the state." *Carlow v. Aultman*, 28 Neb. 672.

An agent of such corporation certainly cannot question its power to own real property. *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 524, 38 L. ed. —.

A conveyance of land to a foreign corporation is not void although a statute forbids it to acquire and hold real estate, but the deed passes the title and the corporation may hold the land subject to the right of escheat in proceedings by the state. *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co.* 22 Fed. Rep. 22.

Under the Pennsylvania Act of April 8, 1881, a conveyance of land by a foreign corporation, 24 L. R. A.

which is held subject to escheat, made before anyquisition taken to escheat the same, is made valid so as to prevent the escheat of the lands on account of the disability of the grantor. *Com. v. New York, L. E. & W. R. Co.* 7 L. R. A. 534, 132 Pa. 561.

Under the Georgia Act of February 8, 1877, providing that the state would not consent to foreign corporations owning 5,000 or more acres of land in that state, unless incorporated under its laws, the state alone can make the question as to the right of a foreign corporation to hold land against the statute. *American Mortg. Co. v. Tennille*, 12 L. R. A. 529, 87 Ga. 28.

As to the subject of escheat generally, see *notes* to *American Mortg. Co. v. Tennille* (Ga.), 12 L. R. A. 529.

An individual cannot question the power of a foreign corporation to acquire real estate, at least where it is clothed with power to hold real estate for some purposes. *Barnes v. Suddard*, 117 Ill. 237.

The right of a foreign corporation to own mining leases is held not open to question by a person who is sued for the price of coal sold him by the corporation. *Grant v. Henry-Clay Coal Co.* 60 Pa. 208.

Information in the nature of a writ of quo warranto was used for the escheat of lands alleged to have been purchased in trust for the foreign corporation, which could not legally hold them (*Com. v. New York, L. E. & W. R. Co.* 114 Pa. 340.) but this case was overruled on the subject of the right of the corporation by *Com. v. New York L. E. & W. R. Co. supra*.

A careful examination of all the cases on the subject shows a fairly clear agreement on the general doctrine that foreign corporations except as restricted by statute may acquire and own real property to the same extent that domestic corporations may do so.

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shaped it, the question is certainly made broad enough.

The opinion of the general term was delivered by *Mr. Justice Follett*, whose opinions are entitled to the highest respect, and he negatives the prohibition embodied in the question, upon the ground, in substance, that from certain general statutes of this state, which relate to the right of foreign corporations to purchase or acquire, and to convey real property, and from numerous special acts, passed to authorize them to acquire lands, it is to be inferred that "it is contrary to the policy of this state to permit such corporations to take, hold, and convey lands in this state, without being specially authorized so to do." The general statutes to which he refers are chapter 158 of the Laws of 1877 and chapter 450 of the Laws of 1887, and he considers that to their declarations it is to be referred, solely, the question of the right of foreign corporations, generally, to acquire, hold and convey lands, for they alone recognize their right in such respects. The Act of 1877 authorized a foreign corporation to purchase at a sale under the foreclosure of a mortgage or under a judgment held by it; to hold the land purchased for not exceeding five years, and to convey it, etc. The Act of 1887 authorized a foreign corporation, doing business in this state, to acquire such real property as might be necessary for its corporate purposes in the transaction of its business here. Both provisions were re-enacted into the "General Corporation Law of 1892" (Laws 1892, chap. 687), as sections 17 and 18.

In order to uphold the validity of the conveyance in question here, I think we might very safely rest our conclusions upon the enactment of 1887 if other grounds were lacking. We might, without doing violence to any rule of law, say that that act was such sufficient authority as to make the title to the land conveyed by the foreign corporation quite indefeasible in its grantee. The general term thought it was not broad enough; but there would not be much stress in reasoning that the foreign corporation being authorized to do business here, the authorization of the Act of 1887 "to acquire such real property as may be necessary for its corporate purposes in the transaction of its business in this state," even though we were disposed to define it as comprehending merely property for proposed use as an office, a warehouse or factory, etc., would, nevertheless, be sufficient to enable the corporation in possession of land by its conveyance to vest in the grantee a good title to it. It is not for the party contracting for the conveyance of its land to raise the question of how far his grantor may have exceeded the authority given by the statutes of this state, any more than he might with respect to an alleged abuse of the powers conferred by its home charter. Those are questions between the corporation and the government. The presumption militates in favor of the validity of the transaction, and the right of interference by the state does not extend to any forfeiture of the property held by the corporation *Re McGraw*, 111 N. Y. 66, 96, 2 L. R. A. 387.

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In *Cornell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547, the objection was that the National Land & Improvement Company, a Pennsylvania corporation which granted certain lands in Colorado to the springs company, was not empowered to acquire a right to the lands, for the reason that they were not necessary to enable it to carry on its business, to which extent corporations in Colorado were limited, because of restrictions upon the legislative power in the creation of corporations. It was held that "whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the state and the corporation, and is no concern of the defendant."

But we are not confined to any such narrow ground as a construction of the particular acts referred to. Our general laws are such as to evidence a state policy, which makes no invidious distinction against foreign corporations coming within our boundaries to extend the area of their lawful operations. The answer to the question is not to be found in the acts to which the learned general term justices refer. If they have not overlooked they have failed, in my judgment, to give due weight and significance to other provisions upon our statute books.

The general corporation law, passed in 1892, contains these further provisions as to foreign corporations: "Section 15. No foreign stock corporation other than a moneyed corporation shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar purposes. . . . The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December 31, 1892, without having procured such certificate from the secretary of state. . . . No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate."

"Section 16. Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the state, and a place within the state which is to be its principal place of business, and designating, in the manner prescribed in the code of civil procedure, a person upon whom process against the corporation may be served within the state."

"The person so designated must have an office," etc.

The negative form of the legislative ex-

pression is pregnant with meaning. All foreign stock corporations are accorded the same right to transact their business here as domestic corporations have, if it be one which the latter may also lawfully transact, and provided there has been compliance with certain stated requirements. It is a recognition of the right of a foreign corporation to do business here, with the imposition of reasonable conditions. A certificate was granted by the secretary of state, in December, 1892, which certified a compliance with all the requirements of law, and that the business of the corporation to be carried on here was such as may be lawfully carried on by a corporation incorporated under our laws for such or similar business. By chapter 691 of the Laws of 1893, known as "The Business Corporations Law," what restrictions may have existed upon the organization of corporations in this state, previously, were done away with. Under that law "three or more persons may become a corporation for the purpose of carrying on any lawful business," by executing and filing a certificate, which shall contain the objects for which formed, including the nature and locality of the business. The effect of all recent legislation is, most clearly to remove all barriers to the transaction, through incorporation, of any lawful business in this state, and to recognize an equal right in the foreign corporation with that of the domestic corporation.

Presumably, in the opinion of the learned general term justices, it was not considered that sections 15 and 16 of the General Corporation Law include within their purview such a business as the acquisition of lands within this state by foreign corporations for purposes not connected with necessities for a corporate use. But I do not think we can so limit the meaning of these sections. It is true that they are followed by sections 17 and 18, to which the opinion below attaches such weight; but their presence is no warrant for ignoring the broad and general authority contained in the preceding provisions. Section 18 may still have an office to perform, in limiting the period of time for which a foreign corporation, without a certificate here, may hold land taken for a debt, or purchased at a sale under a judgment or decree; while the necessity for retaining section 17 is not readily perceived. The foreign corporation which desires to acquire real property, solely for use connected with the transaction of its business here, must, under section 15, procure the certificate of the secretary of state as a condition of being permitted to carry on business and, having the certificate, its right to do business as freely as a domestic corporation necessarily carries with it the recognition of the right to acquire and hold what real property may be necessary for that purpose. Both sections, possibly, were retained in the revision of corporation laws out of abundant caution. Neither section is a new enactment; but merely the continuation of an existing law. Whatever the reason to be assigned for retaining sections 17 and 18, the provisions of sections 15 and 16 contain an authoritative declaration by the legislature, and we neither can nor should

attempt to refine away their comprehensive meaning. Nor am I able to perceive that it is, or that it ever was, the policy of this state to prevent foreign corporations from acquiring and holding real property here, if desired for the transaction of any lawful business. To discover the public policy of a state we are limited, as it was observed by *Mr. Justice Story*, in the *Girard Will Case*, 43 U. S. 2 How. 127, 11 L. ed. 205, to what "its constitution and laws and judicial decisions make known to us." I am aware of nothing in the Constitution upon the subject. There were no statutes passed upon the subject prior to the Act of 1877, referred to, and in their silence the principle of a general right in legally constituted corporations, with sufficient charter powers, and the principle of assent implied by the general law of comity between states, had a scope for operation in favor of the right of a foreign corporation to acquire and hold real property here. If special enabling acts have been procured, in particular cases, they do not, necessarily, disprove the general right. Prudence and cautious counsels may have dictated their procurement. While the enactment of the Statute of 1877 contained a limitation upon the right of the foreign corporation to hold real property, with respect to time, the subsequent Act of 1887 was in the direction of removing such, or any, limitation. Then came the General Statutes of 1893, which allowed all foreign corporations to do business here, upon compliance with conditions named, and which place them upon a similar footing with domestic corporations, as to transaction of a corporate business. If we turn only to the decisions of this court, in our investigation of what has been the public policy of this state towards foreign corporations we find them interpreting and applying the principle of state comity in the broadest spirit. In *People v. Fire Assn. of Philadelphia*, 92 N. Y. 811, 44 Am. Rep. 380, it was observed that "where a state does not forbid, or its public policy, as evidenced by its laws, is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its laws." In *Hollis v. Drew Theological Seminary*, 95 N. Y. 166, it was held that "unless the legislature forbids, they" (foreign corporations) "can come here as freely as natural persons and exercise here all the powers conferred upon them by their charter, subject to the limitation imposed upon natural persons, that is, they can do no acts in violation of our laws, or of our public policy. But, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations can do." This decision was in line with the early case in this court of *Bard v. Poole*, 12 N. Y. 495, in which the discussion turned upon the question of the right of a corporation of the state of Maryland to make loans secured by mortgages upon real estate within this state. *Judge Denio* said, in the opinion in that case, that "any of the states of the Union may, as this and several of the other states have done, interdict foreign corporations from performing certain single acts, or

conducting a particular description of business within its jurisdiction. But, in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law and not inconsistent with the policy of the state as indicated by the general scope of its laws or constitution, corporations are permitted by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other states. It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make, and it must also be one which would be valid if made at the same place by a natural person, not a resident of that state."

It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any lawful business which a nonresident natural person might have transacted here. What public policy is evaded, and what public interests are prejudiced, by extending to the foreign corporation for the transaction of its business, the privileges and protection of the laws of our own state, even when that business involves the acquisition of and dealing in real property? If we were to consider the question simply in the light of a sound or a good policy, there are abundant reasons for holding that it is to the public advantage that our borders should be as much open for all lawful purposes to foreign corporations as to natural persons. Their advent and lawful operation cannot but tend to some advancement of our commercial interests and must advantage the commonwealth. It is the policy of the state to encourage the employment of capital here by liberal laws; upon what reasonable ground shall we recognize the natural person who comes here and refuses recognition to the foreign corporation? And how is the matter affected if the capital is employed in dealing in the acquisition and barter of lands, and not in commerce, manufacturing or such like ways? What legal difference is there, which the state can recognize, if all the corporations happen to be residents of this state? The corporation is, nevertheless, a legal entity,

endowed by a sister state with capacities and powers, and seeks our state as the field of its activity in the conduct of its business enterprise. Incorporations are, as a rule, advantageous to private and to public interests. As the business capacities of the general mass of mankind are constantly improving, associations of individuals, voluntarily combining their contributions, are able to perform works of various characters which no one person is able to accomplish. I believe that to be a well recognized principle in political economy. But we are not to consider the question as one simply of sound or of good policy, but whether there is any known public policy which is affected. What reason is there that the courts shall condemn the business proposed to be carried on by the defendant? What vice inheres in it? The case does not fall within those which the courts have decided to be against public policy. The business is not immoral in itself. That it is not prohibited by legislation I think I have been able to show.

In the opinion below it is suggested that if the defendant may legally acquire and convey land in this state at pleasure, there is no limitation upon the amount which a foreign corporation may hold, except in its ability to purchase and pay. As applied to the case of this corporation, it might be a sufficient answer to say that the chartered purpose of dealing in the purchase and sale of real property rather negatives the idea of an intended accumulation of real estate holding to any extraordinary extent. But a better answer would be that it is always within the power of the legislature to interfere and to regulate if, by the magnitude of the business, the public interests are affected and seem unduly threatened. Decisions of this court might be referred to to show how far the legislative power has been deemed capable of extending in the direction of controlling a private business, on the ground that its magnitude affected the public and justified such interference.

Without prolonging the discussion, I think the general term erred in their conclusions, and that *the judgment should be reversed*, and that judgment should be ordered for the defendant upon the submission, with costs.

All concur, except Bartlett, J., not sitting.

Judgment accordingly.

WISCONSIN SUPREME COURT.

Thomas PRICE, *Appt.*,

v.

OAKFIELD HIGHLAND CREAMERY CO., *Resp.*

(.....Wis.....)

1. Allowing filth from a creamery to

NOTE.—For nuisances somewhat similar to that involved in the present case, see *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296; *Meiners v. Frederick Miller Brew. Co.* (Wis.) 10 L. R. A. 658; *Colum* 34 L. R. A.

flow, either by percolation or otherwise, upon premises of an adjoining owner, where it becomes thickened at the top and of a grayish or greenish color, and emits a stench, may be perpetually enjoined.

2. Equity having acquired jurisdiction in case of a nuisance may adjudge reasonable and adequate damages for past injuries.

bus & H. Coal & Iron Co. v. Tucker (Ohio) 12 L. R. A. 577; *Seymour v. Cummins* (Ind.) 5 L. R. A. 123, and note.

(May 1, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Fond du Lac County in favor of defendant in an action brought to enjoin the alleged maintenance of a nuisance. *Reversed.*

Statement by **Cassoday, J.:**

This action was commenced September 27, 1892, to restrain the defendant from throwing out any of its waste matter, consisting of whey, buttermilk, washings, slops, or other foul matter, anywhere about its premises, so as to run upon the plaintiff's adjoining lands, and to abate the same as a nuisance, and for damages, with costs and disbursements. The complaint contains the usual allegations in such cases. The defendant answered by way of admissions, denials and counter allegations. At the close of the trial the court found as matters of fact to the effect that the plaintiff was at the time of the commencement of this action, and had for many years prior thereto been, the owner of a life estate, and in possession of the one-quarter section of land described; that the defendant owned and occupied the adjoining lands; that there is a highway on the line between; that the defendant built a creamery factory upon its land for the manufacture of butter from milk; that said factory is located about eight rods from the plaintiff's residence, and upon the opposite side of said highway; that before building said factory the plaintiff notified the defendant that he would hold it responsible for any damage he might sustain by reason of said factory; that in May, 1890, the defendant began the operation of said factory, and threw out its waste matter on its own premises, and also on the highway in close proximity to the plaintiff's residence; that soon after the defendant dug a well on its premises for the reception of all whey, washing, and other waste matter from said factory, but that before the commencement of this action the defendant ceased to use said well, or to throw out its waste matter on the highway or street near the said residence, and laid and connected iron pipes from its said factory along the highway to a point about 40 rods from the residence of the plaintiff, to a ditch that had been dug to carry off such waste, and the same ran across the plaintiff's lands; that said pipes were sufficiently large to carry, and actually did carry, away all the whey, washings, and other waste matter of said factory to the ditch so dug to carry off such surface water; that the plaintiff sustained no damage by reason of the washings and waste matter of the factory running upon or through his lands; that such whey and washings did not create a great stench near the residence of the plaintiff, nor did it contaminate the water or injure the wells of the plaintiff; that the illness of the plaintiff's wife was not caused by the operation of the factory, nor from the foulness of any waste matter connected therewith; that the actual rental value of the plaintiff's lands was not diminished by reason of the operation of the factory; that in August, 1892, the plaintiff served notice on

the defendant to abate the alleged nuisance mentioned; that at the commencement of this action the running and operation of the defendant's factory was not a nuisance. And, as conclusions of law, that the plaintiff was not entitled to the relief demanded in the complaint, but that the same should be dismissed, and that the defendant was entitled to judgment accordingly, with costs and disbursements. From the judgment entered thereon accordingly the plaintiff brings this appeal.

Messrs. Colman & Sutherland, for appellants:

From the time of Queen Elizabeth to this decision, the continued running of water, though clear, upon another's land, and appliances constructed which so operate, have been held nuisances, to be redressed.

See *Penruddock's Case*, 5 Coke, 101; also cases cited in Wood on Nuisance, § 96, p. 103.

The question of amount of damage done by the defendant is not a material question upon that branch of the case. The private nuisance, the continuous encroachment upon the land, the deep ditch and iron pipe in use daily, is there. That is the nuisance to be abated, as much as overhanging eaves is a nuisance to be abated.

Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705; *Brown v. Illius*, 25 Conn. 583; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Bellows v. Sackett*, 15 Barb. 96; *Underwood v. Waldron*, 38 Mich. 232.

The pretended claim made, that the plaintiff might have dug a ditch through his farm and so carried the liquid across upon some other man's land, is upon a par with all other defenses in the case. The law of ownership and dominion over real estate must be reconstructed from its foundation if such defenses prevail.

Underwood v. Waldron, *supra*; *McCarty v. Boise City Canal Co.* 2 Idaho. 225.

Neither does the defense that the defendant could not care for this waste matter in any other way than to run it on plaintiff's farm, avail.

Jutte v. Hughes, 67 N. Y. 267; *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498; *Gould, Waters*, § 278.

The right to an injunction has grown and is established for just such a case.

Cloues v. Staffordshire Potteries Waterworks Co. L. R. 8 Ch. App. 125; *Davis v. Londgreen*, 8 Neb. 48; *Georgia Chemical etc. Co. v. Colquitt*, 72 Ga. 172; *Norwood v. Dickey*, 18 Ga. 528; *Goodson v. Richardson*, L. R. 9 Ch. App. 221; *Meyer v. Meteler*, 51 Cal. 142; *Wilmarth v. Woodcock*, 58 Mich. 482; *Lembeck v. Nye*, 8 L. R. A. 578, 47 Ohio St. 386. See also *Wilson v. Rockwell*, 29 Fed. Rep. 674; *McKeon v. See*, 51 N. Y. 800, 10 Am. Rep. 659; *Hill v. Sayles*, 12 Cush. 454; *Corning v. Troy Iron & Nail Factory*, 39 Barb. 311, and 34 Barb. 492; *White v. Chapin*, 12 Allen, 516.

The Statute, section 3180, provides for an injunction in such cases as this.

Wood, Nuisance, § 778; *Pettigrew v. Evansville*, 25 Wis. 323, 3 Am. Rep. 50; *Wil-*

son v. Mineral Point, 39 Wis. 160; *Newell v. Smith*, 26 Wis. 582; *Kimberly v. Hewitt*, 75 Wis. 371; *Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287; *Uren v. Walsh*, 57 Wis. 98; *Lawson v. Menasha Wooden Ware Co.* 59 Wis. 393, 48 Am. Rep. 528; *Flanders v. Wood*, 24 Wis. 572; *Church v. Joint School Dist. No 12 of Germantown & Menomonee*, 55 Wis. 399; *Praedrich v. Klieh*, 64 Wis. 184; *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.* 79 Wis. 297.

Messrs. Duffy & McCrory for respondent.

Cassoday, J., delivered the opinion of the court:

The plaintiff's land runs along on the north side of the highway. His residence is on the southeast corner of his land. The defendant's creamery is situated just south of the highway, and nearly opposite the plaintiff's residence. Near the creamery the defendant constructed a well or cesspool, into which the waste matter from the creamery was caused to flow. The bed rock of that cesspool appears to have been more elevated than the bed rock of the plaintiff's well. The result was that the waste matter from the cesspool percolated through the soil, and passed into the plaintiff's well, and destroyed its usefulness. Upon complaint being made, the defendant ceased to use the cesspool, and caused such waste matter to flow eastward along the south side of the highway, for about 20 rods, through a tiling or iron tube; and from there caused the same to flow eastward along the south side of the highway, for about 20 rods further, in an open ditch to a depression in the ground, where the land descended northward, and from whence the waste was carried by a culvert under the highway, and then allowed to flow northward onto the plaintiff's pasture land for a distance of 18 or 20 rods. This waste matter from the creamery, not only in the plaintiff's well, but along the open ditch, and also in the plaintiff's pasture, would soon become thickened at the top, and of a grayish or greenish color, emitting a stench more or less disagreeable, depending upon the duration of its presence. From the very nature of things, it must have been, at least to some extent, injurious to the soil and the pasture, if not the cattle therein. Such facts appear to be fairly established by the evidence. The question recurs whether the defendant has the legal right to thus perpetually invade the possession and premises of the plaintiff. Undoubtedly, a nuisance, to be actionable, must materially affect or impair the comfort or enjoyment of the person complaining, or the use or value of his property. *Stadler v. Grieben*, 61 Wis. 500.

This court has held that any business, though in itself lawful, which necessarily impregnates large volumes of the atmosphere with disagreeable, unwholesome or offensive matter, may become a nuisance to those occupying adjacent property, in case it is so near, and the atmosphere is contaminated to such an extent, as to substantially impair the comfort or enjoyment of such adjacent occupants. *Pennoyer v. Allen*, 56 Wis. 502, 43

Am. Rep. 728. In such case it is no defense that the business was conducted in a reasonable and proper manner, and with ordinary cleanliness, and that the odors sent over and upon the adjacent premises were only such as were incident to the business when properly conducted. *Ibid*.

At an early stage of the trial in the case at bar the court, in effect, expressly ruled that the case would be determined on the condition of things as they were in 1892, and not as they were before the new drain was constructed, and hence that all testimony in regard to the condition of things in 1890 and 1891 would be regarded as immaterial. It may be that at the time of the commencement of this action, and for a short time before, the atmosphere in and about the plaintiff's residence was not contaminated to such an extent as to substantially impair his comfort or enjoyment of the same, and hence that an injunction should not be granted upon that ground alone. But the case presented is not confined to the contamination of the atmosphere, even in 1892. On the contrary, the filth from the defendant's creamery was then actually being cast upon the plaintiff's premises. The case is different from the mere pollution of the atmosphere or the waters of a natural stream by some customary use while passing over the defendant's premises. It is worse. It is the invasion of the plaintiff's premises with an offensive foreign substance by means of artificial appliances. In *Tenant v. Goldwin*, 1 Salk. 360, 2 Ld. Raym. 1092, *Lord Holt, Ch. J.*, said: "If the defendant has a house of office [privy], and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is, of common right, bound to repair, it."

The reason is that every one must so use his own as not to do damage to another. And, as every man is bound so to look to his cattle as to keep them out of his neighbor's ground that so he may receive no damage, so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbor." That case has frequently received sanction in the English courts. Thus, in *Bullard v. Tomlinson*, L. R. 29 Ch. Div. 115, the plaintiff and defendant were adjoining land owners, and had each a deep well on his own land; the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water that percolated under ground from the defendant's land to the plaintiff's, and consequently the water which came into the plaintiff's well from such percolating water when he used his well by pumping, became adulterated with the sewage from the defendant's well, and it was held that the plaintiff had a right of action against the defendant for so polluting the source of supply. The language of *Lindley, L. J.*, is quite applicable here. On page 126 he said: "Prima facie, no man has a right to use his own land in such a way as to be a nuisance to his neighbor; and whether the nuisance is effected by sending filth onto his neighbor's land, or by putting poisonous matter on his own land and allowing it to escape on his neighbor's

land, or whether the nuisance is effected by poisoning the air which his neighbor breathes or the water which he drinks, appears to me wholly immaterial. If a man chooses to put filth on his own land he must take care not to let it escape onto his neighbor's land." So the same court, within a year, and in an opinion by the same learned lord justice, sustained an injunction restraining the use of stables constructed under statutory authority, on the ground that, although used with all reasonable care, yet they were nevertheless used in such a way as to be a nuisance to the plaintiff. *Rapier v. London Tramways Co.* [1898] 2 Ch. 588. That case and others were considered by this court in *Evans v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 597. In *McGenness v. Adriatic Mills*, 116 Mass. 177, a right of action was sustained for a nuisance created and maintained by discharging through a box drain filthy and polluted water upon the land of A., taken from a natural stream which had been polluted. To the same effect: *Woodward v. Worcester*, 121 Mass. 245; *Harris v. Mackintosh*, 183 Mass. 228; *Rodenhausen v. Oraven*, 141 Pa. 546; *Lockwood County v. Lawrence*, 77 Me. 297. 52 Am. Rep. 763; *Savile v. Kilner*, 26 L. T. N. S. 277; *Shotts Iron Co. v. Inglis*, L. R. 7 App. Cas. 518.

The injury inflicted upon the plaintiff and his premises is permanent in its nature. The defendant should be perpetually enjoined from causing filth to flow upon the plaintiff's premises, either directly, by percolation, or otherwise. Equity having thus acquired jurisdiction in the case, it may retain the same, and adjudge to the plaintiff reasonable and adequate damages for past injuries.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Silas Y. GILLAN, Appt.,

v.

BOARD OF REGENTS OF NORMAL SCHOOLS, Resp't.

(.....Wis.....)

1. The power to remove a teacher at pleasure given to the board of regents of normal schools by Rev. Stat., § 404, subd. 3, is discretionary and cannot be reviewed by the courts.
2. Every contract by a teacher for employment, made with the board of regents of normal schools in Wisconsin, includes as part of it the statutory provision for removal at pleasure of the board.
3. No by-law or contract of the board

NOTE.—For construction of a statute prohibiting removal of teacher except for cause, see *Marion v. Oakland Board of Education* (Cal.) 20 L. R. A. 197.

As to power to make official contract binding on successors in office, see *Shelden v. Fox* (Kan.) 16 L. R. A. 237, and note; *Millickin v. Edgar County* (Ill.) 16 L. R. A. 447.

As to right of summary removal of officers, see *Traylor v. Wayne County Auditors* (Mich.) 15 L. R. A. 96, and note; also *Speed v. Detroit* (Mich.) 22 L. R. A. 842.

34 L. R. A.

of regents of normal schools can bargain away, limit, or restrict the statutory power of the board to remove a teacher at pleasure.

(May 1, 1894.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Dane County in favor of defendant in an action brought to recover salary, which plaintiff claimed that he had been wrongfully deprived from earning by the action of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Williams & Robinson and George W. Baird for appellant.

Messrs. R. M. Bashford and T. A. Polleys, for respondent.

The statutory provision giving the respondent board of regents power to remove teachers and other employes of the board at pleasure, became a part of the plaintiff's contract of employment.

Bishop, Cont. § 489, citing cases.

The board of regents could make no by-law or contract by which it could limit, restrict, or bargain away the powers conferred upon it by statute.

Beach, Pub. Corp. §§ 268, 269, 471; *Dill*, Mun. Corp. 3d ed. §§ 96, 97; *Lauenstein v. Fond du Lac*, 28 Wis. 336; *Brimmer v. Boston*, 102 Mass. 19; *Boylston Market Assn. v. Boston*, 113 Mass. 523; *Reg. v. Darlington School*, 6 Q. B. 632.

The power of summary removal vested in the board by statute, being discretionary, no notice or hearing of charges against the appellant was necessary, and the manner in which such discretionary power was exercised by the board cannot be inquired into by the courts.

Atty-Gen. v. Brown, 1 Wis. 518; *State v. Watertown*, 9 Wis. 254; *State v. McGarry*, 21 Wis. 496; *State v. Kuhn*, 84 Wis. 229; *State v. Prince*, 45 Wis. 610; *Reg. v. Darlington School*, supra; *People v. Higgins*, 15 Ill. 110; *Territory v. Cox*, 6 Dak. 501; *Re Hennen*, 33 U. S. 13 Pet. 230, 10 L. ed. 183; *State v. Hawkins*, 44 Ohio St. 98.

The relation existing between appellant and respondent having been duly terminated by the exercise of the power of removal with which the latter was clothed by statute, the appellant's right to draw his salary as teacher ceased at the same time.

Beach, Pub. Corp. § 168 et seq.; *Eckloff v. District of Columbia*, 185 U. S. 240, 24 L. ed. 120; *Langdon v. New York*, 92 N. Y. 427; *Gillette v. New York*, 6 Daly 286; *Gregory v. New York*, 8 L. R. A. 854, 113 N. Y. 416; *Morley v. New York*, 85 N. Y. S. R. 262.

Orton, Ch. J., delivered the opinion of the court:

By the complaint in this action the plaintiff's claim is predicated upon a contract with the defendant board for his services as a teacher in the normal school in the city of Milwaukee, and as a conductor of institutes for the instruction of teachers in various parts of the state, for the school year commencing on the 1st day of September, 1891, and ending on the 24th day of June, 1892, for the sum of \$2,000 per school year, payable in monthly installments, as teacher in said nor-

mal school, and for \$50 per week and all traveling expenses as such conductor of institutes. The plaintiff entered upon the performance of said contract about the 1st day of September, 1891, and continued to render services thereunder, in a satisfactory manner, up to the 18th day of April, 1892, when he was wrongfully discharged from such employment, without cause or excuse. The plaintiff has been ready and willing at all times to perform all the conditions and requirements of his said contract, but the defendant on said 18th day of April, 1892, refused to allow him to do so, or to pay him therefor. Plaintiff demands judgment for the balance of his compensation as conductor of institutes, and for the balance of his salary for the full school year ending the 24th day of June, 1892, in the gross sum of \$791.68, with interest and costs. The answer is, in effect, as follows: The defendant board was authorized by law to make rules, regulations, and by-laws for the government and management of normal schools; to employ teachers therein, prescribe their duties, and fix their salaries, and to remove any teacher so employed, at pleasure. The state superintendent of public instruction, with the advice and consent of said board, was authorized to make such rules and regulations as they deemed proper for the government of said institutes, designate the counties in which they shall be held, and to employ agents to perform the work in connection therewith. The board had adopted a rule, which was in force September 1, 1891, requiring all persons employed in the normal schools to enter into a written contract with the board in such form as the board may prescribe. At the date aforesaid the plaintiff knew that said board had used a form of such contract, and that it had not been changed, that provided that such contract might be terminated by either party, by giving the other party thirty days' notice thereof. Any contract made between the plaintiff and the board was subject to said terms and conditions, and the provisions of law. The plaintiff had been employed as teacher in said normal school, and conductor, up to the aforesaid date, on said terms and conditions, and at a salary of \$2,000 per school year, payable in monthly installments, and \$50 per week and traveling expenses as conductor of institutes; and he continued in said employment for the school year commencing September 1, 1891, and ending the 24th of June, 1892, on the same terms and conditions. During said school year, and prior to March 16, 1892, there was a contention between the president and the professors and students of said normal school, and the plaintiff had become so involved therein as to impair his usefulness as a teacher in said school. The board therefore deemed it advisable that the plaintiff should be removed from his position as teacher in said school, and at a meeting of said board held in conformity to law, on the 16th day of March, 1892, at its office at Madison, said board adopted a resolution that the secretary of said board give a written notice to Prof. S. Y. Gillan that his services as a teacher in the Milwaukee Normal

School, and institute conductor, be terminated at the end of thirty days thereafter, and that his services as an employé of the board end in thirty days from his receipt of said notice. The plaintiff acknowledged the receipt of said notice on the 18th day of March, 1892. The services of the plaintiff as such teacher and conductor ended, therefore, on the 18th day of April, 1892, and said contract of employment was dissolved and terminated at said date, and since then the plaintiff has not been an employé of said board. The board, on the 25th day of March, 1892, paid the plaintiff \$150 on the pay roll of that month, and on or before the 15th day of July thereafter the board tendered to the plaintiff the further sum of \$141.68, as the balance of his compensation as teacher and conductor, and for expenses, which the plaintiff refused to receive; and the board has tendered the plaintiff the sum of \$324.06 in all, including costs, and has paid the money into court. For this last-named sum the plaintiff obtained judgment.

The action was dismissed, so far as the plaintiff sought to recover any salary or compensation for the school year subsequent to the 18th day of April, 1892. The facts stated in the answer, and the amounts tendered the plaintiff, appear to leave nothing at issue, except the plaintiff's claim of \$641 as the balance of his salary up to the end of the school year,—June 24, 1892. That question depends upon the right of the board to terminate the contract on the 18th day of April, 1892, at its mere pleasure or discretion, and that is the only question on this appeal. The parties do not differ, so far as the contract is for the school year at the salary of \$2,000 per year, payable in monthly installments. The court does not find that the contract between the plaintiff and the board gave either party the right to terminate it on thirty days' notice. But the court seems to predicate the right of the board to terminate the contract at pleasure entirely on the statute, which became a part of, and governs, it. The appellant ought not to be so very particular and critical as to the legality of the meeting of the board which resolved to notify him that his contract was terminated, when the contract itself had its inception in a very informal, if any, action of the board; and the existence of any special contract for the year commencing September 1, 1891, depends upon mere inference, presumption, or implication from the fact that he had such a contract the year before. The board met, and so resolved, and its secretary served the notice of it upon the plaintiff. That was sufficient at least to terminate such a questionable special contract. If there was a hiring of the plaintiff for any certain time, it is implied, rather than expressed. Section 404, Rev. Stat., provides that "the said board shall have the government and control of all the normal schools and shall have power to appoint a principal and assistants and such other teachers and officers, and to employ such persons as may be required for each of said schools; to fix the salary of each person so appointed or employed, and to prescribe their several duties."

Subdivision 2. "To remove at pleasure any principal, assistant or other officer or persons from any office or employment in connection with any such school." Subdivision 3. This statute the court below held, and the learned counsel of the respondent contends, gave the board of regents of normal schools the power to remove the plaintiff from his employment as a teacher of the Milwaukee Normal School, as they attempted to do, April 18, 1892. The learned counsel of the appellant contends that the contract under which the plaintiff was employed contained no such provision, and that the statute does not compel the board to remove teachers without assigning any cause, and that one of the by-laws of the board requires the committee to make formal written contracts with teachers, and such contracts do not contain any such provision. This power was wisely given to the board. An emergency might arise when the continuance of an objectionable teacher, even for a day, in his employment, might be very injurious to the school. The trial of a teacher in a normal school, on charges of misconduct, with its delays and publicity, and the excitement it would produce, and the feelings it would engender, would be very injurious to the school; and it would most likely make heated partisans of the other teachers and the scholars in the contest, and the evil consequences would be great, if not endless. There is no other way in which the character of the teacher could be saved, except by silent removal. An evil-disposed and perverse teacher might prefer to have charges against him made public, and to rally his forces of teachers and scholars and outside friends, and have a fight and battle with the board, no matter how much the school might be injured by it. It is at least doubtful whether the board could set on foot a trial of charges against a teacher of a normal school, with a view of merely removing him. It would seem to defeat the wise purpose the legislature had in view in giving the board this power of removal at pleasure. The question is not whether the board is bound to exercise this power in all cases, but whether, in case they do remove a teacher summarily, the courts could interfere with the exercise of their discretion or reverse their action.

1. This power of summary removal of a teacher, vested in the board by statute, is a discretionary power, and its exercise in a given case cannot be inquired into, or questioned, by the courts. *Atty. Gen. v. Brown*, 1 Wis. 513; *State v. Watertown*, 9 Wis. 254; *State v. McGarry*, 21 Wis. 496; *State v. Kuehn*, 34 Wis. 229; *State v. Prince*, 45 Wis. 610; *Reg. v. Darlington School*, 6 Q. B. 682; *Re Hennen*, 38 U. S. 18 Feb. 230, 10 L. ed. 188; *State v. Hawkins*, 44 Ohio St. 98.

2. This statute that gives the board the power of removal of all teachers at pleasure becomes a part of every contract the board makes with a teacher for his employment in a normal school. This is an old and incontestable principle of the law of contracts. *Bishop*, Cont. § 439, and cases cited. In *Head v. Curators of the University of Missouri*, 86 U. S. 19 Wall. 530, 22 L. ed. 160, the court said, in relation to the employment of a

professor in the Missouri University: "That he and his office and contract were subject to the laws in existence at the time of making it was sufficiently evident, without any declaration on the point."

3. The board of regents could make no by-law or contract by which this power could be bargained away, limited, or restricted. *Lauenstein v. Fond du Lac*, 28 Wis. 336; *Beach*, Pub. Corp. §§ 268, 269, 471; *Dill*, Mun. Corp. §§ 96, 97; *Brimmer v. Boston*, 102 Mass. 19; *Boylston Market Asso. v. Boston*, 113 Mass. 528; *Reg. v. Darlington School*, 6 Q. B. 682. This last case is much in point.

The letters-patent gave the governors of the Darlington School, established by a charter of Queen Elizabeth, the power to remove a teacher or schoolmaster "according to their sound discretion." The case was of a mandamus to restore a teacher who had been removed without charges. The governors had made a by-law by which teachers were to be removed on charges, and the teacher to be heard in his defense. *Lord Denman* held that "the discretionary power given by the letters-patent was fatal to the validity of the by-law." That "the governors, when they undertook to govern the school in the manner required by the charter, accepted a larger trust and a wider duty. They are bound to remove a master who, according to their sound discretion, they think unfit for the place. The power of the governors to remove justifies their doing so, and it is not to be restricted by any opinion we may have of the reasons on which they might have been induced to exert it." The doctrine of that case has never been repudiated or questioned. It is sound in reason as well as in law. When such a discretionary power has been exercised, it can no more be questioned than the statute itself.

4. After the plaintiff had been removed, and the contract relation between himself and the board terminated, and notice thereof received by him, his right to any further salary or compensation, as a matter of course, is also terminated. *Beach*, Pub. Corp. § 168 et seq.; *Eckloff v. District of Columbia*, 135 U. S. 240, 34 L. ed. 120; *Langdon v. New York*, 92 N. Y. 427; *Gillespie v. New York*, 6 Daly, 286; *Gregory v. New York*, 113 N. Y. 416, 3 L. R. A. 854.

The contract of the plaintiff with the board was not for any certain time, but to continue only so long as the board may not exercise this statutory power of removal. The statute became a condition of his contract, as much as if it was written in it, that the board might remove him at pleasure. He accepted the employment with knowledge of the law on this condition of his contract, and he has no reason to complain of it. These principles appear to be unquestionable. The learned counsel has cited no case in contradiction of them. The cases he cites are those in which no notice of the termination of the employment had been given. In *Butler v. Regents of the University*, 32 Wis. 124, the regents did not exercise the power of removal, and there was no such question in the case. In *Tripp v. Utica School Dist. No. 3*, 50 Wis. 651, this court held, in effect,

that the termination of the services of the teacher was not authorized by the statute. If the exercise of this discretionary power conferred on the board by the statute is not effectual to remove a teacher in the normal schools, and terminate his wages, then the statute is nugatory, and has no force whatever, and it had better be repealed. We can come to no other conclusion than that of the circuit court,—that the plaintiff was entitled to no compensation or salary beyond the 18th day of April, 1892. The removal of the plaintiff is not questioned as an abuse of the discretion of the board. This has been a very unfortunate controversy; but it is better that it has been in the courts, than before the board of regents of normal schools, on the trial of charges against the plaintiff, with the view of his removal, for cause, and it has

done far less harm to the plaintiff or the school. The plaintiff's competency and ability as a teacher have not been questioned, or his moral character assailed. He had unfortunately become embroiled in controversies which impaired his usefulness as a teacher, and threatened the success, peace, and harmony of the school. It was thought, no doubt, by the board, that his removal in this quiet way would promote the interests of the Milwaukee Normal School, and the board has not been charged with any other motive. This important case has been very ably presented by the learned counsel on both sides, and we have endeavored to give to it sufficient attention to arrive at a correct conclusion.

The judgment of the Circuit Court is affirmed.

WEST VIRGINIA SUPREME COURT.

E. B. DYER

v.

P. F. DUFFY *et al.*, J. N. Camden and George W. Curtin, *Appts.*

(..... W. Va.)

- *1. Where one by writing empowers another to sell land, implying a cash sale, and the agent simply transfers the writing to a third person, without payment of purchase money, this is not a sale.
2. A mere proposal to sell land does not become a sale until accepted, and notice of acceptance given the proposer.
3. In unilateral contracts, called options, the time fixed for acceptance is of the essence of the contract.
4. A power of attorney may fix a limit of time within which the agent is to do the act. Where it fixes a reasonable time for doing the act, it must be done by the agent within a reasonable time, in order to bind the principal. A proposal of sale made under such power must be accepted within a reasonable time from the date of the power.
5. One dealing with an agent acting under written power is taken to deal with the power spread out before him, and must inspect it to see whether the agent's act is authorized by the power.
6. One dealing with a special agent does so at his peril. He must be careful to see that the agent's authority covers the act he does.
7. An agent appointed by parol to sell land cannot receive purchase money, unless so authorized by his power.
8. A power of attorney merely to sell land implies that the agent shall sell for cash.

*Headnotes by BRANNON, P.

NOTE.—The subject of the acceptance of an option is very fully presented in this case. As to validity of an option, see *Litz v. Goosling* (Ky.) 21 L. R. A. 127, and note; *Graybill v. Brugh* (Va.) 21 L. R. A. 133; *Haves v. O'Brien* (Ill.) 23 L. R. A. 555.

As to another form of unilateral contract, see *Horn v. Hansen* (Minn.) 23 L. R. A. 617.
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and he cannot sell on credit in the absence of authority contained in such power of attorney.

9. Specific performance being addressed to the sound discretion of the court, the party asking it must have been ready, willing, and prompt in the performance of those things incumbent on him, and where he has not been so, and it would impose hardship and be inequitable upon the other party, specific performance will be refused.

(March 23, 1894.)

APPEAL by defendants Camden and Curtin from a decree of the Circuit Court for Kanawha County in favor of plaintiffs in an action brought to compel specific performance of an alleged contract to convey real estate. *Reversed.*

The facts are stated in the opinion.

Mr. J. H. Ferguson for appellants.

Messrs. Brown, Jackson & Knight for appellee.

BRANNON, P., delivered the opinion of the court:

This is a chancery suit of E. B. Dyer against P. F. Duffy and others in the circuit court of Kanawha county, by which Dyer sought to compel J. N. Camden and George W. Curtin to convey to him certain lands on Grassy creek and Elk river, in Webster county. The decree compelled Camden and Curtin to make such conveyance, and they appeal.

In response to a letter from Duffy, not in the record, the nature of which we can only glean from the reply, Camden wrote the following letter: "Parkersburg, W. Va., April 30th, 1888. P. F. Duffy, Esq., Charleston, W. Va.—Dear Sir: Your favor of the 17th instant received, stating that if I will give you an option for a short time on the Elk and Grassy creek lands, in Webster county, you think you can sell the same for one dollar per acre. I will be glad to sell at one dollar an acre, and will confirm any sale you make to that effect within a reasonable time. I will also sell you the lands

at seventy-five cents (75) per acre, if you conclude to take them yourself, and will let me know about it soon. Yours, very truly, J. N. Camden." Upon it is this indorsement, made May 8, 1888: "I hereby transfer the within to E. B. Dyer. P. F. Duffy." Camden afterwards sold and conveyed the land to Curtin. A question which at once presents itself is whether or not Dyer has any right to the land such as he can enforce against Camden, irrespective of the rights of Curtin; for, if he has not, he can succeed against neither. The letter of Camden to Duffy presents two legal features. The one makes Duffy Camden's agent to sell his land; the other makes a proposal to sell the land to Duffy. Let us look at it in the first aspect. When Duffy indorsed on the letter, "I assign the within to E. B. Dyer," what did he assign? It is vague and uncertain. He could not assign the agency,—the power to sell for Camden,—since an agent without power of substitution in his authority cannot assign his power. Story, Ag. § 18. But it is said that Duffy, as agent for Camden, under the first clause, sold the land to Dyer. May we not as well, or more plausibly, say that, taking only the assignment, it relates to the personal right of Duffy? But does this assignment purport to be an act of agency or of sale? It does not purport to be the act of Camden by Duffy, his agent. When an agent does an act for his principal, he must in some way indicate that it is the act of a principal by an agent. We have to annex the letter to the assignment, it is true; but still it remains indefinite, whether it is an attempted subrogation of Dyer to Duffy's power to sell, or an assignment of his own right to purchase, or a sale as agent. It contains not a word importing a present sale of land. It gives no terms. Where no terms are fixed, cash is implied, I know; but I use this argument to show that it is straining the act and implying a sale to treat these few words of assignment as a sale. If the parties intended it as a final act of sale, would they not have made a more definite instrument? It seems likely that Duffy gave it simply to authorize Dyer to find a purchaser. Dyer did set about seeking a purchaser, tending to show that he did not regard himself then a purchaser. If he and Duffy intended by the assignment to make a final sale, would we not expect that Duffy would require cash, as Camden's letter would legally import, or that, if on credit, they would fix terms of credit? Would Dyer risk his purchase without either paying or seeing to terms of credit? Dyer set about seeking a purchaser until, having found one, as he thought, he concluded to consummate a purchase, and on October 18, 1888, deposited in bank, to Duffy's credit, the purchase money. His action indicates that he did not regard himself a purchaser by mere force of the assignment, as he risked no money on it. There is another consideration repelling any idea that we can hold Dyer a purchaser on the date of the assignment. Camden's letter gave no credit. Dyer paid not a dollar down. He took, if Duffy did not give, nearly six months' credit, and Duffy had no authority

to make a credit sale, and such a sale would not bind Camden. One dealing with an agent under written power deals with that power before him, and Dyer did have this letter before him, and took it into possession. One dealing with an agent under written power must take notice of his powers, as an act not authorized is not binding on the principal. *Curry v. Halle*, 15 W. Va. 867; *Hewes v. Doddridge*, 1 Rob. (Va.) 148; *Stainback v. Read*, 11 Gratt. 281, 62 Am. Dec. 648.

Duffy was a special agent to sell particular land, not a general agent, and those dealing with a special agent do so at their peril as to his authority. 2 Kent. Com. 621; Story, Ag. § 126. A sale on credit would not bind Camden, as under a mere power to sell land, not authorizing credit, the agent cannot sell on credit. 1 Parsons, Cont. 58; *Burks v. Hubbard*, 69 Ala. 379; *Delafield v. Illinois*, 28 Wend. 192; *Dresden School Dist. No. 6 v. Aetna Ins. Co.* 62 Me. 880; *Lumpkin v. Wilson*, 5 Helsk. 555; 1 Am. & Eng. Encyclop. Law, 860; 2 Kent, Com. 622; Story, Ag. § 77. The deposit of purchase money in bank was no payment to Camden, as it was deposited to Duffy's credit, and, as the power to Duffy was only a parol power to sell, he could not receive purchase money. *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771. An agent empowered by seal to sell or sell and convey for cash, or perhaps to sell and convey merely, may receive the money; but if the power is by parol, and does not expressly authorize the agent to receive the money, or, though under seal, provides for a credit, he cannot receive it. If, without payment, there had been a consummated, binding contract, this would not be material. Duffy had a silent, undefined interest in the land, but the money going to Camden was separately his, and Duffy's interest would not authorize him to receive it.

Another reason against compelling Camden to specific performance of the alleged sale is that he empowered Duffy to sell "within a reasonable time." The assignment was in a reasonable time, but it could not alone constitute a sale. No money was paid nor terms of credit provided for. If we treat this assignment as a finished sale, we would have to call it, as between agent and purchaser, a "credit,"—one unauthorized by the power, not binding Camden, he ignorant of it. I use this as a circumstance against any theory that this assignment made a sale. It is the only act within a reasonable time; the act of deposit, the next act, not being within a reasonable time. I do not mean that, under the letter, Duffy could not within a reasonable time make a proposal to sell, to be accepted within a reasonable time, or that, if so accepted, payment was essential to the birth of a contract; for I think that such a proposal, so accepted, would make a contract, and Dyer need not pay until he received a deed, unless payment were made an essential element of acceptance,—a condition precedent to the birth of a contract. If we say that the deposit in bank was an act of payment under the sale made by the assignment, it came too late, because, as an act constituting an essential part of the sale,

treating it as an election by Dyer to take the land, it was not within the reasonable time required by the letter of Camden, and because that required a payment to Camden, not a deposit to Duffy's credit, he having no authority to receive; and because, if it had even been deposited to Camden's credit, it would not be good unless, with notice of the deposit, he waived money payment; and because, also, Camden had no notice whatever of such deposit until he had sold the land to another,—until, indeed, this suit was brought. But it will be said that Duffy knew of this deposit. That makes no difference. His powers as agent ended months before with the supposed sale. He had no power in regard to payment of the money, and, of course, his knowledge as to that would not bind Camden, as the doctrine that notice to an agent is notice to his principal applies only to a matter as to which he is agent. If Dyer relied upon such deposit to Duffy's name, he must notify Camden himself of it.

The assignment alone is thus no sale, and gives Dyer no right. But, though the force of the assignment arises in the case, I do not understand that it is claimed that it is alone a contract, but the origin of what finally by the deposit became a contract. The action of Dyer speaks his construction of this indefinite assignment. It has been well said by Sugden, "Tell me what you have done under a deed, and I will tell you what that deed means." Dyer did not pay or offer a dollar at the date of the assignment. He went about seeking a purchaser, likely on speculation. When he had found one, and not before, he deposited the purchase money. In his evidence he treated Camden's letter as an offer by Camden to sell, and said he accepted it, and he was asked if, "at the time you made said deposit, and accepted the offer, did you have any notice?" of a withdrawal of Camden's offer, thus treating the deposit as the acceptance. He says when he made the deposit he asked Duffy to have the deed made, again treating the deposit as his acceptance. He says that certain obstacles existed in the way of confusion of land titles in Webster, and finding papers to give chain of title and boundaries of these lands, and that he would consider six months a reasonable time to consummate the sale. His evidence in the respects named, and in other respects in its drift and spirit, shows that Dyer construed the matter to this effect, namely: That by the letter Camden made a proposal to sell; that by its assignment he, Dyer, became, not at once a purchaser, but entitled to become such, should he thereafter choose to do so; and that by depositing the purchase money in bank to Duffy's credit, with notice to Duffy of the deposit, he became a full purchaser, entitled to call for a deed. Let us, then, so treat it. What aspect does it present? A proposal by Camden, through his agent, to Dyer. Camden's proposal required a consummated sale within a reasonable time. Both clauses of his letter speak an intent not to give long time to effect a sale, but to require promptness. It was an option to purchase, a proposal,—as the letter

itself calls itself, an "option,"—and under the language of the offer, as well as the general law of contracts touching a proposal, it must be accepted, and acceptance made known, and within a reasonable time. *Weaver v. Burr*, 31 W. Va. 736, 8 L. R. A. 94; *Barrett v. McAllister*, 33 W. Va. 738; *Hanty v. Watterson* (decided this term) 39 W. Va.—; *Whart. Cont. § 9*; *Bishop, Cont. § 327*. A mere option to purchase vests no right until accepted. *Stembridge v. Stembridge*, 87 Ky. 91; *Bostwick v. Hess*, 80 Ill. 188. In case of unilateral contracts, called options, as the obligation is, before acceptance, on one side only, the proposer being bound to comply with his proposal, while the other party is under no obligation, and under no peril until acceptance, the provision of the offer as to time of acceptance is viewed with strictness. *Fry, Spec. Perf. § 733*; *Harding v. Gibbs*, 125 Ill. 85. In such contracts the doctrine, often stated, that time is not of the essence of the contract, does not apply; that doctrine applies to contracts when made, not to offers to make them. In case of proposals, time is of the essence as to acceptance. *Stembridge v. Stembridge, supra*; *Longworth v. Mitchell*, 26 Ohio St. 334; *Barrett v. McAllister* and *Weaver v. Burr, supra*. See valuable collection of authorities on subject of options generally in notes to *Lits v. Goodling* (Ky.) 21 L. R. A. 127. Shall we say nearly six months was a reasonable time merely to make an election to accept or reject? Surely not. The mere general statement that titles in Webster were confused, without specification or suggestion of any defect as to this land, and that there was some delay in getting boundaries offers no adequate excuse for delay. He must accept or reject the offer sooner. Camden would want to sell himself, or get another to sell, or have the benefit of a period when timber lands were salable, and not tie himself down to one proposal for so long a time that the period would pass away. It seems certain that Dyer wanted to buy only in the event he could find a purchaser, and could not sooner do so. Camden was not required to wait for this. Time will cancel and withdraw a proposal as effectually as express withdrawal, with notice, if acceptance be unduly delayed. *Bishop, Cont. § 327*; 1 *Whart. Cont. §§ 9, 15*. Camden waited four months without a hint from Duffy or Dyer of the assignment of his letter to Dyer, or that Dyer had any idea of buying, and then himself sold the land to another, with Duffy's written consent, spoken of below, and it is now proposed to enforce a proposal or option not accepted for nearly six months. Take the second clause of the letter. Its effect arises in the case, and is before us, but it seems not to be relied upon. It is only a proposal by Camden to sell to Duffy, if he would communicate an acceptance soon. Both under the law and the language of this offer, it was no sale until Duffy accepted, and made known his acceptance to Camden. *Weaver v. Burr*, 31 W. Va. 736, 8 L. R. A. 94; *Barrett v. McAllister*, 33 W. Va. 738, *Watson v. Coast*, 35 W. Va. 463. It vested no interest in the land. *Stembridge v. Stembridge*, 87 Ky. 91; *Bostwick v. Hess*, 80 Ill. 188. Never

did Duffy accept it. Therefore, if the intent was to assign his personal right of purchase, it is abortive, because Duffy had no interest in the land to transfer to Dyer. Could he assign the right to accept? He could not, because it was a personal right to Duffy to buy at a certain price, whereas a sale to another was fixed at a higher price; and it was a mere option, and that, before acceptance, seems to be non assignable. There is nothing to assign. It is no contract until acceptance, and a man may rely on the honesty, solvency, and promptness of one, but not of another. *Sutherland v. Parkins*, 75 Ill. 388; *Warvelle, Vend.* 187, 188; *Weaver v. Burr*, *Barrett v. McAllister* and *Watson v. Coast*, *supra*. The earliest act of acceptance would be October 13, 1888, when Dyer deposited in bank the purchase money. This was to late. The letter of option expressly limited Duffy's acceptance by the word "soon." Who will say that five and a half months was soon? Soon means promptly and, also, by it Duffy was to let Camden know of his acceptance soon. Dyer never informed Camden of this deposit. He did not know of it until this suit was brought nor of any acceptance by Duffy or Dyer; and the deposit was to Duffy's credit, not Camden's. Under this second clause, what earthly right would Duffy have to receive the money? None, he being the purchaser. Duffy knew of the deposit; but, of course that was no notice of acceptance to Camden, for, under this clause, Duffy could not be agent and purchaser. And, moreover, an agent appointed by parol to sell cannot receive purchase money. *Mann v. Robinson*, 19 W. Va. 49, 42 Am. Rep. 771.

Thus, a review of the case in all its material bearings leads to the conclusion that Dyer had no enforceable contract. Duffy joins in an answer with Camden and Curtin, denying utterly any such sale in fact or law. If any one could give a clear statement on this matter, Duffy is that one. Why did not the plaintiff put him on the stand to attest the sale? The burden is on the plaintiff to prove a sale and remove obscurity from this obscure transaction, and Duffy is the very man who, as the plaintiff says, conferred his right. Dyer says that, when he made the deposit, he requested Duffy to have Camden make a deed, and he thinks Duffy said he had requested Camden to make a deed. Why not prove this by Duffy? Why not prove by Duffy, if such was the fact, that Camden was informed of the assignment, and of the deposit, and approve it, and so waived the delay? Camden swears that he did not know of the assignment of his letter by Duffy to Dyer until the date of his deposition in this suit,—June 15, 1892,—and was given no information of any negotiation between Duffy and Dyer, and none of the deposit by Dyer. Why not prove to the reverse by Duffy, after Camden's evidence called for such proof, if the contrary was true? Dyer in October, after the deposit, sent B. W. Byrne to Camden to see about a deed. Did Byrne tell Camden of the assignment and deposit? We do not know. Byrne, the agent chosen by Dyer for this mission, is not called by him to prove those or any facts.

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I have above sought to show that, tested by principles of law, Dyer never had any enforceable contract for the purchase of these lands. But suppose we treat that vague, uncertain act of assignment of Camden's letter by Duffy to Dyer as creating a contract to sell to Dyer. Then I say that, on the merits, a court of equity ought not to enforce it. Specific performance rests in the sound discretion of the court under all the circumstances. He who asks it must have done those things required of him. Say that the assignment operated as a sale, or say that it was a proposal, as Dyer himself viewed it, giving him right to buy if he thereafter should elect to do so. Neither he nor Duffy informed Camden, until the last of October by Byrne, if he did then. He did not do any act of payment or election to take the land until his deposit in bank, October 13th. He never informed Camden of this election or deposit. If the assignment be treated as a sale, it was Dyer's duty at once to offer to pay Camden, and get his deed. He did not do so. If we regard the assignment as only a proposal giving Dyer right to purchase thereafter, it was Dyer's duty, on election to consummate, to seek Camden, and offer to pay him on delivery of a deed. He did not do so. He deposited the money to Duffy's credit, he having no right to receive; and this nearly six months after the date of proposal, and then did not notify Camden. He knew, too, before he made the deposit, that C. P. Dorr, who purchased the land of Camden for Curtin, was in actual negotiation with Camden for the land, and yet never informed Camden that he, Dyer, had the assignment from Duffy, or had any negotiations with Duffy, but allowed Camden and Dorr to go on and close. His own interest, if he then regarded himself a purchaser, or as having right to become such as also justice to Camden, called upon him to let Camden know of his rights and claim. But he allowed Camden to go on and close the sale to Dorr by a deed to Curtin binding Camden by general warranty. It looks like Dyer had yet not made up his mind to buy. Curtin paid for the land and obtained his deed in ignorance of any claim by Dyer. Would it be right for a court of equity to compel Camden to make good his warranty, and Curtin lose his land, under such circumstances of delay, indecision, and negligence on the part of Dyer?

In determining whether it will exercise its discretion in favor of specific performance, equity must regard the conduct of the parties. Curtin is an innocent purchaser without fault. I do not see that any imputation can be cast on Camden's conduct in the matter. He would have received more money by accepting Dyer's deposit than what he received from Curtin. He had right to expect that, if anything would be done under his letter to Dyer, it would be done promptly, and so provided in it, and that he would not be month after month kept in ignorance of what did take place under it. And, when Dorr approached Camden on the subject of buying the land, he told Dorr that there were reasons why he could not sell him the land without Duffy's consent, and that he

must see Duffy, and have his consent; and afterwards Dorr presented Camden a letter from Duffy, dated August 25, 1888, saying that he gave Dorr privilege to buy his interest in the lands (it appearing that Duffy had some silent interest in them), and in a few days after the date of this letter Camden sold the land to Dorr. Now, would not Camden, knowing nothing whatever of any assignment of his letter to Dyer, or any negotiations between Duffy and Dyer conclude that Duffy contemplated no action under that letter, and that it was at an end? It does not appear that Dyer knew of the letter from Duffy to Camden. I refer to it, however, as a pertinent circumstance, tending to show that Camden's action was in good motive, and not such as to place him under the condemnation of a court of equity when deciding whether to give or withhold relief

against him. I do not at all intend to have it even inferred that any reflection of bad motive or purpose lies at Dyer's door. All we say is that, whatever his right, he made his election too late, and was not in any respect diligent to protect his right. Courts of equity will not exercise jurisdiction in specific performance where it would impose hardship on people not censurable in conduct, and where the circumstances and condition of things have so changed as to make it work loss and hardship to them. *Bonles v. Woodson*, 6 Gratt. 78; *Booten v. Scheffer*, 21 Gratt. 474; *Clay v. Deskins*, 86 W. Va. 350.

Our conclusion is to reverse the decree, and dismiss the bill.

Holt, J., absent.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE of West Virginia *ex rel.*, J. M. THOMPSON *et al.*,

v.

W. H. McCALLISTER *et al.*, *Piffs. in Err.*

(33 W. Va. 435.)

*1. Section 13 of chapter 47 of the Code, which requires members of municipal councils to be freeholders therein, is constitutional and valid.

2. Certiorari, and not mandamus, is the proper remedy to review the proceedings of a municipal council, under section 23 of chapter 47 of the Code.

(Brannon, J., dissents.)

(November 15, 1893.)

ERROR to the Circuit Court for Putnam County to review a judgment in favor of relators in a proceeding by mandamus to compel defendants to recognize relators' claims to be councilmen of the town of Hurricane. *Reversed.*

The facts are stated in the opinion.

Messrs. Brown, Jackson & Knight for plaintiffs in error.

Messrs. C. R. Lewis and Bowyer & Green, for defendants in error:

When the constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interfer-

*Headnotes by DENT, J.

NOTE.—The power of the legislature to prescribe qualifications for office is a constitutional question on which decisions have been few. The opposite sides of the question are presented in the prevailing and dissenting opinions.

As to imposing a test, see *Rogers v. Buffalo* (N. Y.) 9 L. R. A. 579.

As to time of eligibility, see *Demaree v. Scates* (Kan.) 20 L. R. A. 97; *State v. Van Beek* (Iowa) 19 L. R. A. 622; and *contra State v. Sullivan* (Minn.) 11 L. R. A. 272.

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ence to add to the condition, or to extend the penalty to other cases.

Cooley, Const. Lim. 78; *Thomas v. Owens*, 4 Md. 189.

Where the constitution prescribes qualifications the legislature cannot add others.

McCreary, Elections, § 812.

The legislature cannot establish arbitrary exclusions from office, or any general regulations requiring qualifications which the state constitution has not required.

Barker v. People, 8 Cow. 686, 15 Am. Dec. 822.

Where the constitution prescribes that all civil officers of the commonwealth at large shall reside within the state, and all district, county, or town officers, within their respective districts,—it is held, the legislature cannot require the secretary of state to reside at the seat of government.

Page v. Hardin, 8 B. Mon. 648.

Where the constitution provided for office of sheriff without prescribing his duties, it was held, the legislature had no power to take from the office part of the usual duties.

King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754; *State v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84.

In *Donaldson v. Volitz*, 19 W. Va. 156, a law of the legislature, adding rent to the list of debts given in the constitution against which the exemption could not be claimed was held clearly unconstitutional.

By granting the legislature the authority to establish offices and provide the term of office, powers, duties, compensation, and manner of election and removal, the power to add a qualification not being given, is excluded by implication.

State v. Gilman, 6 L. R. A. 847, 33 W. Va. 146.

To allow freeholders special privileges not given them by the constitution is class legislation, and will be held unconstitutional.

State v. Goodwill, 6 L. R. A. 621, 33 W. Va. 179.

Smith, at the time of his election, was, and

has been ever since, a freeholder in said town of Hurricane.

A freeholder is one who owns land in fee, or for life, or some indeterminate period. The estate may be legal or equitable.

Anderson, Law Dict. *State v. Ragland*, 75 N. C. 18.

There is a broad distinction as to whether the ineligibility refers to the election, or to the holding of the office. If to the latter, then, though the person elected may have been ineligible at the time of the election, yet, if he becomes qualified before taking the oath of office and before the beginning of his term of office, he can hold and discharge the duties thereof.

McCrary, Elections, 2d ed. § 258; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 108; *Pricett v. Bickford*, 26 Kan. 53, 40 Am. Rep. 801; *Smith v. Moore*, 90 Ind. 294; *Brown v. Goben*, 122 Ind. 118, *De Turk v. Com.* 5 L. R. A. 858, 129 Pa. 151.

Dent, J., delivered the opinion of the court:

The following is the statement of facts taken from the brief of the counsel for the defendants in error, to wit: "On the 5th day of January, in the year 1893, at an election in the town of Hurricane, Putnam county, W. Va., a town incorporated under chapter 47 of the Code, for municipal officers of said town, John M. Thompson and C. A. Smith, residents of said town, and entitled to vote for members of its common council, together with G. W. Dudding, J. P. Mynes, and M. L. Dunfee, were elected to office of councilmen of said town for the year commencing on the 1st day of February, 1893; the number of councilmen for said town being five, the town not being laid off into wards. On the 16th day of January, 1893, at a meeting of the outgoing council, the returns of said election were canvassed, and it was declared that the above five persons received the largest number of votes at said election for the office of councilmen of said town; and said council, at this meeting further decided, among other things, that said Thompson and Smith were not duly elected officers of said town, because they were not freeholders therein, and further declared that W. L. Losee and W. S. Turley, two members of the old council, but not elected to the new council, should hold over as councilmen until their successors were qualified,—the said Smith, at that time, and at the time of said election, being in possession of a lot of land in said town, which he owned by a title bond, and said Thompson's wife, at said dates, owning in fee land in said town. On the 17th day of January, 1893, the said Smith and J. M. Thompson each bought land in said town, which was conveyed to them, respectively, by deeds dated, respectively, on the 17th and 18th of January, 1893. On the 20th day of January, 1893, the said Thompson and Smith each duly took the oath of office as councilmen of said town, and duly filed the same with the recorder, or acting recorder. At the first meeting of the new council, said Turley and Losee being present and acting, on the 6th day of February, 1893, the said Thomp-

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son and Smith presented themselves, and demanded that they be admitted to the office of councilmen, and permitted to perform their duties as such, but they were refused and denied admittance to their office. On the 11th day of February, 1893, the said Smith and Thompson obtained from the judge of the circuit court of Putnam county a mandamus *nisi* to Wm. H. McAllister, mayor; R. V. Dorsey, claiming to be and acting as recorder; G. W. Dudding, J. H. Mynes, and M. L. Dunfee, councilmen; and W. L. Losee and W. S. Turley, claiming to be and acting as councilmen of said town,—commanding the first five to admit said Thompson and Smith into the office of councilmen of said town, and commanding said Losee and Turley to surrender and turn over to said Thompson and Smith the office of councilmen of said town. The defendants Dudding and Mynes made return to said mandamus *nisi* that they were willing, and had always been, to admit said plaintiffs to the office of councilmen, and had made and seconded a motion to admit them, but that the majority, including said Losee and Turley, had voted against the motion. The defendants McAllister, Dorsey, Dunfee, Losee, and Turley moved to quash the writ of mandamus *nisi*, which motion the court overruled; and, the said defendants not desiring to make return to said writ, the court gave judgment for a peremptory writ of mandamus to issue, from which judgment the last five of defendants have obtained this writ of error and superseas."

Appellants assign these grounds of error in their petition for writ of error, viz.: First, it was error in the circuit court to hold the statute which requires councilmen to be freeholders unconstitutional; second, the circuit court should have sustained the motion to quash the alternative writ of mandamus because, among other defects upon the face thereof, the plaintiffs, claiming several rights, could not obtain a joint writ of mandamus; third, said motion to quash should also have been sustained because the alternative writ of mandamus failed to make a case for the plaintiffs, or either of them, to obtain the relief prayed for.

In my opinion, there are only two questions suggested by the facts in this case as proper, at the present time, for the consideration of this court: (1) Is the law containing the freehold requirement constitutional? (2) If so, have the relators mistaken their remedy as to all other questions raised by them?

1. In determining this constitutional question, we find the rule plainly laid down in the case of *State v. Dent*, 25 W. Va. 19, in these words, to wit: "Article 6, section 1, of our Constitution provides: 'The legislative power shall be vested in a senate and a house of delegates.' This obviously confers on them all legislative power, except such as they are prohibited by the constitution, in other provisions, from exercising." And the person claiming that an act of the legislature is an infringement of the restrictions of the constitution must point out the provision plainly forbidding, either by express

words or by inevitable implication, the passage of such act; and, if none such exists, the act, however unjust or unreasonable it may seem, is valid, and must be sustained by this court. Judge Cooley, as quoted approvingly in the above case, lays down the rule that "any legislative act which does not encroach upon the powers apportioned to other departments of the government, being *prima facie*, valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them." The defendants in error, recognizing the binding force of this rule, point out three sections of the constitution all and each of which they claim are violated by the act in question:

First. Section 4, article 4, which provides that "no person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal." That because this section forbids any persons except qualified electors to hold office, by just implication, the converse of the proposition is also included in the meaning of the section; that is to say, that all electors are duly qualified to hold office. Such reasoning is very fallacious. This provision was simply intended to limit the number from whom the various officers of this state might be chosen to those having a voice in the selection of such officers, and not in any sense intended to determine the qualifications necessary to properly discharge the duties of any office. For the electors to say in the constitution adopted by them that "no one but ourselves shall ever be elected or appointed to any office in this state" does not, by implication, say to the legislature, further, "You shall pass no law that would prevent any of us from holding office," for such an important matter as this would not be left to implication if the electors had considered such a provision desirable. While we have no decision in this state touching this question, the highest tribunals of other states have construed similar provisions in their state constitutions as above indicated. In the case of *Darrow v. People*, 8 Colo. 420, the supreme court of that state, in passing on the same question here raised says: "Counsel argue that section 6, article 7, of the Constitution provides that 'no person except a qualified elector shall be elected to any civil or military office in the state,' by implication, inhibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form; that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer, the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. On the contrary, it is a safeguard of the highest importance to property owners within the corporation. The right

to vote and the right to hold office must not be confused. Citizenship, and the requisite sex, age, and residence, constitute the individual a legal voter, but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office; and certainly no doubtful implication should be favored, for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other disqualifications should be imposed. If, as has been well said, they 'had intended to take away from the legislature the power to name disqualifications for office, other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration.' *State v. Covington*, 29 Ohio St. 102." In the latter decision the court laid down the law in a syllabus as follows, to wit: "The provision in the Constitution (sec. 4, art. 15) that no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector does not by implication forbid the legislature to require other reasonable qualifications for office."

Second. The next claim of the counsel is that the latter clause of section 5, article 4, is violated, which is in these words: "And no other oath, declaration, or test shall be required as a qualification unless herein otherwise provided;" his argument being that the freehold requirement is a test, within the meaning of the constitution. The assertion is so unfounded as to hardly need refutation. This clause is simply an application of section 11, article 3, to the case of officeholders, which is in these words: "Sec. 11. Political tests, requiring persons as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths of past alleged offences, are repugnant to the principles of free government and are cruel and oppressive. No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment. Nor shall any person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law." As will be seen at a glance, nothing is said about holding office, in this section, but it is made to apply alone to the right "to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment." To remedy the omission here, the constitution makers added the clause to section 5, article 4, which refers alone to religious and political tests as a prerequisite or qualification for office, and has nothing whatever to do with any just qualification that the legislature may deem necessary to a proper discharge of the functions of the office. In the case of *Rogers v*

Buffalo, 128 N. Y. 178, 9 L. R. A. 579, the court of appeals, construing the same provisions in the New York constitution, says. "Still another ground of invalidity is alleged by the appellant. He says that the statute conflicts with article 12, which provides for the taking of an oath of office by members of the legislature and all officers, executive and judicial, before they enter on the duties of their respective offices, which oath is therein set forth; and it is there stated that 'no other oath, declaration, or test shall be required as a qualification for any office of public trust.' The statute by which an applicant for appointment to a position in a public office is made to show his fitness therefor is claimed to constitute an illegal test, within the meaning of this section. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people, through their legislature, to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power. The idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse, in any manner involving the liberties of the people. . . . In this case, we simply hold that the imposing of a test, by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of the Constitution." The same reasoning would hold good in an elective office, so far as the section under discussion is concerned.

Third. The last claim of the counsel is that the provision complained of is in violation of section 8, article 4, of the Constitution, in which the legislature is empowered to "prescribe by general laws the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." This section includes all municipal officers, and was only intended to require the legislature to enact general, and

not special, laws in relation to the matters included in the section. But the counsel argue that "by granting the legislature the authority to establish offices, and provide the term of office, powers, duties, compensation, and manner of election and removal, the power to add a qualification, not being given, is excluded by implication." The learned counsel appear to forget the difference so often defined between the federal and state constitutions; the former being strictly a grant of powers, while the latter is a limitation or restriction on the powers of the state legislature, which otherwise would be supreme in all legislative matters, as it is now in all cases wherein not restricted by the constitution,—that instrument itself so declaring, as heretofore mentioned. And for the very reason that the power to prescribe qualifications is not mentioned in this section, the legislature has unrestricted control of that power. And it has been held by the court of appeals of another state that the same kind of provision gave the legislature entire control over all such officers; that the power to prescribe the manner in which they shall be elected and appointed included within it, necessarily, the power to prescribe civil-service examinations, or to prescribe that they should be chosen from a class of citizens who possess some qualification that specially fits them for office, or renders them efficient officers. In the case of *People v. Chute*, 50 N. Y. 459, 10 Am. Rep. 508, the court of appeals, construing this same provision, says: "There is no right bestowed by the constitution upon the elector to choose by vote to that office. But there is a gift from the legislature to the elector so to do, or rather a power thereby intrusted to him by the statute, which may be taken back again. Now, the authority which confers a power, and may take it away, may, in bestowing it, limit and restrict its exercise, as it sees fit, so far as it is not specially prohibited therefrom, and may, within that limit, say for how long, in what manner, and upon what objects it shall be exerted. Certainly, if the legislature may say to the voter, 'You shall not vote for any one for this office, but it shall be appointive,' it may say, 'You shall not vote for any one for this office who is not free from this disqualification which we now declare.' The legislature may not put upon any elector a personal restriction from voting for any officer who may be elective, or whom it may declare elective, save such restriction as is imposed by the constitution, for from that it is especially prohibited. But it may, in the exercise of its judgment, for the public good, limit the number from whom the elector may select, for thus to legislate is within the general and sovereign power of legislation, which it constitutionally possesses." And in the syllabus the court lays down the law as follows, to wit: "Where the power is reserved to the legislature to direct the method of filling an office, whether by election or appointment, it may, in its discretion, when conferring upon the elector the power to elect, limit the number from whom he may select." In this case the freehold requirement is not, techni-

cally speaking, a qualification, but it is a limitation by the legislature in conferring the right to vote, as to the number from whom the elector may select. It is the same as if the legislature had provided that the officers of the municipality must be chosen from among the freeholders thereof, the same as grand jurors are selected. This is not class legislation, because it is in the power of any one to become a freeholder, the same as it is in the power of any one to educate himself under civil-service rules. But it is clearly within the power of the legislature, even if, as the counsel claim, "there is no good reason for such law." Experience in municipal matters, and a wise consideration of the question, will convince any unbiassed mind that such a law has under it the very best of reasons. The fact that a man owns real estate has little bearing on the question as to whether he is capable of filling an office, but the real-estate owners are the substantial people of any community,—its bone and its sinew,—and there are but few among them that do not have some property pride, and an interest in the welfare and prosperity of their permanent dwelling place. On the other hand, among those not owning real estate, belong the floating population,—those who are too trifling and unthrifty to want property, and those who, having wasted their substance in riotous living, and spent their days in idleness are jealous of their neighbors' prosperity, and are ready to tear down, destroy, and scatter broadcast, the results of hard earnings, frugal management, and careful savings. To them, although electors, the prosperity and welfare of the municipality amounts to nothing, for, like the Bedouins of the plains, 'neath the shadows of night they can fold their tents, and silently steal away, while, if there are any among the unfortunate but deserving poor who would make capable officers, their more successful neighbors are ever ready and willing to lend a helping hand, and see that they own the necessary "ten feet of ground." It was no trouble for the relators to become freeholders, when they found a necessity for so doing. A municipal corporation is the legislative grant of local self-government to the inhabitants within a certain designated territory, which is known as the "city," "town," or "village," and corporate powers granted are exercised by its inhabitants in its corporate name. The freeholders of such municipality own every foot thereof, and the benefits derived therefrom are enjoyed, and the burdens borne, almost entirely by them. The loss or gain of the municipality is their loss or gain. They favor just and reasonable taxation, because it increases the general welfare, and thereby is beneficial to their private interests. They oppose excessive and injudicious expenditures of public levies, because the waste must fall heaviest on them. They therefore have an interest that makes them efficient and reliable municipal officers. While the office of councilman is the most important office, within its limited jurisdiction, of any in the state,—combining, as it does, legislative, judicial, executive, and ministerial powers,—there is usually no pay,

and but little honor, attached to such office, and the burden and annoyance are exceedingly heavy. A competent man, who has no sufficient interest in the community to become a freeholder, does not care to give his time, endure the labors, and suffer the annoyance of the office, simply to improve the property of others; and sometimes it is almost impossible to induce competent freeholders to undertake it, however great their interests may be. By making it exclusive, the office is rendered more important, and it devolves upon the freeholder, as a duty, to accept. Under our system of government, all officers are but the servants of the people, and it is but just that the people should have the best service possible; and in endeavoring to secure this, for the public weal, the legislature has wisely incorporated this provision in the general law relating to the incorporation of cities, towns, and villages, and it is now in the special charter of nearly every city and town of over 2,000 inhabitants. It is further plain, under our statutory law, the candidate must be a freeholder at the time he is voted for, because the voter has a right to presume that the candidate is eligible to the office at the time he asks his suffrage; otherwise, the election is void. The election law especially requires that, in nominating candidates for office, they shall be certified to be legally qualified to hold the office for which nominated. But it is not necessary to decide this question at the present time, except as a mere dictum.

The constitutional question being out of the way, the only other question that presents itself is whether mandamus is the proper remedy to review the action of a municipal council in determining, under the law, that a candidate is not legally qualified to hold the office. This entirely depends on the fact as to whether the council, in so determining, was acting within the limits of its authority, or assuming a jurisdiction it did not possess. Mandamus is not a proper remedy to control the action of a municipal body, when acting within the scope of its legal powers but only when it refuses to act at all, or is acting without legislative authority. *Mason County Supra. v. Minturn*, 4 W. Va. 300. Section 23, chap. 47, Code, provides: "All contested elections shall be heard and decided by the council." This constitutes the council a special tribunal to judge of the election and qualification of its own members. The counsel, in argument, places the question of contest on too narrow grounds. He would limit it to the case where two persons are claiming the same office by election. Where there are substantial doubts as to whether a candidate elected to office is eligible or not, any citizen interested, as taxpayer or elector, would have the right to raise the objection, and it would then become the duty of the council, as the only tribunal in which the authority is vested, to promptly hear and determine the matter. This gives a quick and speedy hearing, while the office might expire before a determination was reached, if left to the courts. In case of a miscarriage of justice before the council, chapter 110, § 2, provides for a review of the decision of the council

by means of certiorari; and in case of reversal, and disobedience on the part of the council, which is not at all probable, a way would be found to compel respect to the orders of superior judicial tribunals.

The judgment of the Circuit Court is reversed, the mandamus nisi is quashed, and these proceedings are dismissed, at the costs of the relators.

Holt, J., concurring:

Section 13 of chapter 47 reads: "The municipal authorities of such city, town, or village shall be the mayor, recorder and the councilmen, who shall be freeholders therein and who together shall form a common council." I do not think the freehold qualification unconstitutional. These offices are created, not by the constitution, but by the legislature, in the exercise of its inherent, plenary, legislative power, qualified so as to require a general law for incorporating cities, towns, or villages containing a population of less than 2,000. Section 8, article 4, of the Constitution says that in such cases, among others, the legislature shall prescribe the manner in which they shall be elected, appointed, and removed, and leaves it to the legislature to say from what body of persons they shall be elected or appointed, but with this qualification: That, being municipal officers, the negative provision of section 8 of article 4 of the Constitution applies,—they must, in any event, be citizens of the state, entitled to vote; for, if the constitution is to be taken as prescribing exhaustively the qualifications of such municipal officers created by law, as well as of those officers created by the constitution itself, then section 21 of chapter 47, saying that the mayor, recorder, and councilmen must be residents of such city, etc., is also unconstitutional, and a resident of the city of Pocatalico could be legally elected mayor of the city of Charleston, and a resident of the city of Charleston could be legally elected mayor of the city of Pocatalico. So there are many other equally obvious and indispensable qualifications for various offices which the legislature has created, and may yet create, under its inherent, plenary, legislative power over the subject. See *State v. Covington*, 29 Ohio St. 118; *Darrow v. People*, 8 Colo. 417, 420; *Mechem*, Pub. Off. § 96; *Rogers v. Buffalo*, 128 N. Y. 173, 9 L. R. A. 579.

I regard the power of the legislature inherent, as well as given by section 8 of article 4, as comprehending the power to create these municipal offices, and prescribe the qualifications of such as are appointed or elected to fill them, and that the statute, in so far as it requires them to be freeholders of the town, should not be declared void on account of an implication that might at first blush seem to arise from the negative provision contained in section 5 of the same article of the Constitution. Plenary power in the legislature is the rule. There can be no restriction, except what the Constitution of the United States or of the state prescribes. Therefore, it is for those who question the validity of the statute to point out where and how it is forbidden, and if this is not made

clear and palpable, beyond reasonable doubt, such doubt must be solved in favor of the legislative power, and the act sustained; and this, if no other good reason were apparent, is sufficient. For twenty years, almost (1877), it has been practically interpreted as constitutional by the action of all departments of the government, and it would now create a great confusion and inconvenience to hold it void; and this in the case of special charters as well as in the general law. Great weight is always rightly attached to such long, contemporaneous, practical exposition. See *Bridges v. Shalliceas*, 6 W. Va. 562, and the authorities cited by Judge Haymond.

Brannon, J., dissenting:

Not concurring in the judgment in this case, I file, without revision, to express my views, the following opinion prepared by me, but which did not meet with the approval of the court, as will appear in opinions prepared by Judges Dent and Holt:

John M. Thompson and C. A. Smith were elected on January 5, 1893, at a municipal election for the town of Hurricane, Putnam county, as members of its council; but the council refused to allow them to enter into office, upon the ground that at the date of the election they were not freeholders, and allowed W. L. Losee and W. S. Turley, incumbents in said office, to continue to act therein until their successors should be elected and qualified. Upon a writ of mandamus, the circuit court gave judgment for the claimants, Thompson and Smith. The writ ran to the mayor, recorder, and councilmen, including Losee and Turley, and they, except Mynes and Dunfee, councilmen, bring the case here by writ of error. A number of important questions arise on the record, involving principles of great practical import:

First question: If the claimants were not freeholders, would it disqualify them from being councilmen? The town was incorporated under the general law found in chapter 47 of the Code, and as section 13 requires the mayor, recorder, and councilmen to be freeholders, it is claimed that claimants are disqualified. If this be so, then a resident of this town may be a voter, and qualified to be elected governor of the state, and yet be ineligible to the town council. The claimants are qualified voters. Are they qualified to hold these offices? Is the freehold qualification demanded by the statute unconstitutional? Section 1, article 4, of the Constitution reads, "The male citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside," with various exceptions in that section specified. Here is a broad declaration that all male citizens shall be entitled to vote, with specific exceptions. Other exceptions cannot be made by the legislature. Plainly, it was the purpose, by this section in the organic law, to point out, and make clear and certain, in what particular persons among the people of the state the sovereign power of the ballot resides. If we wish to know who is the voter, we look here, and here alone. It vests in the citizen this great right. It cannot be taken from him by

legislation. If he falls within the general grant in the opening clause of the section, and not within any of its exceptions, he is a suffragan, over any power that would deny his right, or add another qualification. Cooley, Const. Lim. 758. He is a voter, though as poor as Lazarus. But has he another great privilege,—“right,” I should say; for it is hard to say which is the higher right, in the freeman,—that of voting, or that of being voted for? The constitution has granted the citizen the ballot. Has it forgotten his right to hold public office? It has carefully defined the qualification of voters, in the well drawn section quoted. Has it failed to define the qualification of officers? Having defined the qualifications of voters, it was not to be supposed that it would omit the very important matter of defining who might be officers. It has not omitted to do so. It makes the one right practically the correlative of the other. To the citizen clothed with the right of suffrage is given also the right of holding office. It should be so, and it is so. Section 4 of article 4 provides that “no person except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of thirty, and the attorney-general the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the state for five years next preceding their election or appointment, or be citizens at the time this constitution goes into operation.” This does not in affirmative express terms declare that a voter shall be competent to hold office, as does the first section say that all male citizens shall be voters. It could have been better drawn, for present purposes, by declaring that any one who is a voter should be competent to be elected or appointed to office, but the section means that. We must read sections 1 and 4 together, as if *in pari materia*, because they deal with two kindred subjects, and they are located close together. Section 1 has just defined the qualifications of voters. Section 4 takes up the subject of qualifications of officers, and in saying that no person but citizens entitled to vote shall be eligible to office, it, by implication,—by strong and plain implication,—means to declare that a citizen entitled to vote shall likewise, because of his quality of voter, be entitled to be elected or appointed to office. In saying that none but voters shall be officers, it means to assert the converse,—that voters shall have right to be officers. It is a negative pregnant. A reading of the two sections will more strongly impress one that such is the meaning of the fourth section than can be conveyed in words of explanation or construction. The negative mode of expression was used in the section, likely, to exclude all persons not voters from office; for, if it had said that all voters should be eligible to office, it might have been contended that persons not voters might be made eligible to office, while under the section as it is, in the negative form, that is prohibited. But surely it did not mean to leave the gate swinging, so as to let any power disable a voter from

holding office. When it says that one not a voter shall not hold an office, does it not impliedly say that a voter may hold office? That it meant, not simply to exclude those not voters from office, but at the same time to confer upon voters the right to hold office, is shown by the fact that the section goes on to prescribe certain qualifications for governor, judges, attorney-general, and senators. Why touch the subject of qualification for office at all, if the section had for its aim only to exclude nonvoters? The convention, knowing that, by declaring that none but voters should become officers, it had vested in voters the right to become officers, and desiring to require, as to governor, judges, and senators, certain qualifications in addition to their being voters, made the specific additional requirements as to them. Comparing this section 4, article 8, as found in the Constitution of 1868, with that in the present one, we notice the insertion in the present constitution of the word “but,” not till then found in the section. In the former constitution, it read: “No persons, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office. Judges must have attained the age of thirty-five years, the governor the age of thirty years,” etc. In the present constitution it reads: “No person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of thirty,” etc. The insertion of the word “but” indicates that the convention knew that the first clause expressed a general rule or definition of qualification for office, admitting all voters to the right; and as governor, judges, senators, and attorney-general would fall within it, unless excepted, and desiring to except them, it, for safety, inserted the word, to make it more clear than it had been. In other words, it is an exception, the same as if, after allowing all voters to be chosen to office, it had said, “except that the governor and judges must have attained the age,” etc. Why the necessity of exception, if there is no general rule? Thus, to be a voter is to be also qualified to take office; to be a voter is the correlative of the right to be an officer, except as regards governor, judges, senators, and attorney-general, to the extent, as to them, specified in section 4. Judge Brown so construed a similar section in the Constitution of 1868, in *Phares v. State*, 8 W. Va. 569, 100 Am. Dec. 777, saying: “The constitution prescribes who are entitled to vote, and it also provides that any person so entitled to vote shall be eligible to office.”

I will propound two questions, which I will assume to think are decisive. Can the legislature enact that the governor, judges, or senators shall be freeholders? No; because the constitution only demands that they be voters, and of certain age, and no other qualifications can be exacted. The naming those shows that no others were intended. Can the legislature enact that the auditor and treasurer shall be freeholders? I answer no, as I do as to governor, because the constitution has only demanded that they be voters. The

only difference is that as to governor, judges, and senators, further qualifications are exacted. Will it be contended by any one that the legislature may exclude a voter from the auditorship because he is not an owner of realty? If it cannot, it is only because of this constitutional provision. Section 8 empowers the legislature to "prescribe by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." It does not give the legislature power to prescribe the qualifications of officers. If the convention had left open that important matter, it would be expected that it would, in the section just quoted, grant to the legislature the necessary function or power of prescribing such qualification; but it did not so, and simply because it had itself done so in section 4. Can we suppose that the framers of the constitution intended to leave open that most important matter,—important as it concerns the rights of individual citizens, and more important as it concerns the vital interests of all the people of the state in the administration of its government;—namely, the qualification for office, leaving it subject to the fluctuation of sentiment, the caprices of constantly changing legislatures, the passions of the hour? The very idea of a written constitution of government tells us that the definition of eligibility to official station should be, and would be, one of the very first subjects dealt with in it. If section 4 does not perform this function, where do we find it? There is no statute defining qualification for office. The legislature has always understood that the constitution did this work; for the Legislature of 1868, passing a general election law under the Constitution of 1868, which contained a like section to section 4 now under discussion, did not define the qualifications for office. Neither did the Legislature of 1872-73, passing a general election law under the present constitution. Neither did the Legislatures of 1882 and 1891, in the general election laws passed in those years. Four general election laws have been passed in twenty-eight years, none defining the qualifications for office. I have not found where the legislature has done so in any act. Thus, we have the contemporaneous construction of the legislative department of government through many years, and a great mass of legislation, to the effect that the constitution prescribed and fixed the qualifications of officers. This has great effect. *Cooley*, Const. Lim. 81.

Counsel for appellee argues that the fact that section 6 requires officers to take an oath, and closes with the injunction that "no other oath, or declaration or test shall be required as a qualification, unless herein otherwise provided," would forbid the freehold requirement. It would, if we could consider it a "test," within the meaning of this provision; but, from the first thought, I doubted whether it would apply to a property qualification or an educational qualification, though the words "unless herein otherwise provided" might favor, slightly, such contention. My inclination was to regard

matters of opinion or bias or political action as here referred to. We know that this prohibition had its birth and suggestion in the existence of test oaths springing from the passions and excitement of the civil war designed to exclude participants therein, on the Confederate side, from holding office. English history tells us of test acts, and they relate to matters of opinion, chiefly religious opinion, like that in 25 Car. II., requiring an oath from officers against transubstantiation, and requiring them to take the sacrament under the English church; and that earlier in the same reign, called the "Corporation Act," requiring officers to renounce the covenant; and also the uniformity act, requiring clergymen to assent to everything in the Book of Common Prayer. So far as advised, from authority here accessible, I think this provision against tests relates to opinion, and not such as a property qualification. See *Story*, Const. §§ 1847, 1849, and *Hume's* and *Macaulay's* Histories of England. I have met with the cases of *Atty-Gen. v. Detroit*, 58 Mich. 218, 55 Am. Rep. 675, where it is held, paragraph 6, that a provision in the Michigan constitution just like the one in ours does not apply to those special qualifications required for particular offices. The opinions in that case, and also the opinion on pages 91, 92, in the case of *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108, will sustain the view I have just expressed as to the meaning of the word "test" as here used. I have also met with *Rogers v. Buffalo*, 123 N. Y. 178, 9 L. R. A. 579, holding same view. Therefore, as section 4 confers upon the voter the capacity to take office, with the exceptions therein stated, the legislature does not possess the power to add to those exceptions, any more than it possesses power to disfranchise a citizen from voting by prescribing qualifications or exceptions beyond those stated in section 1.

The legislature cannot establish arbitrary exclusions from office, or any general regulations requiring qualifications not required by the constitution, except for crime. *Cooley*, Const. Lim. 4th ed. 78; *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322; *Black v. Trower*, 79 Va. 123; *Thomas v. Owens*, 4 Md. 189; *Page v. Hardin*, 8 B. Mon. 648. *Chancellor Sanford*, in *Barker v. People*, *supra*, used this language: "Eligibility to public trusts is claimed as a constitutional right which cannot be abridged or impaired. The constitution establishes and defines the right of suffrage, and gives to the electors and to various authorities the power to confer public trusts. It declares that ministers of religion shall be ineligible to any office. It prescribes, in respect to certain officers, particular circumstances without which a person is not eligible to those stations [as does ours], and it provides that persons holding certain offices shall hold no other public trust. [So does ours.] Excepting particular exclusions thus established, the electors and the appointing powers are, by the constitution, wholly free to confer public station upon any person, according to their pleasure. The constitution giving the right of election and the right of appointment, these rights consisting essen-

tially in the freedom of choice, and the constitution also declaring that certain persons are not eligible to office, it follows from those powers and provisions that all other persons are eligible. Eligibility to office is not declared as a right or principle by any express terms of the constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the constitution. Eligibility to office, therefore, belongs not exclusively or especially to electors enjoying the right of suffrage. It belongs to all persons whomsoever, not excluded by the constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusion from office, or any general regulations requiring qualifications which the constitution has not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts, or that all persons not possessing a certain amount of property should be excluded, or that a member of the assembly must be a freeholder, any such regulation would be an infringement of the constitution; and it would be so because, should it prevail, it would be, in effect, an alteration of the constitution." Now, observe that *Chancellor* Sanford goes beyond where I need go; for he says that, without anything in the constitution expressly defining qualifications for officers, the mere fact that certain persons were by the New York constitution excluded, as is the case with us, is sufficient, alone, to vest in others, not excluded, the right to take office, or in the voters the range of choice from all not excluded. There was no such section as our section 4 for the chancellor to rely upon. If his proposition was right, how more can I assert that the position here taken is right, where we have a section 4, excluding only nonvoters, and leaving it to be understood that all that were voters should be allowed to receive office? This common principle of construction is illustrated in *Donaldson v. Volz*, 19 W. Va. 156, holding that as the constitution, after granting exemption from execution, had specified certain exceptions, the legislature could not add rent. The expression of certain exceptions included others.

We have been under the impression that the property qualification for office had been, many years ago, abolished, by change in constitutional law. It surely has not been restored, and cannot be, but by a change in the constitution. It will not do to say that, while it may not be demanded as to state and county office, it may be as to municipal offices; for section 4 includes them, in terms. Were this not so, I would hold a different opinion. So I hold that the want of freehold qualification does not exclude from holding the position of councilman. It cannot be true that a man may be elected governor, and yet cannot be elected a town councilman, merely because, though a voter, he is not a freeholder. This would impress one as an

absurdity and injustice. Ought the local taxing power to be vested only in the property owner? Members of the legislature, vested with greater taxing powers, need not be freeholders. The only cases cited in support of the contention that the freehold qualification is not unconstitutional are *State v. Covington*, 29 Ohio St. 102, and *Darrow v. People*, 8 Colo. 417. In the former it is held that the provision in the Ohio constitution that "no person shall be elected or appointed to any office unless he possesses the qualifications of an elector" does not forbid, by implication, the legislature to require other reasonable qualifications for office. The reasoning on the point is short and unsatisfactory. The judge says the power of the legislature should not be denied by mere implication, unless clear. He thought it was not clear. I think it very clear. But I add that it does not appear that the clause in the Ohio constitution containing the negative words had, as ours has, the feature of prescribing qualifications as to governor, judges, and senators, nor the section giving the legislature power only to prescribe terms, compensation, and manner of choice of officers, but failing to give it power to fix qualifications. The Colorado constitution is the same, in effect, as that of Ohio. The remarks just made apply to the Colorado case; and I note the fact, specially, that in neither the Ohio nor the Colorado constitutions did the clause include municipal offices, as ours does. The Colorado court says that the clause in the Colorado constitution had no relation to municipal officers. The decisions are of less authority because of that fact. If one additional material qualification may be prescribed, why not another? Why not many others? The constitution is fundamental law, and strictly construed in defense of the citizen's rights. It is the Magna Charta of his freedom and rights, political and civil. Admit once that it does not fix his qualification for office. Where would his disfranchisement end? That would depend upon uncertain political, religious, or other winds. Would we limit the act within the bounds of the reasonable? That would be indefinite, unsafe, precarious,—dependent upon the times and motives and aims dominating them. Against these things, it was intended to imbed the right in the solid rock of the constitution. If we say it might have been imbedded in plainer language, yet we must look at the policy,—the evil against which it was intended to provide. I do not say that no provision or qualification whatever that is reasonable—essential to fit the party for the duty—may not be prescribed. I lay down a general rule. But I say this freehold test is not reasonable or necessary to make a man a competent or suitable officer. The Virginia court, passing on the constitutional clause giving all voters the right to hold office, held void an act requiring members of electoral boards to be freeholders. It admitted that there might be cases where, by implication, an additional qualification might be imposed, when it was essential to the discharge of the duties of the place, but the qualification of freehold could not be

justified on this theory. *Black v. Trower*, 79 Va. 123.

Another question: Were Thompson and Smith freeholders when elected? Smith held land under a purchase evidenced by a title bond providing for a conveyance on payment of purchase money, and was in possession, but had not paid for the land. He thus had an equitable estate in fee simple. A freehold may be in an equitable estate as well as legal estate, as authorities below cited show. There is nothing, then, to prevent his being a freeholder, but nonpayment of purchase money. Shall a man owning land, in possession, who happens to owe yet a little purchase money, be deemed not a freeholder? The only reason is that he is not entitled to call for a conveyance of the legal estate. But he has a vested interest or property in the land, recognized by law. In the eye of equity, he is the owner of the land, holding in trust for his vendor only for purchase money, while the vendor holds the legal estate in trust for him, and is entitled only to the money. A court of law would recognize his right by giving him an action of trespass. If the law were that, to be a freeholder, he must have legal title, it would be different, but Virginia cases of binding authority repel that idea. It is ancient law that the *cestui que use* is a freeholder, so as to be a good juror. Co. Litt. 272b; 4 Bacon, Abr. 556, title *Jurries*. But as to such cases I think the statute of uses would execute the use to the possession, and give good legal title. *Helmondollar's Case*, 4 Gratt. 586, held that one having the equitable interest in land, entitled to call for the legal title, is a freeholders; and it is stated that, among many Virginia cases, no one denies that a *cestui quo trust* of a freehold estate is a good grand juror, who is required to be a freeholder. In *Cunningham's Case*, 6 Gratt. 695, a purchaser, by oral contract, in possession, who had paid for the land, was held to be a freeholder. In *Carter's Case*, 2 Va. Cas. 319, it was held that a grantor, who had passed away the legal title by deed of trust, and had merely the equity of redemption, was a freeholder. In *Moore's Case*, 9 Leigh, 639, the owner conveyed the land to a trustee to secure a debt, and then such owner conveyed to another person his equity of redemption, and put him in possession, and this person was held to be a freeholder. So the legal title in the person is clearly not necessary to constitute him a freeholder. And upon the strength of *Burcher's Case*, 2 Rob. (Va.) 826, I conclude that the fact that Smith owed yet some purchase money does not prevent his being a freeholder. It decided that a person was a freeholder who was in possession under a purchase; the deed to him not being delivered to him but in the hands of another, as an escrow, to be delivered on payment of purchase money, which remained partially unpaid. The opinion said, as I now say: "It seems sufficient if the juror is in possession of a freehold estate, and enjoying the profits and substantial ownership thereof;" that he was in lawful possession, and a court of equity would regard the land as the purchaser's property, and, if

he failed to pay, would not turn him out, but give him a day to pay, and then sell the land as his, and pay him any surplus of its proceeds after payment of the debt. If that was so at the date of that decision, when the court of law did not recognize the equitable title, or its owner as having any title, but would turn the purchaser out, by ejectment, at the suit of the vendor, how much more should we hold it to be law now, when section 20, chapter 90, of the Code compels the court of law to view the purchaser's right as a substantial right, by declaring that a vendor shall not, at law, recover against the vendee land sold by the vendor to such vendee, when there is a writing stating the purchase and its terms? The heading in *Reynold's Case*, 4 Leigh, 663, says that it seems that one who has contracted, by article under seal, to sell his land, but has not conveyed it, and still holds the legal title, is a freeholder,—that is, the vendor; and therefore it may be said that if the vendor is a freeholder the vendee cannot be a freeholder in the self-same land. But that statement is not binding, because the court says it did not decide it, as that question was not adjourned to it; and, secondly, it is true, as said by Judge Gholson in *Burcher's Case*, *supra*, that the vendor only agreed to sell on certain conditions precedent to be complied with by the vendee, and the record did not show that they had been performed, or a dollar paid, or that any title had been made, or even that possession had passed to the vendee. I hold that the want of legal title or failure to pay purchase money does not settle that the party is not a freeholder. Is he in possession of land, claiming freehold estate, by right, legal or equitable, recognized by law, whether the purchase money had been paid or not? If yes, then he is a freeholder. Therefore, Smith was a freeholder.

Another question: Was Thompson a freeholder when elected? His wife owned an estate in fee in land. We do not know by record when she acquired it, so as to say whether it was separate estate, nor whether there was issue by the marriage. But in no conceivable view upon the record, as it is, was Thompson a freeholder when elected. If we could see that the wife acquired the land, and the marriage took place before the Married Woman's Separate Estate Act, April 1, 1869, we could say that he was a freeholder, because, by marriage simply, he was entitled to possession and rents and profits during the joint lives of himself and wife. *Pickens v. Kniseley*, 36 W. Va. 794, 800. It would be a freehold, as it would continue during their joint lives, at least. 2 Kent, Com. 130; *Dejarnatts v. Allen*, 5 Gratt. 499, 513; Schouler, Husb. & W. §§ 187, 181; Schouler, Dom. Rel. §§ 89, 201. Thompson would also be a freeholder, by reason of being invested with an estate by the curtesy initiate, though it does not appear that there was issue of the marriage, as such an estate is freehold, since it exists for the life of husband. It is true that at common law there must be issue, to create an estate by curtesy initiate. 2 Bl. Com. 126; 2 Minor, Inst. 108. And under our Statute, Code, chap. 65, § 15, as it stood

up to the Act of March 20, 1882, notwithstanding it broadly declared that "if a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same," yet *Winkler v. Winkler*, 18 W. Va. 455, construed it as not dispensing with any of the four common-law requisites of curtesy. But chapter 86, Acts 1882, amended said Code, section 15, by utterly dispensing with issue as an element in curtesy; and I think it would operate to vest in the husband an estate by curtesy initiate, as here is an estate of inheritance, not separate estate, vested in the wife during coverture. But we cannot say that the land vested in the wife, and the marriage took place, before April 1, 1869. If on the other hand, we suppose that the wife acquired this land after April 1, 1869, it being thus separate estate, under section 2, chap. 66 Code 1891 (Code 1887, chap. 65 § 8), the wife yet living, the husband could not be tenant by the curtesy initiate. It has been seriously questioned whether a husband could, by force of common law, take an estate by curtesy in the separate real estate of his wife; but the better opinion is—and the law here, as settled in *Winkler v. Winkler*, *supra*, is—that he can. That question—that is, whether the common law would, alone, give him such estate—is, however, unimportant practically, because the statute would certainly give it. Code chap. 65, § 15; opinion in case just cited (page 468). But there is this distinction between an estate by curtesy in lands of the wife, not separate estate, and lands that are her separate estate, namely, that in lands not her separate estate there is curtesy initiate, whereas, in lands that are separate estate, there cannot be curtesy initiate, but only curtesy consummate. In other words, until the death of the wife, no estate whatever in her lands vests in the husband. He has, while she lives, only a chance or possibility of becoming clothed with an estate upon the event of the death of the wife before his death. This is because the separate estate statute declares that the wife shall hold her separate estate, and its issues, rents, and profits, to her sole and separate use as if she were single, free from the control or disposal of her husband. This statute is, in letter, spirit, and purpose, plainly inconsistent with the existence of any substantial estate of the husband in her land while she lives. See *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740; *Alexander v. Alexander*, 85 Va. 354, 1 L. R. A. 125; *Wells, Married Women*, 106; *Hill v. Chambers*, 30 Mich. 422; *Porch v. Fries*, 18 N. J. Eq. 204; *Thurber v. Townsend*, 22 N. Y. 517; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Cole v. Van Riper*, 44 Ill. 58; *Stewart v. Ross*, 50 Miss. 776; 4 Am. & Eng. Encyclop. Law, 987; *Billings v. Baker*, 28 Barb. 343. Therefore, Thompson was not a freeholder, when elected.

Another question: But both Smith and Thompson, after election, and before their term of office began, acquired land, and became freeholders. This raises the question whether, though they were not freeholders when elected, it is enough that they were when their terms began. Much difference of

opinion has existed in the courts upon this question. Where the constitution or statute declares that only certain persons shall be elected or be eligible to office, it may be plausibly contended that it refers to the date of the election, and that one not so qualified cannot be elected to, and cannot hold, the office, though he become so qualified before his term begins. But, even in such case, highly respectable authorities hold that it is sufficient if he be so qualified at the commencement of the term. Some authorities for the former view are *Searcy v. Grov*, 15 Cal. 117; *State v. McMillen*, 23 Neb. 885; *Taylor v. Sullivan*, 45 Minn. 309, 11 L. R. A. 272; *State v. Clarke*, 3 Nev. 566; *State v. Williams*, 99 Mo. 291. Some authorities for the latter view are *Smith v. Moore*, 80 Ind. 294; *Brown v. Goben*, 122 Ind. 113; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 103. The latter view derives additional force by the fact that the votes cast for the ineligible candidate are not necessarily void. If they were, there would be more reason to say that he could not even be voted for; but they are so far votes, so far effectual, that if the ineligibility be not known to the voters, or be not such as they are bound to know, the minority candidate, is not elected, and cannot claim the office. *Dryden v. Swinburne*, 20 W. Va. 89. But we are not called upon to say which of those views is correct, because in this case the statute cited to disable these claimants from holding their offices does not say that only freeholders shall be chosen or elected or be eligible, but says, "The municipal authorities of such city, town or village shall be a mayor, recorder and councilmen, who shall be freeholders therein." This simply says that to be such officers they must be freeholders. It only means that the powers and functions of these offices shall be wielded only by freeholders. Why defeat the popular will, this being the language, by mere construction, simply because, when elected, the persons elected were not freeholders, when at the time they actually act in office they are? The letter of the act does not require it, neither does its spirit, since its object is only to keep nonfreeholders from acting in office. It was meant, not as a prohibition against their election, but against their holding office. Authority will sustain this position. In *Privett v. Bickford*, 26 Kan. 52, 40 Am. Rep. 801. the constitution provided that no person who had borne arms against the United States should be "qualified to vote or hold office" unless his disability should be removed, and it was held that though disqualified when elected, if the person's disabilities be removed before taking office, it was sufficient. In *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, it was held that an alien at date of election, but naturalized at beginning of term, could hold. In *De Turk v. Com.*, 129 Pa. 159, 5 L. R. A. 853, the constitution provided that no one holding office under the United States should "hold or exercise any office in this state." A postmaster, when chosen county commissioner, resigned as postmaster, even after quo warranto begun to oust him as commissioner, and it was held

he was competent to hold. In *Com. v. Pyle*, 18 Pa. 519, it was held that, "where one would be ineligible to office on account of disqualification, he must get rid of the disqualification before he is appointed or elected; but, where the prohibition extends only to the enjoyment or exercise of an office, it is sufficient that the person be qualified before he is sworn." The United States Constitution says: "No one shall be a representative" who is not of a certain age, or has engaged in rebellion; but John Young Brown, under age at date of election, and others under disability when elected, but becoming of age, and whose disabilities had been removed, have been admitted to the house of representatives and senate. McCrary, Elections, § 258. Therefore, I conclude it is sufficient that the plaintiffs were freeholders at the commencement of their terms.

Another question: Can both Smith and Thompson unite in one writ of mandamus? The rule is that, where the interests of several relators are separate and independent, they cannot join in one writ of mandamus, any more than in another form of action. High, Extr. Legal Rem. § 439; 14 Am. & Eng. Encyclop. Law, 219. But this is a peculiar case, as to this point; and, if any case would justify a joinder of two interests, this would. The offices may be deemed separate it is true; but they are claims to seats in a body composed of numerous members, elected simply to that body, not to any particular places or seats therein, not by separate wards, but for the whole town, by all its voters, at one election. Their places are held by Losee and Turley. Which one of these parties holds Thompson's place? Neither one more than the other. Suppose Thompson to sue alone, simply for the admission to the board of councilmen. If he were admitted, whom would he oust?—Losee or Turley? Would the council say which one? If it did, it would simply do so arbitrarily, or by lot, for it would have no rule to go by. Perhaps Thompson might ask Losee's place alone, and have order for his motion. But what if Smith also, asks the place of Losee? and perhaps, if he sued for Losee's place, Losee might say that he did not withhold his place, any more than did Turley. Would not, if we assert that both should sue separately, either be entitled simply to ask admission generally, without asking the place of either Losee or Turley? If so, is it not better to tolerate a joint application for both Losee's and Turley's seats? Precedents are found fully justifying this joint writ. Two persons joined in one writ to be sworn in as church wardens. *Reg. v. Guise*, 2 Ld. Raym. 1008; *Reg. v. Twitty*, 2 Salk. 433; *King v. Middlesex*, 8 Ad. & El. 615; *Reg. v. Heathcote*, 10 Mod. 48. In *Manns v. Givens*, 7 Leigh, 689, seven

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persons held as slaves claiming manumission under one and the same deed, joined in one mandamus to compel its recordation, and no objection was thought of, for misjoinder. True, they all claimed under one deed, but each one's freedom was a separate right annexed to his person only. These parties claimed under one election, which is one element for consideration. Nineteen persons appointed as a board of visitors to a college sued out without objection, a joint writ against that number, constituting the old board, to try title. *Lewis v. Whittle*, 77 Va. 415. In a case reported in 43 La. Ann. 92 (*State v. Shakespeare*), several councilmen of New Orleans, turned out of the board, took one mandamus to obtain restoration, and it was held that they could so sue. The opinion in *Haskins v. Scott County Suprs.*, 51 Miss. 410, using language probably of Merrill (*Mandamus*, § 232), states the principle that "relators must have a right common to all of them; must have a joint benefit in the performance of the act or duty required of respondent, and be joint sufferers because of the nondoing. Otherwise, they cannot unite in this suit." Does not the plaintiffs' case come within that statement of the principle? Though I have had some question on this point, I conclude that there is no error in the use of the writ jointly by Smith and Thompson.

Another question: It is contended that mandamus does not lie, but that certiorari is the proper remedy. The council canvassed the election returns, and declared by its order that Smith and Thompson received the highest number of votes. There was no complaint or error in its action touching the election to call for certiorari, but, after declaring them elected, the council refused to admit them. This called for mandamus, not certiorari. That mandamus has been long used in the Virginias as a proper process to try title to office, and compel admission of him who has title to it, is well settled. In the great, I may say historic, case of *Bridges v. Shallcross*, 6 W. Va. 662, where every inch of ground of the slightest value was hotly contested, wherein Bridges sought to enforce his title and admission to the office of superintendent of the penitentiary the efficacy of the writ was not even questioned, and Judge Haymond said that if it had been the objection could not have been maintained. I shall not discuss the matter, being satisfied that that case, and others I cite, will sustain the remedy by mandamus. *Cross v. West Virginia, Cent. & P. R. Co.* 84 W. Va. 742, 85 W. Va. 174; *Booker v. Young*, 12 Gratt. 303; *Dew v. Sweet Spring Dist. Ct. Judges*, 3 Hen. & M. 1, 8 Am. Dec. 639; Hutch. Treatise W. Va. § 1278; *Lewis v. Whittle*, 77 Va. 415. I would affirm the judgment.

OREGON SUPREME COURT.

Eli T. BRANSON, *Appl.*,

v.

Henry GEE, *Resp't.*

(....Or.....)

A statute authorizing gravel to be taken from private lands for necessary repairs on highways is not unconstitutional because notice is not required to be given to the owner, or any participation allowed him in the selection or formation of the tribunal to assess his damages, where he is given an opportunity to present a claim for compensation to the county court by written complaint and have his damages assessed and paid, with opportunity to be heard on that question.

(April 17, 1894.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Yamhill County in favor of defendant in an action brought to recover damages for the alleged wrongful entry by defendant upon plaintiff's property and digging and taking away gravel therefrom. *Affirmed.*

The facts are stated in the opinion.

Mr. J. J. Spencer for appellant.

Messrs. Irvine & Coshov, for respondent:

In *Kendall v. Post*, 8 Or. 181, the validity of this particular portion of the sections under consideration in this case was directly attacked, and this court at that time without division, concurred with the circuit court and held said section to be valid and operative. The 14th Amendment of the Constitution of the United States cannot invalidate a statute that was a valid "law of the land" prior to its ratification. "A constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect."

Cooley, Const. Lim. 6th ed. 77, and cases there cited.

The statute under consideration, as it now stands, had been the law for fourteen years before the ratification of the 14th Amendment, and the statute was but declaratory of the common law.

Stat. 5 Eliz. chap. 13; *Denniston v. Clark*, 125 Mass. 223, citing *Comyns*, Dig. Ohinin, chap. 4; Stat. 14 Car. II, chap. 6; 7 Geo. III, chap. 42; 13 Geo. III, chap. 78; *Jones v. Andover*, 6 Pick. 59; *Benjamin v. Wheeler*, 8 Gray, 409.

Similar statutes to the one under consideration have been the law of the land, both in England and the United States almost from that period "to which the memory of man runneth not to the contrary."

Bank of Columbia v. Okely, 17 U. S. 4

Wheat. 235, 244, 4 L. ed. 559, 161; *State v. Simons*, 2 Speers, L. 761; *State v. Doherty*, 60 Me. 509.

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases, to which the one in question belongs.

Cooley, Const. Lim. 6th ed. 434, and cases cited in *note 4*.

That the statute in question contemplates proceedings authorized under the law of eminent domain, there seems to be no question.

People v. Smith, 21 N. Y. 598; *Bankhead v. Brown*, 25 Iowa, 544.

That portion of the 14th Amendment to the Federal Constitution was never intended to restrict the laws of eminent domain. There is no restraint upon that power except requiring compensation to be made.

People v. Smith, *supra*; *Garrison v. New York*, 88 U. S. 21 Wall. 196, 23 L. ed. 612.

When the property is taken directly by the state or any municipal corporation by state authority, it has been repeatedly held not to be essential to the validity of a law, for the exercise of the right of eminent domain, that it should make or tender compensation before the actual appropriation.

Cooley, Const. Lim. 692, and cases cited; *Loweree v. Newark*, 38 N. J. L. 154; *Garrison v. New York* and *People v. Smith*, *supra*, *McCrary v. Griswold*, 7 Iowa, 251; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

"Due process" not does mean necessarily by a judicial proceeding.

Re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; *McMillen v. Anderson*, 95 U. S. 87, 24 L. ed. 355; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 181, 31 Am. Dec. 813; *Mills v. St. Clair County*, 7 Ill. 238.

If compensation is secured before the property is taken, it is sufficient. It need not be actually paid to the owner.

1 U. S. Dig. § 140, p. 560; Cooley, Const. Lim. 692, and *note*; *Rogers v. Bradshaw*, 20 Johns. 785.

The property of the county may be considered an adequate fund for the payment of the damages.

Bloodgood v. Mohawk & H. R. R. Co. supra; 1 U. S. Dig. §§ 143, 144, p. 560; *Cortelyou v. Van Brunt*, 2 Johns. 357, 3 Am. Dec. 439; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Gidney v. Earl*, 12 Wend. 98; 2 Kent. Com. 339, 340; *Gardner v. Newburgh Trustees*, 2 Johns. Ch. 166, 1 L. ed. 334, 7 Am. Dec. 526; *Charles River Bridge Propra.*

NOTE.—In respect to due process of law in taking property of individuals for public use, see also *Scott v. Toledo* (C. C. N. D. Ohio) 1 L. R. A. 688.

In seizure, sale or destruction of property, see *Burdett v. Allen* (W. Va.) 14 L. R. A. 357; *Jenkins v. Ballentyne* (Utah) 16 L. R. A. 699; *State v. Robbins* (Ind.) 8 L. R. A. 498; *Chauvin v. Valiton* (Mont.) 3 L. R. A. 194.

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As to notice and opportunity to be heard in proceedings to take or burden property, see *Re Madera Irrigation Dist. Bonds* (Cal.) 14 L. R. A. 755; *Utman v. Baltimore* (Md.) 11 L. R. A. 224 and *note*; *Speer v. Athens* (Ga.) 9 L. R. A. 402; *State v. Stewart* (Wis.) 6 L. R. A. 394; *Kuntz v. Sumption* (Ind.) 2 L. R. A. 655, and *note*; *Poulsen v. Portland* (Or.) 1 L. R. A. 678.

v. *Warren Bridge Proprs.* 86 U. S. 11 Pet. 557-559, 645, 650, 9 L. ed. 828, 868, 865.

A statute providing for the assessment of damages under the right of eminent domain, by a tribunal other than a jury is not unconstitutional.

Kendall v. Post, 8 Or. 141; 6 Am. & Eng. Encyclop. Law, p. 618, and cases therein cited.

The county court is an impartial and proper tribunal, and exercises judicial functions in such cases.

Pruden v. Grant County, 12 Or. 808; *Kendall v. Post*, *supra* and authorities there cited.

Lord, Ch. J., delivered the opinion of the court:

This is an action to recover damages alleged to have been caused by the defendant's entering upon the plaintiff's lands described in the complaint, digging and taking gravel therefrom, and leaving the fences open, so that cattle entered upon and destroyed his pasture. The defendant, after denying the allegations of the complaint, set up as a separate defense thereto that Yamhill county was and is a duly organized county of the state of Oregon; that during all of the time mentioned in the complaint the defendant was the duly appointed, qualified, and acting supervisor of the road district in which plaintiff's lands are situated, and that two legally established county roads ran over and upon said lands; that the laying down of the fences as alleged was for the purpose of obtaining access to a bed of gravel situated on such lands; that the gravel therein was necessary to repair said county roads, and that such entry was for the purpose of securing it to be used thereon; that the gravel alleged to have been dug and hauled away was so used; that the laying down of the fences, and the digging and carrying away the said gravel, was done in a prudent and careful manner, without unnecessary damage; and that Yamhill county is liable for such damage as the plaintiff may have sustained thereby, and not the defendant. To defendant's separate defense the plaintiff demurred, alleging that it did not state facts sufficient to constitute a defense to the action. The demurrer being overruled by the court, the plaintiff refused to plead further, whereupon the court rendered a judgment dismissing the action, and awarding the defendant costs and disbursements, from which judgment the plaintiff has brought this appeal.

Our statute makes it the duty of supervisors to keep the roads in their districts open and in good repair, and to enable them to do so they are authorized by section 4092, Hill's Code, "to enter upon any lands adjoining or near the public road and gather, dig, and carry away any stone, gravel or sand . . . necessary for the making and repair of any public road in their district;" and section 4093 provides that, "if any person shall feel aggrieved by the act of any supervisor cutting or carrying away timber or stone as aforesaid he may make complaint thereof in writing to the county court at any regular meeting within six months after the cause of such complaint shall exist, and such court shall proceed to assess and determine the damages, if any, sustained by the complainant, and cause the same to be paid out

of the county treasury." The plaintiff contends that these provisions of the road law are unconstitutional and void, because (1) they do not provide for giving notice to the owner whose property is taken, nor (2) for his participation in the selection or formation of the tribunal upon which is devolved the duty of assessing his damages. Lands for highways, as well as timber, stone, and gravel with which to make, improve, or repair them, are taken by right of eminent domain. *Cooley, Const. Lim.* 657. By the constitution of this state it is provided that private property shall not be taken for public use without just compensation, and, except in case of the state, without such compensation first assessed and tendered. *Const. Or. art. 1, § 18.* Under this provision the private property of the citizen cannot be taken against his will for any purpose other than a public use, nor, except in case of the state, without just compensation first assessed and tendered. With the state it is not a condition precedent that the compensation should precede or be concurrent with the taking of private property for public use. It may appropriate such property without compensation being first assessed and tendered, but it must make provision by which the party whose property has been seized can obtain just compensation for it. Nor is this all. When the public exigencies demand the taking of private property for public use, it must be done by due process of law. The constitution of the United States provides that the "state shall not deprive any person of life, liberty, or property, without due process of law." Article 14, § 1, amendments. "Due process of law," *Earle, J.*, said, "is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature," and that, generally stated, it meant "an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights." *Stuart v. Palmer*, 74 N. Y. 191, 80 Am. Rep. 289. Consistent with these principles, the property of a citizen cannot be taken by the power of eminent domain without some notice to the owner, or some opportunity being afforded him, at some stage of the proceeding, to be heard as to the compensation to be awarded him. When the public appropriates property to improve or repair a public highway, the owner is entitled to a hearing or to be heard as to the compensation which he is to receive. Upon the question of compensation Mr. Lewis says: "All the authorities agree that the owner is entitled to be heard as a matter of right, and consequently that he is entitled to such notice as will give him an opportunity to be heard." *Lewis, Em. Dom. § 866.* While, therefore, the state, when taking private property for a public use, or a county by its authority, is not bound to make or tender compensation before its actual appropriation, yet, as the citizen cannot be arbitrarily deprived of his property, it must make provision by law whereby the owner can have a hearing or be heard before an impartial tribunal as to the just compensation to be awarded him. By section 4093, *supra*, the state has afforded an

opportunity to any person aggrieved by the act of any supervisor in entering upon his land and carrying away gravel, etc., pursuant to the provisions of section 4092, to be heard, and his grievance considered, by the county court, which is clothed with ample power to determine and assess his damages and cause the same to be paid by the county upon complaint in writing of the person so aggrieved. This provision undeniably affords an opportunity for the party aggrieved, whose property has been taken by the supervisor, to propound his claim for compensation; and the fact that this duty devolves upon him as a preliminary step is no objection to its validity or constitutionality. It not only affords a remedy to which the party aggrieved can resort to have his compensation determined and assessed, but also provides adequate means for its satisfaction or payment out of the county treasury without risk of loss. Hence it clearly appears that he has an opportunity to be heard as to the just compensation which is to be awarded to him, and that he is not deprived of his property without due process of law.

But it is claimed that the owner of property taken for public use is entitled to participate in the selection of the tribunal to assess his damages, as otherwise he might be denied a fair and impartial trial, and thus deprived of the just compensation guaranteed him by the constitution. It is no doubt true that the compensation must be determined by an impartial tribunal, but as Mr. Elliott says, "the character of the tribunal, and the manner in which its

members shall be selected, is a matter to be determined by the legislature, except where the constitution directs how the tribunal shall be selected, and what its character shall be." Elliott, *Roads & Streets*, 214-217. As to how the tribunal to assess the damages shall be formed, it is not necessary that the owner of the property to be affected shall be consulted. A court or judge, with or without a jury, is an impartial tribunal. Lewis, *Em. Dom.* § 818. In the case at bar the county court—composed of the judge and county commissioners—is the tribunal authorized by law to determine and assess the damages, and, when engaged in the transaction of such business, exercises judicial functions, and must be regarded as an impartial tribunal. In *Kendall v. Post*, 8 Or. 144, it was held that a party aggrieved by the acts of a supervisor, who had taken stone from his land to repair the highway, must resort for redress to the county court while transacting county business, to determine and assess his damages, and that the statute was not unconstitutional because it authorized such court to assess the damages without a trial by jury. As the state, by the right of eminent domain, may take gravel or other suitable material for repairing public highways from adjoining lands, and has provided an impartial tribunal for ascertaining and paying the damages suffered thereby, it results that the party affected must apply for redress to such tribunal, and that the objections urged against the validity of the acts are not tenable.

The judgment must therefore be affirmed.

MICHIGAN SUPREME COURT.

Josiah DAVIE *et al.*

v.

LUMBERMAN'S MINING CO., *Plff. in Err.*

(33 Mich. 491.)

1. A contract to mine ore in a certain pit at a certain price per ton "as long as we can make it pay" is too indefinite to entitle the contracting parties to an allowance for prospective profits in case their work is stopped by the other party to the contract.
2. The words "as long as we can make it pay" have no special signification in a contract to mine ore.

(November 18, 1892.)

ERROR to the Circuit Court for Menominee County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged breach by defendant of a contract to pay plaintiffs for certain work done in the operation of a mine. *Reversed.*

The facts are stated in the opinion.

Messrs. Ball & Hanscom and *B. J. Brown*, for plaintiff in error:

NOTE.—For indefiniteness as affecting validity of contracts, see also *Wells v. Alexandre* (N. Y.) 15 L. R. A. 218 (with note on validity of contract for purchase of indefinite quantity); *Barrow S. S. Co. v. Mexican Cent. R. Co.* (N. Y.) 17 L. R. A. 359; *Schwanebeck v. Smith* (Md.) *ante*, 168, 24 L. R. A.

The contract was one continuing only during the pleasure of the plaintiffs. It was equivalent to an agreement to work so long as the plaintiffs should make enough to satisfy them. Contracts to be valid must be mutually binding.

Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. Rep. 708.

The contract was too indefinite and uncertain to be capable of enforcement against plaintiffs, and was therefore void for want of mutuality.

A contract to employ a teacher for a certain time, and to pay "good wages," is too indefinite to be valid.

Fairplay School Twp. v. O'Neal, 127 Ind. 95.

A contract to pay one of two notes given for corn, if the corn market should advance sufficiently to justify it, is void for uncertainty.

Thompson v. Hortner, 78 Md. 474.

The requirement of "good cause" to justify the revocation of an agreement is too vague to constitute a binding contract.

Cummer v. Butts, 40 Mich. 322, 29 Am. Rep. 580.

Words used in a written contract are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the contract evidently points out that, in the particular instance, and in or-

der to effectuate the immediate intention of the parties, it should be understood in some other and particular sense.

2 Greenl. Ev. § 278.

The profits which the plaintiff were allowed to recover were too uncertain, contingent, and speculative to found a verdict upon.

McKinnon v. McEwan, 48 Mich. 108, 42 Am. Rep. 458; *Allis v. McLean*, 48 Mich. 432; *Talcott v. Crippen*, 52 Mich. 386. See *Petrie v. Lane*, 67 Mich. 454.

If the words "make it pay" were shown to have any special significance, other than the usual meaning, that fact would not affect the contract if the mining captain knew of no such usage and did not contract with reference to it.

See 2 Parsons, Cont. 7th ed. 678-675.

Mr. F. O. Clark, with **Mr. R. C. Flannigan**, for defendants in error:

Durand, J., delivered the opinion of the court:

On October 7, 1889, the plaintiffs, who were practical miners, entered into a verbal agreement with the defendant company, through its mining captain, to go to work in what is called the "Cave Pit," and were to receive \$1.50 per ton for all the ore they produced, as long as they could make it pay. The plaintiffs practically agree that the mining captain, with whom the contract was made said to them that he would give \$1.50 a ton for all the ore they could produce anywhere in the pit, to which they responded, "All right; we will take the contract, and work it as long as we can make it pay." The plaintiffs were to put in skip roads for hoisting the ore, and were to put it in position for hoisting, and the defendant was to furnish the hoisting machinery and do the hoisting. Acting under this contract, the plaintiffs went to work in the pit. They leveled off a place and put down some plank platforms to pile ore upon, and sorted out some ore from the loose rock, and took some ore also out of a seam in the foot wall of the pit, and placed it on these platforms. On the morning of the third day after they began to work, the captain of the defendant company went down, and found the plaintiffs digging into the foot wall of the pit, upon which he ordered them to quit mining at that point. A controversy then arose between him and the plaintiffs in reference to where they had a right to dig, and as to the extent of their right, which ended by the plaintiffs quitting the work. The plaintiffs contended that they had a right to mine at any point they chose, and that they had a right to dig into and through the foot wall, and that they had a right, under their contract, to mine all ore which might be newly discovered by them after digging through the walls of the pit, and that they were not confined to such ore as they might find within the pit, as it had already been opened and worked. The defendant contends that, even if the contract is a valid one, it merely had reference to such ore as might be found within the pit, as it had been opened and worked, and that it gave them no right to dig or break through the walls of the pit, and mine ore found outside of the walls; that it was essentially what is known among miners as a "scramming contract," which is one that con-

fers the right to mine and gather such ore as may be left within the limits of a mine or pit as it has been opened and mined before, that nothing beyond that was ever thought of, and that the act of the plaintiffs in breaking through the walls of the pit, and mining in a newly discovered vein of ore, was never contemplated by the parties; and that it would greatly endanger the property of the defendant, as well as the lives of the miners, by rendering it likely to cave, as had happened before, and for which reason it is alleged this pit was named "Cave Pit;" and the defendant insists that the plaintiffs were stopped from digging in the foot walls for the reasons stated, while the plaintiffs contend that the real reason was that the defendant thought that they would make too much money if allowed to mine in the rich vein of newly-discovered ore beyond the foot wall. The plaintiffs also contend that the term employed in the contract, "as long as we can make it pay," has a special signification among miners, and means as long they could make "company account" wages, being such wages as the company was then paying by the day for such work; and they introduced some testimony, against the defendant's objection, tending to prove this to be so, while the defendant denies that this is so, and contends that the term has no special signification. The plaintiffs also contend that they had discovered a body of ore which amounted to at least 17,000 tons, and that if they had been allowed to mine it,—as they claimed they had a right to do under the contract referred to,—they would have realized a profit of \$22,000; while the defendant contends that this is not true, and that the dangers and contingencies were so great that no estimate of profits could be made which would be at all reliable, or upon which the jury could intelligently act in attempting to decide upon what the damages should be. The questions of fact were all fairly submitted to the jury, who found a verdict of \$1,000 for the plaintiffs, and a judgment for that amount was thereupon rendered in their favor. The defendant claims error.

The questions we are called upon to consider all relate to and depend upon the two main propositions in the case, which are whether or not the contract is of such a character as to entitle the plaintiffs to damages for its breach, and, if it is, then whether or not the profits which the plaintiffs claim they would have made if they had been allowed to proceed to mine the ore, as long as they could make it pay, are not so speculative, uncertain, and contingent as to make it improper to permit the jury to pass upon them in deciding upon the damages to which the plaintiffs are entitled. We have sought in vain for a valid reason to sustain the plaintiffs in their contention in this case, but we cannot do so. We do not think the contract is of such a character as to be enforceable as an executory contract. The agreement was simply that the plaintiffs would work at mining the ore in "Cave Pit" for \$1.50 per ton as long as they could make it pay. No limitations were put upon their methods, or how or in what manner they should conduct the work in order to make it pay, nor does it give the defendant any voice in deciding upon whether or not the plaintiffs could make it pay,

nor does it place the subject of the contract upon any certain basis upon which a jury can lawfully and justly arrive at a fair rule of damages in case of its violation. Under this contract, the plaintiffs must be presumed to be the sole judges of whether or not it would pay them to do the work, and of how long they should continue it. Neither do we think that the clause, "as long as they could make it pay," has any special signification in this case. It is not in any sense ambiguous, and can have no different meaning when applied to mining than it has in any mechanical or agricultural employment. It is a term used daily in all the different enterprises and occupations in which men are engaged, and its scope is so well understood that no evidence is necessary to show what it is, or that it means anything different in one case than in another. When a party agrees to sell articles of merchandise, or deliver the productions of his labor to another at a certain price as long as he can make it pay, every one must clearly understand that the term is dependent on conditions over which the promisee has no control, and in so far as any one has the power to make the term effective, it is lodged solely in the promisor, who by judicious purchases or skillful manipulations of labor may be able to make a transaction pay when a more careless, negligent, or improvident person would be unable to do so. This serious element of uncertainty destroys all mutuality in the contract, and gives the promisor full power to say when a further execution of the contract will not be advantageous, because he cannot make it pay. Contracts cannot arise where there is no mutuality, nor can they arise from the action of one party alone where the other has no power to prevent his action. The uncertainty of the term, "as long as we can make it pay," employed in this contract, is illustrated in the case of *Oummer v. Butts*, 40 Mich. 323, 29 Am. Rep. 580. In that case the contract stipulated that on sixty days' notice it

might be canceled by either party for "good cause." One of the parties terminated the contract whereupon the other party, who insisted that no "good cause" for his dismissal existed, brought suit to recover for the profits he would have made if the arrangement had not been interrupted. *Mr. Justice Graves*, in an opinion concurred in by the entire court, says: "The difficulty is inherent. It exists in the terms adopted by the parties. The requirement of 'good cause,' as something on which the right to revoke by one or the other should depend, is, as here introduced, too vague to be fairly intelligible. The phrase in such connection, as to parties and subject-matter, has no such distinct sense as to furnish a common and intelligible criterion for the parties, or any determinate sense whatever. It is impossible to say that the wills of the parties concurred, and that each meant exactly what the other did, or even to say what either meant. The case is one where the parties have failed to express themselves in terms capable of being reduced to lawfull certainty by judicial effort." The same general rule is laid down in cases cited in *Am. & Eng. Encyclop. Law*, pp. 844, 845, and notes; *Blanchard v. Detroit, L. & L. M. R. Co.* 81 Mich. 43, 18 Am. Rep. 149; *Cannell v. Gibbs*, 83 Mich. 381; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708.

Under this view of the law, we must hold that the plaintiffs cannot recover under this contract for any prospective profits which they might have made if they had been allowed to complete it, and the jury should have been so instructed. As this disposes of the case in favor of the defendant, it is unnecessary to discuss the question of damages, or any other question raised by the record.

It follows that the judgment must be reversed, with costs of this court, and a new trial granted.

The other Justices concurred.

WASHINGTON SUPREME COURT.

UNION SAVINGS BANK & TRUST CO.,

Appt.,

v.

George GELBACH, Treasurer of Thurston County, *Resp't.*

(.....Wash.....)

The rate of interest on a county warrant, which is by statute to draw "legal interest" after presentation to the treasurer and indorsement to show that it is not paid for want of funds, cannot be reduced by a statute reducing the rate of interest, as the rate which first begins to run upon it is a part of the contract obligation.

(*Hoyt and Anders, JJ. dissent.*)

(March 27, 1894.)

APPEAL by petitioner from a judgment of the Superior Court for Thurston County denying a writ of mandamus to compel defendant, as treasurer of Thurston County, to pay county warrants, with a certain rate of interest upon them. *Reversed.*

The facts are stated in the opinion.

Messrs. A. E. Buell and Crowley, Sullivan & Grosscup, for appellant:

The legal rate of interest at the time of the issuance of these warrants was ten per cent per annum.

1 Hill, Code, §§ 2785-2796.

Without any statutory provision, these warrants by custom would draw interest at the legal rate.

NOTE.—The ground of the above decision clearly is that a county warrant, presented and indorsed for want of funds becomes under the Washington statute a contract for interest at the existing legal rate, and that such contract does not become ma-

ture until notice of readiness to pay. In this respect it is to be distinguished from a judgment as to which see *note* to the case of *Rockwell v. Butler* (Colo.), 17 L. R. A. beginning on p. 612.

Beymour v. Spokane, 6 Wash. 362.

The act fixing the legal rate of interest, which went into effect June 7, 1898, can have no effect whatever upon contracts and obligations created and existing before the passage of such act, and the contracts or obligations which bore interest will continue to bear interest at the rate fixed by the law at the time of their creation.

Mc'racken v. Hayward, 48 U. S. 2 How. 608, 611, 11 L. 897, 898; *Sutherland*, Stat. Const. 621; *Cooley*, Stat. Lim. 6th ed. 844.

If it be true the legislature attempted to change the rate of interest upon contracts made prior to the passage of this act, their effort must necessarily result, if carried into effect, in the impairment of all contracts providing for interest.

Edwards v. Kearzey, 96 U. S. 600, 24 L. ed. 796; *Effinger v. Kenney*, 115 U. S. 568, 29 L. ed. 496; *Koshkonong v. Burton*, 104 U. S. 679, 26 L. ed. 890.

The constitution makes no distinction between express and implied contracts.

2 Story, Const. § 1377; *Flisk v. Jefferson Police Jury*, 116 U. S. 181-184, 29 L. ed. 587, 588.

Changing the rate of interest does not affect existing contracts or debts due prior to such enactment, whether they are evidenced by judgment or by agreement of the parties.

Cox v. Mariatt, 36 N. J. L. 889, 13 Am. Rep. 454; *Rockwell v. Butler*, 17 L. R. A. 611, 17 Colo. 290; *Myrick v. Battle*, 5 Fla. 848; *Roberts v. Cocke*, 28 Gratt. 207; *Bryan v. Moore*, 1 Minor, (Ala.) 877; *Lee v. Davis*, 1 A. K. Marsh. 897, 10 Am. Dec. 746.

A municipal corporation is liable just as is a private corporation or an actual person upon contracts properly assumed by the corporation.

1 Beach, Pub. Corp. § 216.

Interest is allowed when it is part of the contract, or as penalty.

Rensselaer Glass Factory v. Reid, 5 Cow. 607; also 1 *Sutherland*, Damages, chapter on Interest; *Harmanson v. Wilson*, 1 Hughes, C. C. 207.

If a debt ought to be paid at a particular time and is not then paid through the default of the debtor compensation in damages equal to the value of money which is the legal interest upon it, shall be paid during such time as the party is in default.

1 *Sutherland*, Damages, p. 596.

In no case will it be found where the right to interest was an integral part of the contract, part of the contract, either by agreement of parties or operation of law, that the courts have permitted this right to be impaired.

If a private person contracts to pay "interest" the rate he must pay is determined by what the legal rate was at the date of his contract.

Ackens v. Winston, 22 N. J. Eq. 444.

This contract-right to interest resting in this case upon specific statute would be equally valid if it rested on customary law.

1 *Sutherland*, Damages, p. 582, note.

The Interest Act of February 21, 1898, should be construed as applying to warrants drawn after it went into effect.

Saunders v. Carroll, 12 La. Ann. 798; *Bryan v. Moore*, 1 Minor (Ala.) 377; *Macoleta v. Packard*, 14 Cal. 179; *Lee v. Davis*, 1 A. K. Marsh. 24 L. R. A.

897, 10 Am. Dec. 746; *Beals v. Amador Company*, 85 Cal. 624.

Mr. Milo A. Root, for respondent:

Warrants are not contracts to pay, but are merely evidence of indebtedness, and a means of payment.

Ashe v. Harris County, 55 Tex. 51 and cases cited; *Allison v. Juniata Company*, 50 Pa. 354; 1 Dill. Mun. Corp. 4th ed. §§ 485-487; *Dan. Neg. Inst.* 8d ed. § 427.

Interest is allowed on warrants after presentment only; and such interest is in the nature of damages and not by reason of any contract.

It is not the issuance and delivery of a warrant that causes it to draw interest; but it is the refusal of payment on presentment.

1 Hill's Code, § 216; *Mahanoy Twp. v. Comry*, 108 Pa. 386; *Madison County v. Bartlett*, 2 Ill. 67; *Dan. Neg. Inst.* § 430.

Where interest is allowed not by virtue of contract to pay it, but as damages for default in the discharge of an obligation, the legal rate must govern; and if the legal rate be changed, the old rate will be allowed up to date of change and the new rate thereafter.

Sanders v. Lake Shore & M. S. R. Co. 94 N. Y. 641, and cases cited; *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670; 1 *Sutherland*, Damages, §§ 368, 369.

Where one contracts to pay a principal sum at a certain future day with interest, the interest prior to the maturity of the contract is payable by virtue of the contract and thereafter as damages for breach of the contract.

O'Brien v. Young, 95 N. Y. 429, 47 Am. Rep. 64, and cases cited.

Where a person makes his promissory note for a certain sum with a given rate per cent interest, the note will draw that rate until maturity, and the statutory rate thereafter. The interest after maturity is in nature of damages, and not by agreement of parties.

Holden v. Freedman's Sav. & T. Co. 100 U. S. 72, 25 L. ed. 567; *Brewster v. Wakefield*, 68 U. S. 22 How. 118, 16 L. ed. 801; *Bernhiel v. Firman*, 89 U. S. 23 Wall. 170, 22 L. ed. 766; *Euton v. Boissonault*, 67 Me. 540, 24 Am. Rep. 52, and cases cited; *Bennett v. Bates*, 94 N. Y. 355; *Wells, Fargo & Co. v. Davis*, supra; *Searle v. Adams*, 3 Kan. 515, 89 Am. Dec. 598; *Kitchen v. Branch Bank at Mobile*, 14 Ala. 283; *White v. Curd*, 86 Ky. 192; *Gardner v. Barnett*, 86 Ark. 477; *Talcott v. Marston*, 3 Minn. 389; *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142; *Bell v. Bell*, 25 S. C. 152; *Brown v. Hardcastle*, 68 Md. 485; *Pearce v. Hennessy*, 10 R. I. 223.

When a state changes its legal rate of interest, a judgment rendered before the change will draw the old rate up to the date of the change and the new rate thereafter.

Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925; *O'Brien v. Young*, 95 N. Y. 429, 47 Am. Rep. 64; *Wells, Fargo & Co. v. Davis*, supra; *White v. Lyons*, 42 Cal. 280.

Where a judgment is given for a certain amount "with interest" from a certain date in the past, the interest will be computed so as to conform to any changes made in the legal rate during such period.

White v. Lyons, 42 Cal. 279; *Randolph v. Bayne*, 44 Cal. 369; *Stark v. Olney*, 3 Or. 88.

If it be conceded that the obligation to pay interest arises from contract, it is certainly only an implied contract. The constitutional provisions against laws impairing the obligations of contracts do not apply to such contracts.

Harmanson v. Wilson, 1 Hughes, C. C. 207; *Louisiana v. New Orleans*, 109 U. S. 285, 288, 27 L. ed. 936, 937.

No obligation, either *ex contractu* or *ex delicto*, can draw greater than legal rate of interest except by *express* agreement.

Bell v. Bell, 25 S. C. 152.

Stiles, J., delivered the opinion of the court:

Appellant, being possessed of warrants issued by Thurston county in 1891-92, upon the call of respondent, who is treasurer of the county, presented them to him for payment. The treasurer offered payment of the principal, with interest at 10 per cent per annum until June 7, 1893, and at 8 per cent since that date. The reason for the difference in the rate of interest offered was that whereas, prior to June 7, 1893, the legal rate of interest in this state was 10 per cent, the Act of February 21, 1893, which took effect June 7, reduced that rate to 8 per cent. The Statute (Gen. Stat. § 216) requires the treasurer, when he has no funds to pay a county order or warrant presented, to indorse it, "Not paid for want of funds," with the date of the indorsement over his signature; and from this time it is declared the order shall draw legal interest. The contention of the appellant is (1) that the language and intention of the Act of 1893 are wholly prospective; (2) whatever may have been the intention it was not within the power of the legislature to change the rate which prevailed at the time when the orders were presented and indorsed.

In *Swunders v. Carroll*, 12 La. Ann. 798, the first of the above points was well covered, and it was held that a new interest law would not be considered as applicable to cases which arose previous to its passage unless the legislature, in express terms, declared such to be its intention. We have no idea that our legislature of 1893 contemplated for one moment that public obligations of this class would be repudiated, to the extent of one fifth of the interest thereon, by the passage of the Act of February 21. The act itself bears no evidence of any such intention. But a disposition of the case upon this point would be far from satisfactory, and we shall consider it upon the other as well. It is agreed that, if the provision in regard to interest of 10 per cent entered into and become a part of the contract, the legislature could not impair it by making the reduced rate applicable to the warrant either before or after the passage of the law; but, if the exaction of interest is mere penalty for the unlawful act of detaining money due, then it is conceded that it is changeable with the change in the law. A county order or warrant is lacking in one of the qualities which make notes, bills, checks, etc., commercial paper, viz. "negotiability." This lack, however, is due entirely to the fact that it is open to all defenses which might have been made to the claim on which it was founded. In *Alison v. Juniata County*, 50 Pa. 351, it was held, following

Dyer v. Covington Twp. 19 Pa. 200, that such warrants were not even contracts upon which a suit could be maintained, but that the original indebtedness was the sole ground of action. There are some other cases of like tenor, perhaps, but they do not express the current law of such matters. Dillon on Municipal Corporations, §§ 485-487, and Daniel on Negotiable Instruments, §§ 427-430, treat these warrants as only something less in negotiability than notes or bonds, and therefore not commercial paper.

This court, in *Seymour v. Spokane*, 6 Wash. 362, maintained a doctrine exactly the contrary of that put forth in Pennsylvania and a few other states concerning the payment of interest on warrants where no statute required it. But however the case may be elsewhere, or in other cases, we are satisfied that it cannot be held here that a county warrant is not a contract to pay money. Our statutes governing the presentation and allowance of claims against counties, and the issuance of warrants for the sums allowed, plainly contemplate that the transaction between the claimant and the county is to be merged in the warrant, and settled by it, just as fully as is a store account between a merchant and his customer when the latter gives his note for the balance found due upon the former's books. One of the principal reasons we find given in the cases alluded to for not allowing interest on warrants, where there has been no custom and no statute, is that people who have dealt with a county have, by advancing the price of their goods, discounted the face of their claims before their warrants are issued. But here we have the law making the payment of interest mandatory, so that one who deals with a county knows that he is expected to sell to it on a cash basis, the same as he does to a private individual, making himself whole for delay in payment out of the interest required to be paid him. When the dealer delivers goods to the county, it is just as much implied that he shall have interest at the legal rate from the time his warrant is presented as that he shall have his claim passed upon and a warrant issued for the amount found due. But it is said that the right to interest exists only because it is given by statute as a penalty for the county's nonpayment on demand, to which the sufficient answer is that every right which a creditor has against a county is to precisely the same extent statutory. The right to sue, the right to have a claim allowed, the right to have a warrant, and to have it paid, all depend on statutes which are none the less necessary to the existence of any of these rights because they are universal accompaniments of county organization. The obligation to pay interest is no less one of contract when the claim for interest is based upon a transaction growing out of contract, because the burden of paying interest is imposed upon the county by a statute. Its obligation to pay the principal has the same foundation.

The only question which remains, then, is whether, since the warrant has read into it a contract to pay "legal interest," it can be held that the rate is to vary as the legal rate is changed by statute from higher to lower, and *vice versa*. It is claimed that there is notice in

the statute itself that the rate which is legal at one time may be changed later, and that the warrant holder takes the risk of the change. To support this proposition a number of cases are cited which hold the rule to be that, where a note provides for "interest" from the date until maturity, the rate recoverable after the maturity may be changed. These cases are based upon the principle that the interest before the maturity is based upon the contract, while that after is dependent upon the rules as to damages. But no case is produced which holds, nor is it claimed by respondent that where a note provides for "interest," or "legal interest," until maturity, any change in the interest law has been held to apply so as to raise or lower the rate recoverable up to maturity; that is, the universal holding is that, where the right to interest is based on the contract, it is the legal rate at the date of the contract which must prevail, and cannot be altered. *Kosh-konong v. Burton*, 104 U. S. 668, 26 L. ed. 886. Now, a warrant, under our statutes, is a promise to pay it in its order of issue, when money applicable to it comes into the treasury, and its maturity, by analogy with a note, is the time when the treasurer gives notice of his readiness to pay it, and stops the interest. Respondent says that, if a warrant is considered as a contract, it is one which becomes due instantly upon presentation, and therefore the interest upon it, like that upon a past due note, is only allowed as damages. But there is this difference: A note can be sued upon, judgment taken, execution issued, and property levied upon and sold, and the debt paid; but no action lies either upon a warrant or the original debt. In the case of the note interest after maturity or judgment is the penalty inflicted for the wrongful failure to pay; but with the warrant the forbearance enforced by the condition of the public treasury is the reason at bottom of the allowance of interest. It is the private debtor's fault that he does not pay; but it is not the fault of the county, which must exist, but cannot pay faster than it receives the means to pay with. It is also said that the law allows interest at different rates, from time to time, according as the value of money is supposed to vary, and purely as compensation for the detention of money. Such is the theory of it when it is allowed as a penalty; but, as we have seen, this theory has no application when the payment of interest is based upon a contract, although that contract merely provides for the legal rate. Respondent is forced to admit that if, instead of passing a new law merely lowering the legal rate, the legislature had simply repealed section 2795 of the General Statutes, upon this theory, all interest on county warrants would have stopped June 7, or, if the rate had been doubled, interest on such warrants after that rate at 20 per cent would have been recoverable. Such a conclusion would alone be sufficient to stamp such a theory as wholly unreasonable. Public policy can justly have but little to do with such matters, but the importance of maintaining the public credit is not to be estimated at nothing. Repudiation of public obligations is not to be thought of in these days, and cannot be tolerated in the guise of reduced interest on past transactions any more

than would a clipping of the principal. Nor, as has been said before, do we believe the legislature had any such intention in enacting the new law. Other statutes make ample provision by which the counties can at any time fund their legal indebtedness at as low rates as money can be procured for, thereby paying off at a stroke, all their high interest bearing warrants, and placing themselves on a cash foundation. In the meantime they ought to, and under the law can, do no less than meet their obligations upon the same terms as a private person. Having contracted to pay interest on their warrants at 10 per cent, that rate is due on the holder. *Judgment reversed*, and remanded, with directions to set aside the order of dismissal and proceed with the cause.

Dunbar, Ch. J., and Scott, J., concur.

Hoyt, J., dissenting:

I am unable to agree with the conclusions of the majority announced in the foregoing opinion. Under well settled rules of law, money due and unpaid, if the amount thereof is liquidated, will draw interest at the legal rate. It is equally well settled that an exception to such rule exists in favor of the sovereignty and of its necessary agencies in the government; that, under such exception, sums due and unpaid will not draw interest unless there is express statutory provision therefor, or such universal custom and acquiescence therein as to have the force of express legislation. It is conceded that counties are necessary agencies of the state, and are entitled to the benefits of this exception. It must follow that the warrants in question, being claims against a county, will only draw interest by virtue of the express provision of the law which provides that after they have been presented, and payment refused for want of funds, they shall draw interest at the legal rate. Without this provision the warrants would draw no interest, and the sole object of its enactment was to place counties upon the same basis, so far as the payment of interest on money due was concerned, as private individuals were, without any legislation. If the money was due from a private individual, it would draw interest at the legal rate which was or should be established during the time that payment was delayed; and the fact that a certain rate was the legal rate at the time the money became due would not establish that as the necessary rate until payment. If the legislature should change the legal rate, the changed rate would obtain from the date the law making the change went into effect. If a note is given bearing a certain rate of interest, and nothing is said about the rate which it shall draw after maturity, the great weight of authority is to the effect that after such maturity it will only draw interest at the legal rate, unaffected by the contract rate set out in the note. In a case of this kind there would be much greater reason that the rate of interest as specified in the contract should continue to attach to the use of the money after a violation of its terms than that the rate in existence at the time a warrant was presented for payment should continue to be the rate as to the money represented by such warrant, uninfluenced by the fact that the legal rate had been changed by the legislature.

What is said in the opinion of the majority as to the right of one furnishing goods for the county growing out of the rate of interest which prevailed at the time such goods were furnished needs no attention, for the reason that it is not contended on the part of the appellant that the rate of interest upon the money due for such goods would be established prior to the time of the issue and presentation of the warrant.

Something is said about public policy, but, in my opinion, considerations of that kind can have no influence in the determination of this question, for the reason that the law seems to me clear, when the object to be accomplished by the legislation is taken into consideration. If, from the language of the provision, it was clear that the legal rate named therein referred exclusively to such rate at the date of the presentation of the warrant, such fact would not warrant the construction placed thereon, for the reason that the rate prescribed was not a contract rate, but was in the nature of a penalty for the nonpayment of the money, like the penalty imposed for the nonpayment of a judgment, which it is conceded is within the control of the legislation, unaffected by the rate of interest established by law at the date of the entry of the judgment. But, as I read the provision, it has no particular reference to the date of the presentation of the warrant, but is simply a general provision applying to all warrants by which it is provided that, during the time the money due thereon is unpaid, such money shall draw interest at such rate as, from time to time, shall be established by law as the legal rate. The construction contended for by the appellant would, in my opinion, only be warranted if the statute was to the effect that

after the presentation of the warrant it should draw interest at the legal rate at the date of its presentation. The general language used, and the statement that the warrant shall draw interest at the legal rate, when fairly interpreted, should only be held to mean that the legal rate referred to is that prevailing from time to time while the warrant remains unpaid.

I am unable to find anything in the language used to show an intention on the part of the legislature to create a legislative contract. It only appears therefrom that the state and its counties should be put upon the same footing as individuals, and be required to pay for the use of money retained, after it is due, a fair compensation; and such compensation is fixed at the legal rate, which is fixed by the legislature from time to time, as the value of the use of money changes. There is no reason why the legislation should be so construed as to compel the payment of more than a fair compensation for the use of the money. Such, however, is the result of the construction given by the majority. The judgment directed will require the county of Thurston to pay for the use of the money 10 per cent, when the use has been by law declared to be worth only 8 per cent. Stress is placed upon the fact that the retention of the money by the county, being caused by the state of its treasury, should put it upon a different basis than an individual whose neglect to pay is caused by want of funds. I can see no reason whatever for so discriminating against a county, which is but one of the agencies through which the state does its business.

Anders, J.: I concur in the above.

MISSOURI SUPREME COURT (Div. 2).

Harvey S. WALKER, *Resp't.*,
v.

HANNIBAL & ST. JOSEPH R. CO., *Appt.*

(.....Mo.....)

1. A baggageman on a train is not serving his master in delivering drills, which are carried merely to accommodate persons who have no contract with the carrier and for which the carrier receives no benefit, and therefore his negligence in throwing the drills from the car, by which a person to whom they were sent is injured, does not make the carrier liable.
2. The knowledge of a conductor that a baggageman on the train over whom he has no control whatever is carrying articles as an accommodation is no notice to the carrier.
3. The fact that articles were sent by

a ticket agent does not make a railroad company liable for negligence of a baggageman in throwing them from a train and injuring the person to whom they were sent, where they were sent by the ticket agent for his own benefit and carried by the baggageman merely as an accommodation, without the authority or knowledge of the carrier.

(May 8, 1894.)

A PPEAL by defendant from a judgment of the Louisiana Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Spencer & Mosman, for appellant:

In order to render the master liable for the

NOTE.—An important illustration of an employé's services for a third person outside the line of his duty, while performing similar services within the line of his duty is presented in the present case. Somewhat similar in respect to the relation of the carrier to the person gratuitously served by the employé but not turning on the question of the scope of employment of the employé whose negligence causes the injury are cases as to the right of a person to be considered a passenger in respect to negligence of the carrier when he is wrongfully riding on a railroad train by favor of trainmen and without payment of fare. See, as to these, *McVeety v. St. Paul, M. & M. R. Co.* (Minn.) 11 L. R. A. 174. Also *Atchison, T. & S. F. R. Co. v. Headland* (Colo.) 20 L. R. A. 822.

See also 36 L. R. A. 806.

negligent act of his servant, the act of the servant must be done in the course of his employment. The master is never liable for the acts of the servant, which are not connected with the particular service he has employed the servant to perform. If the negligence occurred while the servant was doing something inconsistent with his duty to his master, the master cannot be held liable. The act must pertain to the duties which he was employed to perform. If the intention of the servant in carrying and delivering the drills, in doing which the negligence occurred, was to serve himself, or to serve another than the master, the master is not liable.

Garretsen v. Duencel, 50 Mo. 104, 11 Am. Rep. 405; *Cousins v. Hannibal & St. J. R. Co.* 66 Mo. 576; *Mitchell v. Crasnoweller*, 18 C. B. 286; *McClenaghan v. Brock*, 5 Rich. L. 17; *Stevens v. Woodward*, L. R. 6 Q. B. Div. 318; *Towanda Coal Co. v. Heeman*, 86 Pa. 418; *Farber v. Missouri Pac. R. Co.* 82 Mo. App. 381; *Jackon v. St. Louis, I. M. & S. R. Co.* 87 Mo. 430, 56 Am. Rep. 460; *Murphy v. Caralli*, 8 Hurlst. & C. 462; *Foster v. Essex Bank*, 17 Mass. 508, 9 Am. Dec. 163; *Cunningham v. Grand Trunk R. Co.* 81 U. C. Q. B. 350; *Walton v. New York Cent. Sleeping Car Co.* 189 Mass. 556.

Under the facts and circumstances of this case, it is entirely immaterial what purpose or motive actuated James, and induced him to carry the drills. A master has a right to determine himself, and assign to his servants their duties, and no assumption by a servant of duties not assigned to him, will bring those duties within the course of his employment, as defined by the master.

Marion v. Chicago, R. I. & P. R. Co. 59 Iowa, 428, 44 Am. Rep. 687; *Cunningham v. Grand Trunk R. Co.* and *Murphy v. Caralli*, *supra*; *Oil Creek & A. River R. Co. v. Keighron*, 74 Pa. 316; *McDaniel v. Highland Ave. & B. R. Co.* 90 Ala. 64; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 63; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 856.

Defendant's train baggageman, James, was not an agent with general and undefined power.

As general agent and foreman of the lime company he had for years dealt with these general agents possessing these general powers; he was bound to know the general course of transacting business by railroad companies.

2 Redf. Railways, §§ 183, 184; *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 687.

Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limit of his power.

2 Kent, Com. 7th ed. p. 793; Noyes, Maxims, chap. 44; 1 Parsons, Cont. 41; *Tate v. Evans*, 7 Mo. 420; *Wheeler & Wilson Mfg. Co. v. Givan*, 65 Mo. 92; *Maberry v. Chicago, R. I. & P. R. Co.* 75 Mo. 492; *Tucker v. St. Louis, K. C. & N. R. Co.* 54 Mo. 177; *Chouteau v. Filley*, 50 Mo. 174.

It is not a question of the scope of the train baggageman's duty, but the question is, Did he exceed or transcend his powers and authority? If he did, the defendant is not bound.

Oxford v. Peters, 28 Ill. 484; *Golden v. Newbrand*, 53 Iowa, 59, 35 Am. Rep. 257.

94 L. R. A.

As James was a special agent whose duties and course of employment only authorized him to act for the defendant as the custodian *en route* of the baggage of its passengers, and as these drills did not belong to any passenger, and clearly were not baggage, the law would hold that the baggageman was acting for himself and not the defendant, in receiving, carrying and delivering these drills.

Batterly v. Groat, 1 Wend. 272; *Bard v. John*, 26 Pa. 482; *Brown v. Purviance*, 2 Harr. & G. 316; *Gordon v. Rott*, 7 Dowl. & L. 87; *Iygo v. Newbold*, 24 Eng. L. & Eq. 507; *Burke v. Shaw*, 59 Miss. 448, 42 Am. Rep. 370; *Morier v. St. Paul, M. & M. R. Co.* 81 Minn. 351, 47 Am. Rep. 798; *Rayner v. Mitchell*, L. R. 2 C. P. Div. 355.

It was a purely voluntary act on the part of James, outside the course of his employment, for the consequences of which the law would not hold the master liable, and certainly the law would not hold the master liable to the party who had induced the servant to perform for him a gratuitous act without the master's consent.

Oliver v. Whitney Marble Co. 108 N. Y. 292; *Choteau v. Steamboat St. Anthony*, 16 Mo. 216; *Hoar v. Maine Cent. R. Co.* 70 Me. 65, 35 Am. Rep. 299; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 418.

Under the evidence in this case, the law will hold that James, in receiving carrying and delivering these drills was *pro hac vice*, the servant of the plaintiff, and not of this defendant.

Oil Creek & A. River R. Co. v. Keighron, 74 Pa. 316; *Mound City Paint & Color Co. v. Conlon*, 92 Mo. 229; *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211.

Having trusted exclusively to the baggageman for the favor, Walker cannot now claim to have recourse on another party.

Silver v. Jordan, 136 Mass. 319; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Raymond v. Crown Eagle Mills Proprietors*, 2 Met. 319; *Schepstien v. Dessar*, 20 Mo. App. 569; *Ferris v. Thaw*, 72 Mo. 446; *Hovey v. Pitcher*, 18 Mo. 191.

Where A surreptitiously employs the servant of B to perform for him a service, the law conclusively presumes that in that service he is the agent of A alone, and A will not be heard to say that the man was B's agent in the performance of the service.

Fitzsimmons v. Southern Exp. Co. 40 Ga. 330, 2 Am. Rep. 577; *Robinson v. Jarvis*, 25 Mo. App. 426.

Walker knew that the carriage of said drills was inconsistent with the duty of a train baggageman; was in violation of defendant's rules, and was in fraud of its interests and business, and the case falls clearly under the decisions in—

Snider v. Crawford, 47 Mo. App. 8; *De-steiger v. Hollington*, 17 Mo. App. 888; *Lewis v. Slack*, 27 Mo. App. 119.

Ordinary care only required the baggageman to use reasonable means to protect Walker in the position in which he was known by him to be.

Boland v. Missouri R. Co. 36 Mo. 484; *Maschek v. St. Louis R. Co.* 71 Mo. 276; *Brown v. Congress & Baker Street R. Co.* 49 Mich. 153; *Boyd v. Graham*, 5 Mo. App. 403.

Messrs. Fagg & Ball also for appellant.
Messrs. Harrison & Mahan, for respondent:

The defendant should have shown plaintiff ordinary care. It was defendant's duty to maintain the place where he put the letters on its train in a reasonably safe manner, and having failed to do so, defendant is liable.

Moore v. Wabash, St. L. & P. R. Co. 84 Mo. 487; *Bennett v. Louisville & N. R. Co.* 103 U. S. 577, 26 L. ed. 285; *Holmes v. Northeastern R. Co.* L. R. 4 Exch. 254; 1 Thomp. Neg. 318; Whart. Neg. § 821.

From the facts the inference is irresistible, that defendant acquiesced in and consented to its baggagemen carrying and delivering the drills. And under such circumstances the defendant is clearly liable for the negligence of its baggageman.

Reilly v. Hannibal & St. J. R. Co. 94 Mo. 600; *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540; *Atchison, T. & S. F. R. Co. v. Johns*, 36 Kan. 769, 59 Am. Rep. 609; *Bishop, Non-Cont. L.* § 609; *Cooley, Torts*, p. 538, 539; *Edwards v. Thomas*, 66 Mo. 468; Whart. Ag. §§ 476, 477; *Brannock v. Elmore*, 14 Mo. 55; 16 Am. & Eng. Encyclop. Law, p. 791, and cases cited.

Proof of the notoriety of a fact is competent to show notice or knowledge of it by another.

Crane v. Missouri Pac. R. Co. 87 Mo. 588; *Gurley v. Missouri Pac. Co.* 93 Mo. 451; *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 63; *McGee v. Missouri Pac. R. Co.* 92 Mo. 220; *Wood, Mast. & S.* § 401, p. 776; *Lawson, Usages & Custom*, 41, § 42.

He who has knowledge of facts sufficient to put him upon inquiry, is chargeable with notice of the fact which inquiry would disclose.

Egberman v. St. Louis Second Nat. Bank, 84 Mo. 408; *Mason v. Black*, 87 Mo. 342; *Meier v. Blume*, 80 Mo. 184; *Fellows v. Wise*, 55 Mo. 413.

Mr. Beeler, one of defendant's executive officers, testified that conductor Hance had full charge of the train, except of express matters. Now, the knowledge of the conductor was the knowledge of defendant. He represented the company, and the information he received while in the line of his duty, was information given to the company.

Smith v. Wabash, St. L. & P. R. Co. 92 Mo. 369; *Hoke v. St. Louis, K. & N. R. Co.* 83 Mo. 360; *Hilden v. New York & Erie Bank*, 72 N. Y. 285; *Whitehead v. St. Louis, I. M. & S. R. Co.* 99 Mo. 271; *Mihills' Mfg. Co. v. Camp*, 49 Wis. 130; 1 Redf. Railways, 5th ed. 537, 538.

It should not be expected that proof will be given of the express authority to do the particular act.

1 Redf. Railways, 5th ed. 539.

Defendant is estopped from saying that its agent acted without its knowledge or authority.

Harrison v. Missouri Pac. R. Co. 74 Mo. 370, 41 Am. Rep. 818; *Rosenthal v. St. Louis, I. M. & S. R. Co.* 40 Mo. App. 579; *Meier v. Blume*, 80 Mo. 184; *Whittaker's Smith, Neg.* p. 154.

The scope of an agent's employment is to be determined not only from what the principal may have told the agent to do, but from what the principal knows, or in the exercise of ordi-

nary care and prudence ought to know, the agent is doing.

Kingsley v. Fitts, 51 Vt. 414.

The presumption is that the agent acted within his authority.

Brett v. Bassett, 63 Iowa, 340.

Plaintiff had every reason to believe, since he found defendant's baggagemen delivering drills when he came, and they kept it up during all his employment down to the day of his injury, that it was done for the interest and benefit of defendant, especially since they were always shipped by defendant's old and trusted agent Stover, who died in the employ of defendant.

The authority of both agent Stover and baggageman James was apparent and binding on defendant.

Evans, Ag. 594-606; 193, note; Whart. Cont. §§ 90, 130, 269; *Adams Exp. Co. v. Schlessinger*, 75 Pa. 246.

Burgess, J., delivered the opinion of the court:

Action to recover damages on account of personal injuries sustained by plaintiff by reason of the alleged negligence of the servant of defendant. The evidence showed that the plaintiff was the general foreman in charge of the works of the Hannibal Lime Company, at Bear Creek, a small station on the line of defendant's road, six miles west of Hannibal; that the office of the lime company was in that city; that plaintiff had charge of all its business, including the shipment of lime from Bear Creek, and had been such foreman for five or more years previous to the injury; that he was accustomed to send iron drills, used for getting out the rock to make lime, to a blacksmith at Wither's Mills, two miles west of Bear Creek, to be sharpened. The drills were from five to six feet in length, weighing some thirteen pounds each. They were sometimes sent on wagons, sometimes on hand cars, and sometimes in defendant's baggage car. No instructions or directions were given as to the manner by which the drills were to be returned by the blacksmith. The blacksmith at Wither's Mills (Jacob Stover) was postmaster at that place, and was also defendant's ticket agent, and had been for about fifteen years before the accident. After the drills were sharpened by Stover, he would take them from the shop to the station house, and lay them down on the railroad platform, in front of the depot. They were usually wired, three together. He would then tag the drills, "Hannibal Lime Company, Bear Creek station," or, if not so tagged, he would mark them with chalk, in the same way. He would then, upon the arrival of defendant's passenger train from the west, put the drills in the baggage car, in charge of defendant's baggage man, who would receive them, place them in the car, and deliver them to the lime company at Bear Creek station. If the train stopped, he would drop them off at the platform, and, if it did not stop, he would throw the drills off anywhere east of the rock chute. This way of delivering the drills by the baggage man had continued for ten or fifteen years before, and up to the day of, the injury. It was a custom of long standing, and the drills were

so delivered as frequently as from three to five times per week, and often every day in the week, during this long series of years. Each retiring baggage man would hand down the habit and custom to his successor. The evidence showed: That the plaintiff was in the habit of communicating with the managing officers of his company at Hannibal by letters, which he would throw into the baggage car as the train went by; and on the day of this accident he went down to the track, in order to put a letter which he had written his employers in Hannibal on the train, as he had been accustomed to do that as the train came in he was standing with one foot on the rail of the side track nearest the main line, with the letter in his hand. When the train got within 200 feet of him, he noticed the ends of the drills projecting out of the open door of the baggage car, saw them raised up, and saw the baggageman look out of the door, and down the track, towards the point where he was standing, and then drew himself inside the car. Anticipating that the drills were to be thrown off, plaintiff at once left his position by the side of the track, and ran northward to get out of the way. When he had gotten about 15 feet from the point where he was standing when he was looking out the drills. The baggageman testified that he looked out of the door of the car, and down along the track, and, seeing plaintiff standing by the side of the track, stepped back into the car, and, bracing himself, swung the drills with all his might from the train, as far as he could throw them, for the purpose of avoiding any possibility of striking the plaintiff; that he did not see plaintiff move from the position where he had first seen him, and did not know that he had left that position; that, knowing the position where plaintiff stood, he supposed it would be perfectly safe to throw the drills over beyond the side track. The drills struck the ground, and, revolving, struck plaintiff, knocking him down, injuring his arm,—the point of one of the drills entering his arm. A portion of one of the bones of the forearm had to be removed, thereby shortening that bone, and altering the normal position of the hand with relation to the wrist, and, as compared with its previous condition, permanently impairing the usefulness of the hand and arm. The evidence further showed that James, the man who threw the drills out of the car, was the agent of the American Express Company, and also a train baggageman in defendant's service; that under the regulation of the defendant, promulgated for the guidance and direction of train baggagemen, such baggagemen were not permitted to carry any article or commodity in the car which did not belong to the passengers on the train, and come properly within the designation of passenger's baggage, unless it was the property of the railroad company itself, such as tools, material, or supplies sent out by it for its servants at the various stations; that drills shipped by the public over the road properly fell within the designation of freight or express matter, and the train baggageman, James, was not authorized to carry them; that they could only be carried on a passenger train by the express company, as express matter. Plaintiff swore that defend-

ant never, to his knowledge, received a cent for the carriage of the drills; that, so far as he knew, his company was the only party interested in their carriage. And this was corroborated by defendant's train baggageman, Mr. James, who testified that he was never instructed by defendant to carry the drills, and never informed any of its officers that he was carrying them; that plaintiff put the drills on the car at Bear Creek, and instructed him to throw them off at Wither's Mills for "Uncle Jake," and he carried the drills purely as a matter of accommodation, never having received anything for so doing. The present management of defendant company took charge in 1894, some two years before the accident. The superintendent, S. E. Crance, the trainmaster, T. S. Beeler, as well as the general agent of defendant at Hannibal, E. F. Bradford, testified that they did not know that the drills were being carried by the baggageman on a passenger train. Plaintiff's evidence, however, showed that Woodward, the superintendent who preceded Crance prior to 1894, as well as Beeler, the trainmaster under the present management, had been seen in the baggage car on two or three occasions when drills were being carried by the baggageman. But the evidence further showed that the presence of drills in the car, if seen by them, would excite no suspicion that they were being carried by the baggageman for outside parties; that it was perfectly right and proper to carry drills and tools belonging to the defendant in the car, or to carry such drills in the baggage car as express matter. The evidence further showed that Hance, the conductor of the train, was frequently in the car when the drills were being carried, and probably knew that the baggageman was carrying the lime company's drills; but it was shown that the train baggageman, in his department of work, and in respect to his special duties, was entirely independent of the conductor, who had no authority over him in respect to the nature of the articles carried in the car. Defendant demurred to the case made by plaintiff's evidence, and renewed its demurrer at the close of all the evidence, but it was overruled. A trial resulted in a judgment for the plaintiff in the sum of \$5,000; and the defendant, after an unsuccessful motion for a new trial, brings the case to this court by an appeal.

Before the defendant can be held liable for the negligent act of its baggageman, it must be made to appear not only that at the time of the injury he was its servant, and in its employ, but that the act of the servant which occasioned the injury was done in the course of his employment. The master is not liable for the acts of the servant which are not connected with the service which the servant had been employed to perform. If, for instance, a servant should be employed to do a particular thing or kind of work, and does something else, without his master's consent, and, by reason of his negligence or carelessness, another is injured, the master is not liable, because the injury was not done in the course of his employment. In order that the master may be held liable, the act causing the injury must pertain to the duties which the servant was employed to perform. If the baggage-

man, in delivering the drills, was not serving his master, but was merely doing so to accommodate others, and the master was deriving no benefit therefrom, then the master is not liable, even though the injury complained of would not have been committed without the facilities afforded by the baggageman's relations to the defendant. *Garretzen v. Duencel*, 50 Mo. 104, 11 Am. Rep. 405; *Cousins v. Hannibal & St. J. R. Co.* 66 Mo. 572; *Mitchell v. Grassweller*, 18 C. B. 287; *Farber v. Missouri Pac. R. Co.* 116 Mo. 81, 20 L. R. A. 350. In *Towanda Coal Co. v. Heeman*, 86 Pa. 418, plaintiff, a small boy, climbed onto the cars; and a brakeman, after the train started, threw coal at him, striking him in the face,—blinding him,—and he slipped off, and was run over. The evidence showed that the brakeman had no duty to perform in admitting or excluding persons from the train; that this duty was vested solely in the conductor. The court denied a recovery, saying: "The legal rule was stated in the opinion of Alderson, J., in that case (*McKenzie v. McLeod*, 10 Bing. 385), to be that the act of the servant is the act of the master where the duty is defined by precise orders; and where something is directed to be done, and the manner of doing it is left wholly to the discretion of the servant, the judgment exercised may be considered the judgment of the master, and he must be answerable. 'But where he has neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how in common justice or common sense, the master can be held responsible.' An examination of all the testimony shows that there is nothing contained in it to prove that the brakeman whose conduct is complained of, in the assault he made on the plaintiff, was acting in pursuance of any authority conferred on him." In *Farber v. Missouri Pac. R. Co.* 82 Mo. App. 378, the court says: "The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service cannot make the master liable. Something more is required. It must not only be done while employed, but it must pertain to the duties of the employment. That has been repeatedly decided in this state. *McKeon v. Citizens' L. Co.* 42 Mo. 83; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 419; *Jackson v. St. Louis, I. M. & S. R. Co.* 87 Mo. 480, 56 Am. Rep. 460." In *Walton v. New York Cent. Sleeping Car Co.* 139 Mass. 556, "the defendant was the owner of sleeping cars running in the trains of the Boston & Albany Railway, over its road, and had in its employ, as a porter on the car, one Maxwell. Maxwell had arranged with a woman at Newton to do his washing, and the woman was to send her daughter to the train to get his soiled linen. Maxwell did the linen up in a bundle, and, as the train ran through the station without stopping, dropped the bundle off; and it struck plaintiff, a trackman on the Boston & Albany road, and injured him severely, and he brought suit against the sleeping-car company. Plaintiff asked the trial court to rule that if Maxwell was in the employ of the defendant, paid by it for taking care of the car, allowed to keep articles of personal property of his own in the car, and, having such in his possession in the car on

this occasion, carelessly and negligently threw the same from the car while passing over the railroad therein, in the performance of his general duties in the care of the car, and that the plaintiff then being in the exercise of due care, and rightfully on the railway, the defendant would be liable for all such damages resulting therefrom as would be legally recoverable for the injuries occasioned thereby." The judge refused so to rule, and ruled as follows: "The defendant is not responsible if the injury to plaintiff was done by Maxwell, the servant of defendant, without the authority of defendant, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment. If Maxwell was employed by defendant as a porter upon its parlor car, and wholly for the purpose of his own, and disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw the bundle—his own property—from the platform of the parlor car, and thereby the plaintiff, who was not a passenger, was hit and injured while in the exercise of due care, and if this injury done by Maxwell was not within the scope of his employment, then the defendant is not liable." The judge also ruled, as requested by defendant, that, upon all the evidence, the plaintiff could not recover. The supreme court says: "The ruling and instructions of the court were correct. There was no evidence that Maxwell was employed by defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment, and it was wholly immaterial that he was at the moment riding in a car of the defendant, in which he was employed by it for other purposes." In *Cunningham v. Grand Trunk R. Co.* 81 U. C. Q. B. 350, the plaintiff was in the employment of one C., a contractor with defendant for building fences along its line. As a matter of convenience to him, he was permitted by defendant to carry his tools upon its trains, and was, at the time of the injury, taking two crowbars from Port Hope to a point on the line of the road where his men were at work. As the train passed the spot, C. dropped one bar out, and the baggagemaster pitched out the other, which struck and injured the plaintiff. The baggageman had nothing to do with C., nor any right to meddle with his tools, nor did he ask him to put the bar out. Held, that defendant was not responsible for the injury, for the baggageman was not acting as the servant for defendant, nor in pursuance of him employment.

The evidence shows that the baggageman in the case at bar was a special agent, having no general power, and that his duties were to look alone after the baggage of passengers. Carrying the drills, which occasioned the injury, was not within the line of his employment. It necessarily follows that the defendant cannot be held responsible for any injuries occasioned by the negligent handling of them, unless it was done by the direction of defendant's officers and agents, or with their knowledge and consent, and for the benefit of defendant corporation. To establish this knowledge on the part of defendant's officers,

it was shown that the conductor in charge of the train knew that it was the custom of the baggageman to carry the drills to and from Wither's Mills to Bear Creek, and to dump them off at the latter place, on their return, while the train was in motion. Beeler, the general agent, E. F. Bradford, superintendent, and the former superintendent, Woodward, had been in the baggage car on several occasions when the drills were being carried by the baggageman. But the evidence also shows that the conductor had no control over the baggageman, who was also express messenger, and that it was not unusual to carry such things as express matter. The other parties—Crance, Beeler, and Bradford—stated that they did not know that the drills were being carried by the baggageman for outside parties, even if they saw them. The plaintiff testified as follows: "I don't know that Mr. Beeler knew anything about the arrangement by which the bars were carried. . . . I never paid anything to the company for carrying the drills. I never knew the lime company to pay anything to the defendant for carrying them. . . . The railroad never received a dollar or a cent, to my knowledge, for the carriage of the drills, or the letters that I spoke of. . . . Q. No officer of the company knew anything about those drills being carried there, to your absolute knowledge? A. No, sir. . . . I knew the lime company was the only one interested. I did not speak to Mr. Woodward about the drills, nor let him know that the blacksmith was sharpening the drills for us, or that the drills were being carried on the train." The evidence did not show that the officers of the defendant knew that the baggageman was in the habit of carrying drills for the lime company, that they consented to it, or that it came within the line of his duty to do so, but it did show to the contrary. If it had been shown that the baggageman had been in the habit of carrying the drills, and putting them off at Bear Creek station, by and with the knowledge and consent of defendant's officers, and as its agent, authority to do so might be inferred therefrom. *Edwards v. Thomas*, 66 Mo. 468. But he was also, at the same time, agent for an express company, and his conduct in handling the drills was as consistent with the one service as the other. Moreover, he testified that he was not acting as baggageman in handling the drills; that he did so gratuitously, merely as an accommodation to the plaintiff; and the evidence of the plaintiff himself tended strongly to show that such was the case. The mere fact that the baggageman handled the drills was no evidence, of itself, that he was doing so in the capacity of a baggageman, and

was no notice to defendant. In order to make defendant liable for the act of the baggageman, for acts of negligence committed not in the line of his employment, it must be shown that he either had express authority to transact the business connected with the injury, or that defendant, by its officers, knew that he, as its agent, was so engaged, for such a length of time as would justify the presumption that he was authorized to so act. It was not enough that the conductor, Hance, had knowledge that the baggageman was in the habit of carrying drills from Wither's Mills, and putting them off at Bear Creek station, for the lime company, for, as has been said, the conductor had no control whatever over him, and notice to him was no notice to the defendant company.

But it is contended by plaintiff that Jacob Stover, the defendant's ticket agent at Wither's Mills, shipped the drills on the passenger train of defendant of his own accord, without solicitation of plaintiff, and with the acquiescence, if not permission, of defendant, and that in so doing he was in the line of his employment as station agent, his act was that of the defendant, and that it is estopped to deny that its agent acted without its knowledge and authority. That this position is correct, with respect of the acts of a station agent clothed with the power to receive and forward freight, and who acts within the scope of his authority, seems to be well-settled law. *Harrison v. Missouri Pac. R. Co.* 74 Mo. 860, 41 Am. Rep. 318, and authorities cited. But there was not one scintilla of evidence which showed, or tended to show, that the drills were sent as freight, or that Stover had any authority to send them as such, or in any other way, on defendant's passenger trains. Stover's acts in sending the drills by the baggageman, as well, also, of the latter in handling them, were unauthorized by defendant, who should not be held responsible for the injury, under the circumstances disclosed by the evidence. The arrangement seems to have been one between plaintiff, for the lime company, and James, the train baggageman, with reference to something not in the line of his employment, and of which his employer had no knowledge, and gave no consent.

Under the views herein expressed, it becomes unnecessary to pass upon the question as to what duty defendant owed plaintiff at the time of the injury, when on its right of way for the purpose of mailing letters upon its train. The demurrer to the evidence should have been sustained.

The judgment is reversed.

All of this division concur.

TEXAS SUPREME COURT.

ALLIANCE MILLING CO., *Plff. in Err.*,
v.
EATON, GUINAN & CO. *et al.*

(86 Tex. 401.)

A deed of trust in favor of certain creditors and not for all of them does not become operative without their consent and before they have knowledge of it so

as to take priority over an attachment which is levied after the acceptance of the trust by the trustee and his taking possession of the property.

(February 8, 1894.)

ERROR to the Court of Civil Appeals, Third Supreme Judicial District, to review a judgment affirming a judgment of the District Court for McLennan County in favor of

NOTE.—*The necessity of acceptance of an assignment or deed of trust for creditors.*

- I. Assent and presumption.
General doctrine.
- II. Assent presumed.
a. In general.
b. Statutory presumption.
- III. Extent of presumption.
- IV. Rebuttal of presumption.
a. In general.
b. Conditions imposing a release.
c. Other conditions.
d. Assignments hindering, delaying, or defrauding creditors.
e. Assignment direct to creditors.
- V. Express assent.
- VI. Sufficiency of assent.
- VII. Time of assent.
- VIII. Effect of assent.
a. In general.
b. After attack.
- IX. Effect of assignment.
- X. The Massachusetts doctrine.
a. Principles of.
b. Time of assent.
c. Comity.
- XI. English decisions.

The principles of assent as deducible from the opinions of the various courts would seem to be, that the assent of the creditors to an assignment or deed of trust made for their benefit will be presumed when the assignment is absolute, beneficial, and imposes no terms or conditions, either by way of release or discharge of the debts by the creditors, or in any other way imposing a detriment to the creditor or a benefit to the debtor. Such presumption, however, is subject to rebuttal by showing dissent.

In Massachusetts the courts hold that assent must be shown and is not to be presumed, but this doctrine would seem to arise from the want of equitable jurisdiction in the courts of that state to enforce the trust, and from the fact of the repeal of the Statute of 1838, relating to the question of assent to such deeds.

I. Assent and presumption.
General doctrine.

Assent or acceptance on the part of the grantee or other party to a deed or other instrument, by means of which the title to property, whether real or personal, is to be transferred to him, or by which he is in any other manner to become bound, is a fact, the truth of which is to be established by competent evidence, before such deed or other instrument can be adjudged to have a legal existence. *Welch v. Sackett*, 12 Wis. 244.

Like every other fact, it may be established by direct evidence, or its existence may be inferred or presumed from other facts already in proof. *Ibid.*

Where a deed is executed by the grantor and delivered to a stranger for the use of the grantee, with-

out the previous advice, direction, or authority of the grantee, and without his knowledge, the law will presume that the grantee assents to it, the moment it is delivered to the stranger. *Ibid.*

Assent is an act of the mind—that intelligent power in man by which he conceives, reasons, and judges, and of which it is a primary, invariable, and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with or knows their existence. *Ibid.*

Without such impression or knowledge, there can be no assent, no *actus contra actum*; and to presume it in opposition to the facts, is to presume that which is impossible; which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do. *Ibid.*

In *Gassam v. Poyntz*, 4 Ala. 374, 37 Am. Dec. 745, it is said that the creditors may either assent to the debtor's proposition, or take their chance by suit.

"A presumption" may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. *Welch v. Sackett, supra.*

It is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature that as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject. *Ibid.*

It is a generally admitted principle of the law that to the creation of a trust by deed, in favor of any person, it is not necessary that a *cestui que trust* should either be a party or assent to it. *Halsey v. Fairbanks*, 4 Mason, 206.

A trust may be created for the benefit of a creditor without his knowledge. *Shepherd v. McEvers*, 4 Johns. Ch. 136, 1 L. ed. 791, 8 Am. Dec. 561; *Soull v. Reeves*, 3 N. J. Eq. 84, 29 Am. Dec. 694.

Delivery or assent, however, on the part of the trustee or mortgagee, is essential. *Foster v. Perkins*, 42 Me. 188.

An acceptance is necessary to constitute the assignee a trustee for the creditors. *Brevard v. Neely*, 2 Sneed, 164.

Delivery by the grantor, and acceptance by the grantee of a deed, are both requisite to pass the legal title to land, and both facts may be established by circumstances as well as by direct proof. *Hubbard v. Cox*, 76 Tex. 242.

The trustee, having accepted the terms of the trust, and there being no repudiation of its terms by the beneficiaries, his acceptance inures for the creditors' benefit. *Bank of California v. Marshall*, 1 Tex. Civ. App. 704.

The title of the assignee under a deed of assignment, in trust for creditors, in no way depends upon the consent or non-consent of creditors to take under the assignment. *Thomas v. Chapman*, 62 Tex. 183.

A trust unknown to the creditor at the time of its

defendants in an attachment proceeding to reach property which had been conveyed in trust for creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. Scarborough & Rogers, for appellant:

A deed of trust is but a mere mortgage with power of sale, and does not pass title.

McLane v. Paschal, 47 Tex. 869; *Blackwell Barnett*, 52 Tex. 838.

A mortgage, like any other contract, requires the consent of the mortgagor and mortgagee, and it must be consummated by delivery. Without these there is no mortgage, but only an attempt at one, or proposition to make one. And delivery of a contract includes acceptance of it by the grantee or obligee.

Willis v. Taylor, 67 Tex. 484; *Welch v. Sackett*, 12 Wis. 287; *Cobb v. Chase*, 54 Iowa,

creation will not deprive him of the right to its benefits. *Wallis v. Beauchamp*, 15 Tex. 308.

The fraudulent intent of the grantor alone will not avoid such a deed unless the assignee or the creditors knew of, or participated in, the fraud. *Truss v. Davidson*, 90 Ala. 350.

In *Hutchinson v. Green*, 91 Mo. 367, it was held that the creditors of a corporation might make an assignment without the consent of stockholders, for the benefit of creditors.

Where the deed of assignment was voidable, it was held that preferred creditors, though not parties to the declaration of trusts, might claim under it. *Bellamy v. Bellamy*, 6 Fla. 62, 102.

In *Kalkman v. McKidder*, 16 Md. 55, the court stated that the presumption of assent depended upon the character of the instrument of transfer. Such an assignment will not be considered beneficial, unless the deed devotes the property absolutely, and under all circumstances, to the payment of the debt secured. In that case, the court admitted the general principle as laid down in *Halsey v. Fairbanks*, 4 Mason, 206, but held that the assignment in the present case did not absolutely and under all circumstances devote the property to the payment of the debts, and as there was no evidence of assent, in fact, of the creditors, the law would not presume any.

II. Assent presumed.

a. In general.

Where the deed provides a security without imposing any terms upon the creditor, or in any manner postponing the collection of his demand, the provision being manifestly for his benefit, the law implies his assent and the deed is not revocable by the grantor. *Lockwood v. Nelson*, 16 Ala. 294.

It is for the benefit of a creditor to receive all the effects that the debtor has. *Hall v. Denison*, 17 Vt. 310.

The beneficiary is not bound to show his assent thereto, by executing the deed, his assent being presumed in the absence of evidence showing the contrary. *Wiswall v. Ross*, 4 Port. (Ala.) 821; *Ashurst v. Martin*, 9 Port. (Ala.) 566; *Mallory v. Stodder*, 6 Ala. 806; *Elmes v. Sutherland*, 7 Ala. 262; *Hodge v. Wyatt*, 10 Ala. 271; *Kinnard v. Thompson*, 12 Ala. 487; *The Governor v. Campbell*, 17 Ala. 566; *Brown v. Lyon*, Id. 659; *Evans v. Lamar*, 21 Ala. 833; *Rankin v. Lodor*, Id. 880; *Lanier v. Driver*, 24 Ala. 149; *Shearer v. Loftin*, 26 Ala. 709; *Ex parte Conway*, 4 Ark. 366; *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458; *McCain v. Picken*, 32 Ark. 399; *Forbes v. Scannell*, 18 Cal. 242, 287; *De Forest v. Bacon*, 2 Conn. 633; *Merrill v. Swift*, 13 Conn. 257, 46 Am. Dec. 315; *Webster v. Harkness*, 3 Mackey, 220; *Brown v. Chamberlin*, 9 Fla. 464; *Hulick v. Scovil*, 9 Ill. 175; *Gibson v. Rees*, 50 Ill. 383; *Paul v. Logansport Nat. Bank*, 60 Ind. 199; *Price v. Parker*, 11 Iowa, 144; *Robbins v. Magee*, 76 Ind. 881; *Van Winkle v. Iowa Iron & Steel Fence Co.* 56 Iowa, 245; *First Nat. Bank of Emporia v. Ridenour*, 46 Kan. 707; *Stewart v. Hall*, 3 B. Mon. 218; *Reinhard v. Bank of Kentucky*, 6 B. Mon. 252; *United States v. Bank of United States*, 8 Rob. (La.) 262, 412; *Fellows v. Commercial & Railroad Bank of Vicksburg*, 6 Rob. (La.) 246; *Lanahan v. Latrobe*, 7 Md. 268; *Farmers' Bank* 24 L. R. A.

of Maryland v. Thomas, 37 Md. 253, 46 Md. 43; *Horssey v. Chew*, 65 Md. 555; *Houston v. Nowland*, 7 Gill & J. 490, 492; *Copeland v. Weld*, 8 Ma. 411; *Suydam v. Dequindre*, Harr. Ch. 347; *Valentine v. Decker*, 43 Mo. 583; *Duvall v. Ralain*, 7 Mo. 449; *Rosworth v. King*, 50 Mo. 477; *Hulse v. Marshall*, 9 Mo. App. 143; *Hurd v. Silsby*, 10 N. H. 108; *Spinney v. Portsmouth Hosiery Co.* 25 N. H. 9; *Fellows v. Greenleaf*, 43 N. H. 421; *Johnson v. Farley*, 45 N. H. 509; *Ingram v. Kirkpatrick*, 41 N. C. 462, 51 Am. Dec. 428; *Leitensdorfer v. Webb*, 1 N. M. 34; *Cunningham v. Freeborn*, 11 Wend. 240; *Nicoll v. Mumford*, 4 Johns. Ch. 522, 1 L. ed. 623; *Jackson v. Bodle*, 20 Johns. 184; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 445; *Hyde v. Oida*, 12 Ohio St. 591; *Smith v. Bank of Washington*, 5 Serg. & R. 818; *North v. Turner*, 9 Serg. & R. 244; *Wilt v. Franklin*, 1 Binn. 502, 3 Am. Dec. 474; *Lippincott v. Barker*, 3 Binn. 174, 4 Am. Dec. 433; *Sadler v. Fallon*, 4 R. I. 490; *Smith v. Millett*, 11 R. I. 528; *Furman v. Fisher*, 4 Coldw. 626, 94 Am. Dec. 210; *Brevard v. Neely*, 2 Sneed, 164; *Dews v. Oilwell*, 3 Bart. 438; *Washington v. Ryan*, 5 Bart. 622; *Mills v. Haines*, 3 Head, 382; *Farquharson v. McDonald*, 2 Helsk. 404; *Breedlove v. Stump*, 3 Yerg. 257; *Saunders v. Harris*, 1 Head, 185; *Field v. Arrowsmith*, 5 Humph. 442, 89 Am. Dec. 185; *Nailer v. Young*, 7 Lea, 735; *Baldwin v. Peet*, 22 Tex. 706, 75 Am. Dec. 806; *Wallis v. Taylor*, 67 Tex. 481; *Green v. Banks*, 24 Tex. 508; *Dikes v. Miller*, 24 Tex. 423; *Hall v. Denison*, 17 Vt. 310; *Skipwith v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642; *Lawrence v. Davis*, 3 McLean, 177; *Halsey v. Fairbanks*, 4 Mason, 206; *Wheeler v. Sumner*, Id. 188; *Brashear v. West*, 32 U. S. 7 Pet. 608, 8 L. ed. 801; *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 106, 10 L. ed. 930.

It is not an open question in Alabama, that the assent of preferred creditors to a deed of assignment, valid in other respects, will be presumed. *Smith v. Leavitt*, 10 Ala. 93.

The principle has become such a fundamental one, that it would require the action of the legislature to overturn it. *Ibid.*

In *Brown v. Chamberlin*, 9 Fla. 464, it was said to be the settled rule in law on the subject of the assent of creditors to the assignment, that assignments directed to the creditors were not valid without their assent, but that assignments to trustees for their benefit did not require such assent to render them valid and operative, the legal estate in the latter case passing to the assignee without assent, and preventing the judgment creditor from acquiring a lien except through fraud.

It is presumed in the case of preferred creditors, and is supported by the consideration of their debts, in the absence of conditions. *Sadler v. Fallon*, 4 R. I. 490; *Evans v. Lamar*, 21 Ala. 833, their debts not being postponed beyond their maturity.

Even though the creditors do not become parties, or even express their assent where the assignment is to a trustee for their benefit, no conditions being annexed. *Hall v. Denison*, 17 Vt. 310.

Such assignment need contain no provision for their signature or make them parties to it, if properly drawn and executed between the debtor and the assignee, and the creditor's consent will be presumed. *Fellows v. Greenleaf*, 43 N. H. 421.

No formal acceptance by the creditors is re-

253; Barron, Bills of Sale & Chatt. Mortg. p. 325; Jones, Chatt. Mortg. §§ 104-113.

Messrs. Clark, Dyer & Bolinger for defendants in error.

Stayton, Ch. J., delivered the opinion of the court:

The firm of Eaton, Guinan & Co., merchants, executed a deed of trust on their property to John F. Marshall, which gave him

power, in the usual course of trade, to sell so much of the property as was necessary, for cash, to raise money to pay the indebtedness of Eaton, Guinan & Co. to four other firms named in the trust deed, and to pay to himself 2½ per cent commissions on the amount realized by sales, besides other expenses of executing the trust, as well as the rent of a storehouse in which the business was conducted, after which the residue of the property was to

quired. *Reinhard v. Bank of Kentucky*, 6 B. Mon. 332.

Such presumption rests upon the general principle that a party is presumed to assent to acts done for his benefit. *Forbes v. Scannell*, 13 Cal. 232, 237.

The title and possession of the property having passed out of the debtor to the trustee for the creditors. *Webster v. Harkness*, 3 Mackey, 220.

And the assent, adds nothing to its legal operation as a conveyance of property. *Paul v. Logansport Nat. Bank*, 60 Ind. 190.

The conveyance is not in any way dependent for its validity upon such assent. *Robbins v. Magee*, 76 Ind. 381.

In the above case the court distinguished a voluntary assignment from a composition agreement, holding that in the latter the assent of the creditors gave the contract force, while in the former such assent could neither strengthen nor weaken the debtor's act. *Id.*

The law presumes the benefits, designed for the beneficiaries, will be accepted by them. *Farquharson v. McDonald*, 2 Heisk. 404.

Especially where the deed contravenes no principles of law. *Hulick v. Marshall*, 9 Mo. App. 143.

The deed being absolute in terms and expressly accepted by the assignee, the provisions being fair and equitable, and such that there could be no objection to carrying it into effect. *Suydam v. Dequindre*, Harr. Ch. 347.

No release or condition being stipulated for on behalf of the debtor, and the property being distributable among all the creditors *pro rata*. *Fellows v. Commercial & Railroad Bank of Vicksburg*, 6 Rob. (La.) 246.

The presumption of law as well as of fact in the first instance being that it was made with his assent, unless there be some cause to infer his non-acceptance, the deed being for valuable consideration and operating from the delivery to the trustees for the beneficiaries. *Stewart v. Hall*, 3 B. Mon. 213.

The assent of the *cestui que trust* may be given at any time after the deed is made. *Field v. Arrowsmith*, 3 Humph. 442; *Saunders v. Harris*, 1 Head, 185.

Where there is no conflict and the beneficiaries claimed the benefit of the assignment, at any time before it is revoked, an acceptance at the proper time will be presumed. *Dews v. Oilwell*, 3 Baxt. 422.

The above doctrine is said to be founded upon the established principle of the common law, that it is not necessary to the creation of a trust by deed in favor of another, that the *cestui que trust* should either be a party or assent to it, that if the trustee is for his benefit the law presumes his assent until the contrary is shown, trusts being creatable where there can be no present assent. *Brown v. Chamberlin*, 9 Fla. 464.

The trust must be for their benefit and cannot be for their injury. *Fellows v. Commercial & Railroad Bank of Vicksburg*, *supra*.

So the consent of the creditors is not absolutely necessary to the validity of a voluntary assignment, made in good faith and in compliance with the Indiana statutes. *Robbins v. Magee*, 76 Ind. 381.

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And it is not necessary to the validity of such a deed that the creditors should be consulted, even though such a course might be pursued with propriety, the acceptance by the trustees, and the acquiescence of the creditors for more than twenty years, affording presumptive evidence in favor of assent. *Brashear v. West*, 22 U. S. 7 Pet. 603, 8 L. ed. 501.

Such presumption of law exists in the absence of all evidence to the contrary. *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 106, 10 L. ed. 903; *Lawrence v. Davis*, 3 McLean, 177.

And unless it be proved that they refused its terms, or took no steps to avail themselves of its benefits. *Gibson v. Rees*, 50 Ill. 383.

The dissent must be made manifest in some manner. *Spinney v. Portsmouth Hosiery Co.* 25 N. H. 9.

The creditor manifestly showing his dissent after being notified of such deed. *Ensworth v. King*, 50 Mo. 477.

The assent, however, of the creditor will only be presumed in cases where the provisions of the deed are beneficial and not when prejudicial to his interest. *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 453.

But such presumption is not to be carried so far as to bind him as having actually accepted it. *Hulick v. Scovill*, 9 Ill. 175; *Tuttle v. Turner*, 29 Tex. 753, 773.

It is, however, liable to be rebutted by showing an express dissent; a man cannot be forced to accept a conveyance against his will. *Wilt v. Franklin*, 1 Binn. 503, 2 Am. Dec. 474.

The doctrine of presumption of assent is further recognized in *Truss v. Davidson*, 30 Ala. 359, the instrument being free from fraud or illegality, and containing nothing which can be construed prejudicial to the rights of creditors.

And where there is no fraud in fact, such assent, although given after the execution of the deed and even after the levy of attachments, will be presumed, and will relate back to the day of filing the mortgage. *First Nat. Bank of Emporia v. Ridonour*, 46 Kan. 707.

The presumption of assent will not be affected by reason of a preference clause, in favor of creditors assenting within a given time and releasing their claims, the instrument containing a clause for the distribution of all the property *pro rata*. *Hall v. Denison*, 17 Vt. 310.

The assignment, however, must be absolute and unconditional, the assignor neither retaining a power to change the trustee, nor a control of the deed of trust. *Fellows v. Commercial & Railroad Bank of Vicksburg*, 6 Rob. (La.) 246.

The doctrine is thus expressed in *Ex parte Conway*, 4 Ark. 386: Even creditors are presumed to give their assent to the deed, as it is made for their benefit, unless they come in and specially object to it, deeds of trust often being made for the benefit of absent persons, or even of persons not in being; but no expression of assent on the part of such persons is necessary, such a trust being always held to be executed upon the principle that the deed is complete when the trustees take upon themselves its performance, and it is not necessary to the va-

be returned to Eaton, Guinan & Co., and the trust deed be no longer operative. Marshall immediately took possession of the property named in the trust deed, and, two days afterwards, plaintiff in error, also a creditor of Eaton, Guinan & Co., brought an action against them, and sued out a writ of attachment, which was levied on the property covered by the trust deed. Marshall, and the

creditors Eaton, Guinan & Co. intended to secure by the deed were also made parties to the action. The finding of the trial court and of the court of civil appeals is understood to be that, at the time the attachment sued out by plaintiff in error was levied, the creditors of Eaton, Guinan & Co. for whose benefit the trust deed was intended had no knowledge of its execution, and had not then, in any man-

lidity of assignments that the creditors should be consulted, as they are always presumed to be willing to receive their debts from any hand that will pay them.

If the conveyance is absolute, vesting the property in the assignee, no express assent of the *cestui que trust* is required while the property remains unchanged. The *cestui que trust*, although the instrument is made without his concurrence, may require and coerce the execution of the trust. *Suydam v. Dequindre*, Harr. Ch. 347.

Neither the presence of the grantee nor his previous authority, or his subsequent express assent to the deed, is necessary to make its delivery valid where there is a previous authority to receive the deed, his assent is presumed, where the deed is beneficial to him, although his dissent may be shown and the deed rendered ineffectual. *Merills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315.

A deed of trust for creditors, executed by the debtor and duly recorded, will prevail against a judgment obtained by a creditor, even though the creditors may not have assented to the trust until after judgment. *Skipwith v. Cunningham*, 8 Leigh. 371, 31 Am. Dec. 642.

The established doctrine of presumed assent, was extended in *Bankin v. Lodor*, 21 Ala. 390, to a deed of trust executed by one of the partners individually, and by the firm in which such partner was interested, in trust for creditors, with the usual powers to the trustees to collect the debtor's property and realize the same, and hold the proceeds after payment of expenses in trust for the creditors *pari passu*, as they executed the deed within a certain number of days from its date, and to pay the residue among those creditors who signed the deed within another given time, and to pay in like manner, all those creditors who might sign the deed within a further specified time, with power to carry on the business as therein specified, the deed containing a clause of release by the creditors; the court holding that the assent of all the creditors was not necessary to the validity of such deed, and gave it full force and effect.

These principles were applied in the following cases:

In *Abercrombie v. Bradford*, 16 Ala. 560, where the deed purported to convey all the property of the grantor, absolutely and unconditionally, for the purpose of paying the debts in the manner prescribed by it, no conditions being prescribed to the creditors, before they were entitled to receive the benefits conferred by the deed.

In *England v. Reynolds*, 38 Ala. 370, wherein it was stated that the creditor's assent was not necessary to uphold such a deed as against attaching creditors.

And in *Hodge v. Wyatt*, 10 Ala. 271, where a deed of trust was executed, the court stating that a deed of that description must not be confounded with a general assignment, for the benefit of all or of particular creditors, in which without an express assent of the creditors, one was implied until the contrary was shown in consequence of the benefit which must result to them from the instrument.

So in *Kinnard v. Thompson*, 12 Ala. 457, no delay was stipulated for by the debtor, the property being absolutely, and under all circumstances, de-
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voted to the payment of the specified creditors, and therefore the court followed the rule adopted in the prior decisions in that state, holding the deed good as against an execution creditor named in it.

Again in *Brown v. Lyon*, 17 Ala. 659, where the creditors were not required to execute the deed, they were the only creditors who were parties.

Where a deed purported to be tripartite, and was signed by one of the beneficiaries, there being nothing which showed that it was to be inoperative, until signed by the other beneficiaries, it was held the case was not distinguishable from that class of cases which held that neither the trustees nor the beneficiaries were required to sign the deed in order to give it effect. *Shearer v. Loftin*, 26 Ala. 703.

In *De Forest v. Bacon*, 1 Conn. 633, where the debtor conveyed his estate to trustees for distribution among certain creditors, with a bona fide intention of preferring them, no dissent having been expressed by the creditors.

Where the debtor assigned a number of notes and accounts in trust for certain creditors with instructions to collect and apply the money *pro rata*, after deducting a compensation, of which assignment the creditors were notified, and none dissented or objected. *Van Winkle v. Iowa Iron & Steel Fence Co.* 56 Iowa, 245.

Where no objection was made to the assignment until the complainant filed a bill within sixteen days after the execution of the deed, it was held that the fact that none of the creditors had then formally accepted its provisions could not be rendered an available objection to the deed which was accepted by the trustee. *Reinhard v. Bank of Kentucky*, 5 B. Mon. 252.

In *Duval v. Baisin*, 7 Mo. 449, where the deed was executed for the benefit of preferred creditors who were made parties, but did not sign the same, and there was no provision requiring them to execute the deed before sharing in the benefits conferred by it the same doctrine was followed.

Where the deed showed an intention to pay all the creditors *pro rata*, without provision for individual creditors and nothing pointing to any distinction, there being no attack upon the deed by the creditors, the deed contravening no principles of law. *Hulse v. Marshall*, 9 Mo. App. 148.

So where the assignment was made to a trustee, a nonresident of the state, the property being held in trust for the benefit of all the creditors. *Spanney v. Portsmouth Hosiery Co.* 25 N. H. 2.

And in *North v. Turner*, 9 Serg. & R. 244, where an objection was raised that there was nothing to show that the assignment in question was accepted or that the beneficiaries ever knew of it, the assignment being for valuable consideration and beneficial. *Smith v. Bank of Washington*, 5 Serg. & R. 315, to the same effect.

Where a voluntary assignment, made to a trustee, authorized and directed the assignee to pay out "the following dues or debts owing from me to the following named persons" mentioning such persons by name with the amounts, and provided that the residue should be divided equally among "his creditors," with the proviso that if any of his creditors should not present their claims and release him within four months, the dividends payable to

ner, assented to it. On trial, judgment was rendered in favor of plaintiff, against Eaton, Guinan & Co., for \$1,674.90, and foreclosing the attachment lien, subject to the rights of creditors for whose benefit the trust deed was intended; and the trustee was directed to satisfy that judgment, as far as possible, out of any funds that may remain in his hands, as the proceeds of said property, after satisfying

the debts and claims secured by said deed of trust, and which are therein named," but costs were given against plaintiff. The trial court and court of civil appeals held that: "It was not necessary that the beneficiaries of the deed of trust should accept thereunder before the levy of plaintiff's attachment, in order to give it effect superior to the attachment lien. The trust was at once accepted by the trustee, and,

them should be paid over to the debtor, the court held that such last condition was only applicable to the creditors therein described as "his creditors" and did not apply to those previously mentioned. *Sadlier v. Fallon*, 4 R. I. 490.

In *Skipwith v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642, the deed was objected to as not binding, because not assented to before the judgment lien attached. It was held that it was not requisite for the *cestui que trust* to execute a deed made for his benefit, the legal estate passing by the execution of the deed by the assignee and assignor, and that nothing short of an express or implied dissent on the part of the beneficiary would avoid such deed.

So where the assignment was for the benefit of preferred creditors unconditionally, without any stipulation for a release or otherwise. *Wheeler v. Sumner*, 4 Mason, 183.

In the case of an assignment in trust for creditors, without release or other condition, the property being distributed equally among the creditors *pro rata*, it was held the assent must be presumed upon the general principles of law, the trust being for their benefit, and that it might be inferred as a presumption of law, until the contrary was shown; and further that if the assent was expressly given within a reasonable time it operated retroactively to confirm the conveyance *ab initio*. *Halsey v. Fairbanks*, 4 Mason, 203.

In *Ashurst v. Martin*, 9 Port. (Ala.) 566, the plaintiff contended that the assignment was fraudulent and void, because it made the preference given to the creditors designated in the schedule, dependent upon the condition that they should execute the same and a release, and discharge the assignor within a given time. The court held, it being contended that the creditors named in such schedule, who did not accept the terms, were excluded from any participation in the benefits of the deed, that the true construction was that by refusing to execute the release, the creditors were merely postponed to the third class mentioned in such deed, and were not precluded from taking advantage under the deed, and the property should not be allowed to revert to the debtor.

In *Hyde v. Olds*, 12 Ohio St. 591, an assignment of property was made to a trustee in contemplation of insolvency, with a design apparent upon its face to prefer certain creditors to the exclusion of others, the instrument being accepted by the trustee and the act of assignment complete, the court held the deed took effect without the assent of the creditors not named therein, as they could not be expected to assent to an assignment according to its terms, but that the assignment being complete the statute would take hold according to its legal effect and the law would assent for them.

In *Baldwin v. Peet*, 23 Tex. 703, 75 Am. Dec. 806, it was held that the assent of creditors to a general assignment would be presumed, so as to give it effect, although they knew nothing of it when it was made.

The same conclusion was reached in *Wallis v. Taylor*, 67 Tex. 431; *Green v. Banks*, 24 Tex. 508.

No person can be made a grantee against his will, but a deed may operate by a presumed assent, until a dissent or disclaimer appears. *Dikes v. Miller*, 24 Tex. 423.

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While the validity of the deed rests upon the presumed fact, it is but fair that the presumption of assent should extend to the whole transaction, otherwise by legal presumption a fraud might be aided in its perpetration. *Green v. Banks*, *supra*.

And also to notice of the facts and circumstances under which it was made, as well as to the terms of the deed. *Ibid*.

Where the only evidence of acceptance was the fact that one of them was present and assisted in the negotiations when the deed was executed, the court held the question a matter of presumption. *Ibid*.

When a conveyance is made to another person, his assent is said to be presumed, because there is a strong intendment of law that it is for his benefit, and that no man can be supposed to be unwilling to do that which is for his advantage, and for the reason that it would seem incongruous and absurd, that when a conveyance is completely executed on the part of the grantor that the estate should remain in him, and thirdly because it is contrary to the policy of the law to permit a freehold to remain in suspense and uncertainty. *Dikes v. Miller*, 24 Tex. 423.

The principal case cannot be said to overrule the principles thus established by the above cases, inasmuch as the instrument in question in that case did not constitute an assignment, either general or special, for the benefit of some or of all of the creditors of its maker, but was in effect only a mortgage, with power to secure the creditors named in it.

The principal case further recognized the validity of general assignments, made in accordance with the Texas statute, under which they are valid without the assent of creditors.

b. Statutory presumption.

Under section 3203 of McClain's Annotated Code of Iowa, ed. 1888, vol. 1, page 851, in the case of an assignment of property for the benefit of all the creditors of the assignor, the assent of the creditors is to be presumed.

By the enactments of New Hampshire of 1861 and 1862, as amending the Laws of 1834, chapter 2488, and chapter 2595 of the Pamphlet Laws, the assent of all the creditors is presumed to all such assignments, when properly made. *Fellows v. Greenleaf*, 43 N. H. 421.

Under the statute of that state the deed need not provide that the creditors should become parties by executing it, and, if no conditions are annexed the assignment is for the benefit of the creditors, and their assent will be presumed until the contrary is shown. *Hurd v. Silsby*, 10 N. H. 106; *Johnson v. Farley*, 45 N. H. 506; to the same effect *Fellows v. Greenleaf*, *supra*, the instrument being proper in all respects and according to the statute, the trust being properly and unconditionally accepted.

The statute referred to in the above case is chapter 184 of the Revised Statutes of New Hampshire, Compiled Statutes 297, which contained no provision in regard to the assent of the creditors. *Fellows v. Greenleaf*, *supra*.

The statute seizes upon it and diverts its provisions into an equitable channel, inuring for the benefit of all creditors in proportion to their re-

in the absence of repudiation by the beneficiaries, his acceptance would inure to their benefit." Other questions were raised on appeal, and are presented in application for writ of error, but the view taken of that presented by the ruling above shown renders consideration of them unnecessary.

The instrument in question did not constitute an assignment, either general or special,

for the benefit of some or all of the creditors of its makers, but was, in effect, only a mortgage, with power to sell to secure creditors named in it; and if all creditors named in it assented to it, at the time of its execution, no other effect could be given to it. A general assignment made in accordance with the statute in force in this state regulating such assignments is valid without the assent of

spective demands under the Ohio Statute of March 14, 1853. *Hyde v. Olds*, 12 Ohio St. 391.

Section 8174 of Hill's Annotated Laws of Oregon, vol. 2, ed. of 1887, page 1409, provides that in case of an assignment for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed.

By article 65e of title 73, Sayles' Texas Civil Statutes, vol. 1, page 68, creditors consenting to an assignment are to make known their consent in writing within four months after the publication of the notice, and the creditor, not assenting, can receive no benefit under the assignment, but it is provided that a creditor who has no actual notice may communicate his assent at any time before distribution of the assets, and the receipt by a creditor of any portion of his claim is conclusive evidence of his assent.

In *Sanborn v. Norton*, 59 Tex. 308, it was held that the act did not make consent of any other character invalid, nor prevent the assignee from entering the name and claim of creditors not consenting in writing among those who are to reap the benefits of the assignments, the act stating that creditors not assenting shall not receive the benefits but does not positively shut out those who give their consent otherwise than in writing.

The above provision has for its object the enabling of the assignee to ascertain within a definite period the number of creditors accepting, and the furnishing of such indisputable evidence of consent, and also to place it in the power of the creditor to share in the benefits of the assignment. *Sanborn v. Norton*, *supra*.

In the above case it was further held that the section contemplated that the assignee might proceed as if such creditor were ranked among the accepting creditors, inasmuch as if the assignee paid him a dividend, it was conclusive evidence. *Ibid*.

Under the Revised Statutes of Wyoming, ed. of 1897, title 2, chapter 2, section 93, an assignment for the benefit of creditors is void against any creditor of the assignor, not assenting thereto, in cases of preference, coercion to release, or compromise, false or fraudulent claim, reservation or interest to the debtor, or other matters therein specified.

III. Extent of presumption.

Although a deed be made for a party's benefit, his assent will be presumed, still such presumption is not absolute or conclusive, the law not forcing a party into a contract against his will; he must make his election. *Valentine v. Decker*, 43 Mo. 583.

When its validity rests upon a presumed fact, it is but fair that the presumption of assent should extend to the whole transaction, otherwise by legal presumption a fraud might be aided by its perpetration. *Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806; *Green v. Banks*, 24 Tex. 508.

It should extend to notice of the facts and circumstances under which it was made as well as to the terms of the deed. *Green v. Banks*, *supra*.

The presumption that a party will accept a deed because it is beneficial to him, it is said, will never
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be carried so far as to consider him as having accepted it. *Com. v. Jackson*, 10 Bush. 429; *Tuttle v. Turner*, 26 Tex. 778; *Bell v. Farmers' Bank of Kentucky*, 11 Bush. 84.

The doctrine of presumed assent and acceptance of a trust, made for the benefit of creditors, is not sufficient where there is a contest as to the privity of liens. *Mills v. Haines*, 8 Head. 332.

Where, under an assignment for the benefit of creditors, the latter took no action for eight years when the trust was revoked, after which the creditors took no action for nearly three years, it was held there was no presumption of assent. *Gibson v. Rees*, 50 Ill. 333.

In *Tennant v. Stoney*, 1 Rich. Eq. 222, 44 Am. Dec. 213, it was held that it was not necessary for the creditors, intended to be secured by the deed of trust, to be made parties to or to assent to the execution of the instrument, and that such creditors, so long as they have done no act inconsistent with the deed, might accept of its conditions.

IV. Rebuttal of presumption.

a. In general.

The assent of creditors to an assignment in trust for their benefit is presumed, where the interest would dictate such assent, but this presumption is repelled whenever the conditions imposed by the debtor are not beneficial, or he is delayed in the collection of his debt, his security is impaired, or he is required to do or omit anything whatever. *Mauldin v. Armistead*, 14 Ala. 702; *Elmes v. Sutherland*, 7 Ala. 262; *Abercrombie v. Bradford*, 16 Ala. 560.

There can be no presumption of assent where the assignment contains stipulations prejudicial to the creditors. *Spinney v. Portsmouth Hosiery Co.*, 25 N. H. 9.

In the case of a fraudulent intent unknown to the trustee, the assent of the creditors will not be presumed. *Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806; *Townsend v. Harwell*, 18 Ala. 301.

No assent ought to be presumed to an assignment which, in effect, gives license to the assignee to suffer the property to be wasted by neglect. *Spinney v. Portsmouth Hosiery Co.*, *supra*; *Monell v. Monell*, 5 Johns. Ch. 233, 1 L. ed. 1084.

Nor where the trustee is grossly disqualified by his character or situation from properly discharging the trust. *Spinney v. Portsmouth Hosiery Co.*, *supra*.

There may be a repudiation or rejection of the deed, which may be by some unequivocal act which will operate as an estoppel against further claims under the deed. *Farquharson v. McDonald*, 2 Henk. 404.

Where the assent of the creditors is not to be presumed, the principals established in *Leeds v. Sayward*, 6 N. H. 85, must be applied and a dissenting creditor will be entitled to recover by the trustee process, any surplus remaining after the debts of the assenting creditors have been discharged.

In *Todd v. Bucknam*, 11 Me. 41, the deed contained a provision that every creditor coming in under it, should give six months credit for the balance of his demand, after deducting the amount received out of the trust fund, calculating

creditors, but this is by force of the statute. Such was the ruling in *Shattuck v. Freeman*, 1 Met. 13, and of the correctness of that ruling there can be no doubt. There are decisions, on assignments not made under the statute, holding that the assent of creditors to a general assignment, for the equal benefit of all creditors, which does not require releases, or necessarily delay any of the

creditors for an unreasonable time, will be presumed, unless the contrary be shown; and decisions may be found holding that the same presumption will be indulged when the assignment is for the benefit of a part, only, of the assignor's creditors. Such decisions, however, cannot be looked to as authority for the proposition that assent of creditors is not necessary; for they carry the implication that it is, and

the six months from the time when the trustee should have executed the trust, under the penalty of forfeiting such balance, by instituting process for recovery in the time, the court held that such terms were so manifestly in dereliction of the creditor's rights, as not to justify the presumption of assent.

The presumption is not sufficient in the case of a contest between creditors. *Mills v. Haines*, 8 Head, 533.

b. Conditions imposing a release.

An assignment is presumed to be accepted by the preferred creditors as for their benefit, and will be supported by the consideration of their debts to the extent of the same, unless by its terms it obliges them, in order to take any benefit under it, to release the assignor. *Sadlier v. Fallon*, 4 R. I. 490.

In such cases the presumption of assent does not arise for the reason that a question of discretion is involved. *McCain v. Pickens*, 33 Ark. 399, 405.

In *Miller v. Conklin*, 17 Ga. 430, 68 Am. Dec. 245, where the deed was for the use and benefit of such creditors, as should file their claims with the assignee and release the debtor within ninety days, the assignment was held invalid as against non-assenting creditors.

So in *McBride v. Bohanan*, 50 Ga. 527, where the deed stipulated for a benefit to the assignor by way of extinguishment of the debts, it was held that if the creditors consented they would be bound thereby, but their assent must be shown, otherwise they would not be bound.

And in *Swearingen v. Slicer*, 5 Mo. 241, where the conditions imposed a release, the court held that the assent could not be presumed, and that such a deed was of no effect until executed by the creditors.

The same principles were upheld in *Drake v. Rogers*, 6 Mo. 317, where the deed contained a similar provision.

An assent cannot be presumed where a condition is affixed to a deed (*Hurd v. Silsby*, 10 N. H. 108), where the deed provided a distribution to be made among those who would become parties and release their demands, the statute under which the assignment was made providing that no conditions should be annexed.

If the creditors are to have the benefit of the assignment, only upon condition that they discharge their debt, their assent may not be presumed, as it would involve a question of discretion upon which they might differ in opinion. *Hall v. Denison*, 17 Vt. 310.

In such cases the same presumption of assent does not arise, a question of discretion being involved, and therefore in such cases there must be an express assent. *Haley v. Fairbanks*, 4 Mason, 208.

Where the terms of the assignment called for a release, it was held that until their assent was given to the condition, in the mode, and within the time pointed out by the assignment, that the assigned property was liable to attachment by foreign process in the hands of the assignor. *Sadlier v. Fallon*, 4 R. I. 490.

So where a release is required within a certain time, as a condition of receiving the benefit of the

trust, the reason for presuming acceptance does not exist. *Smith v. Millett*, 11 R. I. 523.

Where the deed conveyed the debtor's property in trust for the benefit of such of his creditors as should within a specified time release him from all further claims, with a provision for the payment of the balance to the debtor, it was held valid. *Phippen v. Durham*, 8 Gratt. 457.

c. Other conditions.

Assent will not be presumed, where the deed contains conditions unfavorable to the creditors, and the deed will be void and the trustee will hold the property as against other creditors, whether assenting or dissenting. *Fellows v. Greenleaf*, 43 N. H. 421.

In *Williams v. Gartrell*, 4 G. Greene, 287, where the assignment was a conditional one, it was held that the code did not apply, and that the assent of the creditors could not be presumed.

Where the assignment in trust imposed a condition upon the trustee, making him responsible only for the actual moneys coming to his hands, and for his willful defaults, it was held that there could be no presumed assent, it not being proved that any of them assented. *Brown v. Warren*, 43 N. H. 330.

So where the deed contained a clause, changing the point of time at which the liability of the trustee should commence, and relieving him from the duty of distributing the property, and also exempted him from the use of diligence, thus opening the door for fraud, it was held that it could not therefore be presumed that the creditors assented thereto. *Spinney v. Portsmouth Hosiery Co.*, 25 N. H. 9.

Where an agreement was entered into in consideration of a promise and agreement by the debtor by which the creditors promised to give time for the payment of their debts until a trustee disposed of the property and applied the proceeds, with a condition that the debtor shall perform his part of the agreement, and the creditors named in the schedule execute the contract, and providing that the total demands of the creditors should not exceed a given sum, such agreement being signed by the plaintiff, and by the other creditors excepting one who refused to sign, it was held the agreement was binding when executed. *Towne v. Rublee*, 51 Vt. 62.

To an assignment conditional that the assignees should render an account to a major part of the creditors, who should sanction the assignment before it took effect, their assent is necessary to give it effect. *Lawrence v. Davis*, 3 McLean, 177.

Where a bank being in embarrassed circumstances, assigned to trustees with authority to sell, collect debts, and complete a certain railroad with power to borrow money for that purpose, and allow claims against the bank, the proceeds to be applied in payment of principle and interest upon the loan, the dividends were to be divided *pro rata* among the creditors who had filed claims after the completion of the road, the deed was held void as to creditors not assenting thereto by filing their claims. *Bodley v. Goodrich*, 48 U. S. 7 How. 276, 12 L. ed. 699.

So where the assignment prohibited the participation of certain creditors, unless they consented to take their share of the surplus, after paying certain preferred creditors, and discharged the debtor

indulge the presumption of assent, on the theory that men will ordinarily assent to such acts as are beneficial to them, but indulge it only in absence of proof to the contrary. In *Halsey v. Fairbanks*, 4 Mason, 215, Fed. Cas. No. 5,964, it appears to have been held that express assent of the creditor would operate "retroactively to confirm the conveyance *ab initio*," whereby the right of an intervening attach-

ment creditor would be defeated, while other decisions hold to the contrary. The English rule in reference to such assignments is thus stated: "If a debtor convey property in trust for creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the conveyance operates only as a power to the trustee, which is revocable by the debtor, and is the

no matter whether their debts were paid or not, it was held void as against creditors not assenting thereto. *Wakeman v. Grover*, 4 Paige 23, 3 L. ed. 325.

d. *Assignments hindering, delaying, or defrauding creditors.*

In *Townsend v. Harwell*, 18 Ala. 303, the above doctrine of presumed assent was held not to apply in the case of a deed of conveyance, made for the purpose of delaying, hindering, or defrauding creditors, such a deed being clearly and utterly void.

To such a deed there must be an actual assent on the part of the beneficiaries, otherwise the levy of an execution subsequent to the date of the assignment will prevail. *Benning v. Nelson*, 23 Ala. 301; *First Nat. Bank of Emporia v. Ridenour*, 46 Kan. 707.

And until such actual assent is shown, any creditor may levy or attach and hold in defiance of the deed. *First Nat. Bank of Emporia v. Ridenour*, *supra*.

The law will not imply the assent of the beneficiaries to such a deed. *Ashley v. Robinson*, 29 Ala. 112.

It matters not however much it may really be for the creditor's benefit, as it would put it in the power of the grantor to make valid his own fraudulent deed. *First Nat. Bank of Emporia v. Ridenour*, *supra*.

Such a deed is but a power which is revoked by the bankruptcy of the assignor. *Ashley v. Robinson*, *supra*.

If the assent of a beneficiary to a fraudulent assignment could be presumed, the rule which makes the participation in the fraud of the beneficiary necessary to vitiate an assignment would preclude the possibility of successfully assailing it for fraud, where it has been made without the knowledge of the beneficiaries, and in their absence. *Ibid*.

To an assignment in trust made with a fraudulent intent unknown to the trustee, the assent of the creditors will not be presumed. *Green v. Banks*, 24 Tex. 508.

An assignment which reserves the surplus to the debtor is constructively fraudulent, and will not be upheld against an attaching non-assenting creditor. *McReynolds v. Dedman*, 47 Ark. 348.

a. *Assignment direct to creditors.*

When the assignment is made to a trustee, the title of the estate passes to him and the assent of the creditors will be presumed, when the assignment is made without condition, it being for their benefit; otherwise when the assignment is made directly to creditors when their assent is necessary. *Smith v. Millett*, 11 R. I. 523.

The creditor's assent must be given at the time of the assignment, upon the principle that it requires two parties to make a contract. *Jones v. Dougherty*, 10 Ga. 278.

Their assent is necessary to give validity in law to the deed. *Nicoll v. Mumford*, 4 Johns. Ch. 522, 1 L. ed. 323.

There must be two parties to the transaction, and however absolute the form of the assignment may be, until it is accepted it does not pass the property. *Webster v. Harkness*, 3 Mackey, 220, 24 L. R. A.

If the assignment is made immediately by the debtor to his creditor, with the manifest intention of both parties that the control of the debtor over the fund shall pass from him immediately, the assent of the creditor is necessary to perfect it. *Ibid*.

V. *Express assent.*

It is considered a settled law that where a deed of trust is executed for the security of creditors, and provides that the creditor shall do or omit anything whatever, the deed is revocable until the creditor assents to it. *Lockwood v. Nelson*, 16 Ala. 234; *Elmes v. Sutherland*, 7 Ala. 232; *Abercrombie v. Bradford*, 16 Ala. 590; *Graham v. Lockhart*, 3 Ala. 9; *Evans v. Lamar*, 21 Ala. 333; *Lehman v. Tallahassee Mfg. Co.* 64 Ala. 597; *Ashley v. Robinson*, 29 Ala. 112; *Lockhart v. Wyatt*, 10 Ala. 231, 44 Am. Dec. 431; *Shearer v. Loftin*, 26 Ala. 703; *Rankin v. Lodor*, 21 Ala. 330; *Townsend v. Harwell*, 18 Ala. 303; *Benning v. Nelson*, 23 Ala. 301; *McReynolds v. Dedman*, 47 Ark. 348; *McCain v. Pickens*, 33 Ark. 399; *Naylor v. Foodick*, 4 Day, 144, 4 Am. Dec. 137; *Camp v. Mayer*, 47 Ga. 414; *Jones v. Dougherty*, 10 Ga. 278; *McBride v. Bohanan*, 50 Ga. 527; *Miller v. Conklin*, 17 Ga. 430, 63 Am. Dec. 243; *Williams v. Gartrell*, 4 G. Greene, 237; *First Nat. Bank of Emporia v. Ridenour*, 46 Kan. 707; *Oxnard v. Blake*, 45 Me. 603; *Aberie v. Schlichenmeier*, 51 Minn. 1; *Luehrmann v. St. Louis Furniture Co.* 21 Mo. App. 499; *Swearingen v. Slioor*, 5 Mo. 241; *Drake v. Rogers*, 6 Mo. 317; *Leeds v. Bayward*, 6 N. H. 33; *Derry Bank v. Davis*, 44 N. H. 543; *Fellows v. Greenleaf*, 43 N. H. 421; *Brown v. Warren*, Id. 430; *Hurd v. Silsby*, 10 N. H. 103; *Spinney v. Portsmouth Hosiery Co.* 25 N. H. 9; *Nicoll v. Mumford*, 4 Johns. Ch. 522, 1 L. ed. 323; *Jackson v. Bodie*, 20 Johns. 134; *Smith v. Millett*, 11 R. I. 523; *Sadlier v. Fallon*, 4 R. I. 490; *Mills v. Haines*, 3 Head, 332; *McEwen v. Bamberger*, 3 Lea, 573, 553; *Dews v. Olwill*, 3 Bart. 432; *Sharp v. Fly*, 9 Bart. 4; *Green v. Banks*, 24 Tex. 508; *Towne v. Rublee*, 51 Vt. 63; *Phippen v. Durham*, 3 Gratt. 457; *Bodley v. Goodrich*, 43 U. S. 7 How. 273, 12 L. ed. 699; *United States v. Hoyt*, 1 Blatchf. 332, 334; *Webster v. Harkness*, 3 Mackey, 220; *Lawrence v. Davis*, 3 McLean, 177.

Where a man seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them, all the creditors must assent to give any validity to the deed, because that is the manifest intention of the grantor. *Rankin v. Lodor*, 21 Ala. 330; *Elmes v. Sutherland*, 7 Ala. 232.

A deed postponing a creditor in the collection of his debt, beyond the time of its maturity, is not valid as a conveyance until it is assented to by the creditor. *Evans v. Lamar*, 21 Ala. 333.

Until that time it is a mere power which may be revoked by the levy of an execution by the creditor, upon the property conveyed. *Ibid*.

In such a case the assent of the creditor will not be presumed. *Ibid*.

Where the assignment is voidable at the election of the creditors, it is competent to waive their objections and consent to allow the assignee to execute the trust. *Aberie v. Schlichenmeier*, 51 Minn.

Where the grant is not absolute, the presumption is not so strong that the grantee accepts the

same as if he had given money to an agent to pay his creditors to whom no communication had been made. The deed, therefore, . . . until third persons had agreed or assented to it, or at least had it communicated to them (if, indeed, that would be sufficient), was a mere revocable transfer." *Smith v. Keating*, 6 C. B. 158.

The same rule is applied in Massachusetts to

assignments for the benefit of creditors, which are not made in pursuance of statute; and, until the assent of the creditors be given in some manner, it is held that property in the hands of an assignee is subject to attachment by creditors of the assignor. *Fall River Iron Works v. Oroade*, 15 Pick. 15; *Russell v. Woodward*, 10 Pick. 408; *May v. Wannemacher*, 111 Mass. 207; *Swan v. Crafts*, 124 Mass. 458;

deed where he derives no benefit under it, but is subjected to a duty or the performance of a mere trust. *Jackson v. Bodle*, 20 Johns. 184.

So where the assignment, by its terms, contemplated the signature of all creditors, it was held that it was of no effect until so signed. *Camp v. Mayer*, 47 Ga. 414.

In such a case if one refuses to sign, the assignment fails to bind any. *Ibid*.

And where, by the peculiar provisions of the deed, nothing short of an express assent of a majority in interest of the parties provided for could render the deed available, it was held that assent was necessary. *Shearer v. Loftin*, 26 Ala. 708.

In the above case, the trustees had no power to execute the trust by a sale of the property, until directed to do so by a certain majority, or by all of the beneficiaries. *Ibid*.

Where the assignment was not in accordance with the provisions of the New Hampshire statute, it was held that the assent of the creditors could not be presumed. *Derry Bank v. Davis*, 44 N. H. 548.

A creditor may, however, bind himself by his assent to an assignment which is not within the provisions of the statute. *Ibid*.

Until after the creditors have accepted, by taking or claiming a benefit under the assignment, or by some distinct act manifesting an intention to do so, no lien or absolute property can be held to exist in their favor. *Mills v. Haines*, 3 Head. 332.

A failure to aver acceptance in a contest with unsecured creditors, after the lapse of two years from the execution of the assignment, has been held sufficient to let in the unsecured creditors, who had in the interim acquired liens by attachment. *McEwen v. Ramberger*, 3 Lea, 576, 588; *Dews v. Olwill*, 3 Bart. 432.

In *Lockhart v. Wyatt*, 10 Ala. 231, 44 Am. Dec. 451, the assignment was in trust for creditors designated in the deed, with the proviso to allow the use of the property for eventual security for a certain time, when the profits were to be applied to pay specified debts. It was held that the assent of the named beneficiaries was requisite to make the deed valid as a conveyance.

Where the deed devoted the property conveyed unequivocally to the payment of three existing specified debts, without any postponement or delay in its appropriation, through the agency of trustees to the payments of the debts, it was held a voluntary assignment, discriminating in the order of payment among the creditors, executed by the grantor and the trustees, and to be regarded as a mere power not effectual as a conveyance of title, until assented to either expressly or by implication, on the part of the beneficiaries. *Ashley v. Robinson*, 29 Ala. 112.

Where the assignment declared and recited that the creditors assented to it, it was held that on its face and in its legal operation it was no more than an act of the assignor, who could not, by a mere declaration or recital, conclude others who did not assent, it being no more than a mere narrative by the assignor which affected him only. *Lehman v. Tallamsee Mfg. Co.* 64 Ala. 567.

In *Naylor v. Fiedick*, 4 Day, 148, 4 Am. Dec. 187, the question was whether a debtor in failing cir-

cumstances could assign his estate to a trustee for the benefit of creditors, with the assent of part of them, expressed either prior or subsequent to the assignment, which should be valid against creditors dissenting, so that such dissenting creditors could not take the estate by legal process to satisfy the debts. Several of the creditors named in the schedule had no knowledge of the assignment at the time, but they did not afterwards dissent, it was held that such assignment was void as against a dissenting creditor issuing an attachment.

In *Ornard v. Blake*, 45 Me. 802, it was held that a mortgage made by a debtor, for the purpose of securing his creditors without their knowledge, was inoperative until approved or assented to by the creditors, even though recorded.

Where a bill was brought to set aside an assignment for the benefit of certain creditors giving a preference, and it was contended that it was not accepted, it was held that in making such assignment the assent of at least two persons was necessary; that a debtor could not change his relation to his creditors by a voluntary assignment of his property to them, and that such an assignment not accepted, and without change of property, left a legal redress of the creditors the same as before the assignment. *Lawrence v. Davis* 3 McLean, 177.

Where the conveyance was made to trustees, the creditors not being parties or privies, as an indemnity to the sureties upon an official bond, it was held revocable by the assignor, with the consent of the trustees until notice of it had been communicated to the creditors, and they had affirmed it, for the reason that where a person without the privity of his creditors, and without consideration, disposes of his property as between himself and the trustees for the payment of his debts, he merely directs the mode in which his own property shall be applied for his own benefit, the creditors being only parties for the purpose of showing how the property is to be applied. *United States v. Hoyt*, 1 Blatchf. 233, 234.

Where a settlement was made by a corporation with creditors, at a sum not exceeding fifty per cent of their respective claims, and an arrangement was made without the knowledge of the debtor for a settlement with part of the creditors on the basis of more than fifty per cent, it was held that such settlement avoided the deed as to all non-consenting creditors, even though the corporation had no knowledge and did not consent to the arrangement. *Luehrmann v. St. Louis Furniture Co.* 21 Mo. App. 489.

A composition agreement is rendered void as to non-consenting creditors, by a secured preference given to any creditor, even without the debtor's knowledge. *Ibid*.

In *Robinson v. Rapelye*, 3 Stew. (Ala.) 83, a deed was executed without the knowledge or consent of even the preferred creditors, their number and the amount of their demands being wholly unspecified, and it was held that although the debtor had a right to prefer a particular creditor or class of creditors, yet the mode in which the right was attempted to be exercised must be unexceptional, and with the knowledge and consent of the creditor intended to be preferred.

In *Green v. Demoss*, 10 Humph. 371, where the

Pierce v. O'Brien, 129 Mass. 814, 37 Am. Rep. 360. These decisions were made before the enactment of a statute regulating general assignments in that state, or since its repeal, as will be seen from the opinions, which all hold that the assent of the creditor is necessary to their validity, and that this will not be presumed. There are other decisions holding that assent of creditors is necessary, and will not be pre-

sumed when assignment is made directly to them, and still others which hold that assent of creditors is not necessary, even though the assignment be to a trustee for their benefit.

We have no intention, in this case, to consider the different holdings, or to announce a rule applicable to questions here suggested, and growing out of assignments to trustees for benefit of creditors not made under statute; but, as

vendor claimed a lien upon property for unpaid purchase money, it was said that it was difficult to state precisely what was sufficient on the part of the creditor, to make them parties, or to make them lien creditors by virtue of the assignment, and that the mere legal presumption of acceptance, because of a benefit to themselves, was not sufficient; that there must be an affirmative act, clearly expressive of their assent and intention to claim the benefits of the deed.

In *Elmes v. Sutherland*, 7 Ala. 262, the conveyance was made to a trustee for the purposes of securing debts past due, and others running to maturity, a date subsequent to the maturity of the latest debt being named for payment, with a proviso for the debtor to continue in possession and use the property, the profits to be applied in payment of the debts, and the court held that such deed passed no title to the trustee without the assent of the creditors, and only operated as the conveyance of a power.

In *Graham v. Lockhart*, 8 Ala. 1, it was held that a deed, stipulating that the debtor might continue in possession, was good if assented to by the creditors, but could not prevent non-assenting creditors from proceeding to sale of the property remaining in the debtor. Only such creditors as actually assented to such a deed are bound thereby.

Where the deed preferred creditors coming in within a certain number of days, it was held not binding upon non-assenting attaching creditors who were entitled to the surplus. *Leeds v. Sayward*, 6 N. H. 83.

VI. Sufficiency of assent.

The assent may be given in two ways; one by claiming the benefit of the deed of assignment, and when it is shown that the assignment is for the benefit of the creditors, and there is a competent grantee and trustee. *United States v. Bank of United States*, 8 Rob. (La.) 262, 412.

An assignment for the benefit of preferred creditors is valid even though their assent is not given at the time, provided they subsequently assent in terms, or by receiving the benefit conferred thereby. *Brooks v. Marbury*, 24 U. S. 11 Wheat. 78, 6 L. ed. 423.

So they may make themselves parties by filing a bill, and by claiming or receiving a benefit under it. *Sharp v. Fly*, 9 Baxt. 4; *United States v. Hoyt*, 1 Blatchf. 332, 334; *Breedlove v. Stump*, 3 Yerg. 237.

By so doing he waives his right to deny its validity, and elects to surrender any lien he has upon the property and to look to the proceeds of sale instead. *Horsely v. Chew*, 65 Md. 556; *Lanahan v. Latrobe*, 7 Md. 268. *Farmers Bank of Maryland v. Thomas*, 37 Md. 258, 46 Md. 43, to the same effect.

Creditors may become parties in other ways than by actually signing the instrument, as by coming in under it for the purpose of obtaining a dividend. *Wallace v. Cumming*, 27 La. Ann. 631.

If the assignment is made without the knowledge of the creditors, they may affirm it when it comes to their knowledge, and will be presumed to do so in the absence of proof to the contrary. *Brevard v. Neely*, 2 Speed, 164.

In *Valentine v. Decker*, 43 Mo. 583, where the assignment was in trust for creditors, it was held 24 L. R. A.

that it was not necessary that an express assent should be given on the part of the creditors to enable them to take under it.

An instrument, such as a deed of assignment, may become operative as a conveyance in favor of any or more of the creditors, who may assent to it, and the assent of all of the beneficiaries is not necessary to make it operative as a conveyance. *Ashley v. Robinson*, 29 Ala. 112.

But a deed assented to by some of the creditors verbally, was held void as against attaching creditors, where the trustee only gave his note as security. *Quincy v. Hall*, 1 Pick. 357, 11 Am. Dec. 198.

The assent of one creditor vests the whole legal title in the trustee, and such a deed is good as against attaching creditors. *Rankin v. Lodor*, 21 Ala. 8-9.

Where the claim was verified and filed within the required time, without objections by the assignee, it appearing from the record that the claim still remained with him, although it had been on the file fifteen months, and had been ranked among other claims upon which dividends were to be paid, the court held that all the circumstances put it beyond the power of the creditor, to recall his previous action and take advantage of the want of a preliminary step on his part, which it was his duty to take, but which had been waived by the other party, and that there was sufficient evidence of acceptance. *Sanborn v. Norton*, 59 Tex. 308.

In *Windham v. Patty*, 62 Tex. 490, the deed contemplated three parties, the maker, the assignee and parties of the third part who were described as "the several persons, creditors of the parties of the first part, who have executed, or shall hereafter execute or accede to these presents," the closing sentence of the deed being as follows: "And the parties of the third part, by their signatures hereto, express their consent to this arrangement, and accept the provisions for them made herein." The deed had no signatures except those of the maker and the assignee, and there was no record evidence of the creditors having signified their acceptance, and the court held that the creditors would not be limited to the method of expressing their assent which was suggested by the deed.

Where the plaintiff sued the debtor who had previously called his creditors together, and with their assent assigned his property to a trustee upon a note and account, the estate having been distributed *pro rata* among the creditors, but such assignment was not signed by the plaintiffs, the court held that the plaintiffs being informed of the terms and conditions of the deed and accepting their *pro rata* without reservation, thereby made themselves parties to the agreement. *Wallace v. Cumming*, 27 La. Ann. 631.

Where the assignment contained no provision that the creditors should assent or sign, before the property passed into the assignee's hands, and was not properly a tripartite deed, but simply between the debtor and the assignee, properly made and sworn to under the New Hampshire statute without conditions attached, and was for the benefit of all the creditors, and the assignee accepted the

it has been sometimes thought that they bear a close analogy to mortgages with power of sale, it may not be improper to ascertain on what ground rests the proposition that assent of creditors is not necessary to give validity to an assignment to a trustee for their benefit, even as against attaching creditors. The cases which hold that a creditor will be presumed to assent to such an assignment as is manifestly

for his benefit only assert a rule of evidence, for they leave the presumption open to rebuttal, and thus concede necessity for contract between the assignor and creditor. The decisions which hold assent of the creditor essential, and refuse to presume it, establish a different rule of evidence; but they also emphasize the necessity for contract between assignor and creditor, as do those decisions which hold as-

trust which was unconditional and unexceptional, it was held that the sentence at the end of the deed, "the creditors whose names are subscribed, agree to said assignment," were mere surplusage and superfluous and not prejudicial to the rights of the creditors who knew nothing of any formal assent being necessary and that the assignment was valid. *Fellows v. Greenleaf*, 48 N. H. 421.

Where the debtor made an assignment in trust, the deed being acknowledged and registered, the trust being accepted two days thereafter, and the deed was attacked as fraudulent by a creditor claiming a prior lien and alleging no acceptance of the benefits by the creditors, it was held that the acceptance of the trustee before the commencement of the suit operated in favor of the secured creditors, who claimed the benefit within a reasonable time, and that the presumption of acceptance would be equally efficacious against third persons, if supplemented by an actual acceptance within a reasonable time, or even without a formal acceptance in the absence of a possible repudiation of the instrument. *Nailer v. Young*, 7 Lea, 736.

VII. Time of assent.

In *Brooks v. Marbury*, 24 U. S. 11 Wheat. 78, 6 L. ed. 422, an assignment for the benefit of preferred creditors was held valid, their assent not being given at the time of the execution, provided they subsequently assent in terms, or by receiving the benefits thereunder.

If the assignment is made for the benefit of those who within a given time signify their assent, the share of any creditor will not be liable to attachment as the property of the assignor before the assent is given, as in such a case the assent when given will be retroactive. *Smith v. Millett*, 11 R. I. 528.

In *McFerran v. Davis*, 70 Ga. 661, there was no provision in the deed that it was to take effect when the creditors accepted its terms, and it was stated that a general assignment, bona fide made by a debtor, and assented to by the assignee was a valid conveyance founded upon a valuable consideration, and good against creditors proceeding adversely to it unless all the creditors for whose benefit it was made, repudiated it, and that where the creditors are not required to be made parties to the deed, they may take the benefit by notice to the trustee within the time named within the deed, or if none be named, within a reasonable time before the distribution of the property.

Unless the creditor disclaims the benefits conferred thereby within a reasonable time after the deed came to his knowledge, the deed is valid. *Major v. Hill*, 18 Mo. 247.

Even as against third parties, upon acceptance within a reasonable time. *McEwen v. Bamberger*, 3 Lea, 576, 583.

Where the assignment was made in trust for the payment of preferred creditors, with a proviso for the distribution of the balance of the estate among such creditors, as should assent within one year, and for the release of the debtor, a creditor who had no notice until after the expiration of such period, and applied as soon as he was acquainted of the assignment, was held to have an equitable right, he having assented as soon as he had notice. 24 L. R. A.

De Caters v. De Chaumont, 2 Paige, 490, 3 L. ed. 1001.

In *Smith v. Millett*, 11 R. I. 528, it was held that an assignor had no power to revoke an assignment for the benefit of creditors, giving a certain time within which the creditors were to accept, before such time had expired.

In *Owen v. Ramadell*, 38 Ohio St. 490, decided under the 6th section of the Act, regulating the mode of administering assignments in trust for creditors, which required a creditor to present his claim to the assignee within a specified time after notice of the assignment, it was held that such provision was no bar to the creditor's claim presented after the period had expired, and that he had a right to come in at any time before the trust was wound up, so long as the trustee had funds in hand.

In *Coe v. Hutton*, 1 Serg. & R. 308, where a release was executed three months after the date of the assignment, which was executed in trust for creditors who should sign it within such period of three months, it was held such creditor was bound, even though he could take nothing under it.

In *Gale v. Mensing*, 20 Mo. 461, 64 Am. Dec. 197, it was held that the deed of trust for the benefit of creditors was not void as a mere matter of law, by reason of the omission of the creditors to sign it, as they were required to do before they could take the benefits thereof.

Where the benefit of an assignment in trust for creditors was not accepted, or even known to the creditor for two years after its execution and attachment by other creditors, the court held the claim of the creditors thereunder void as against the attaching creditors. *Dewa v. Olwill*, 3 Raxt. 438.

In *Wheeler v. Sumner*, 4 Mason, 193, it was contended that the assignment was void because the preferred creditors were not parties nor assenting to it at the time of its execution. The court held it was not necessary to the validity of the assignment, that the creditors should be technically parties to it, nor that their assent should in any manner be given to it at the time of its execution, that it was sufficient if they assented before the property was attached by other creditors.

Where a deed of assignment was for the benefit of creditors executing the same within a specified period, or such further period as might be allowed by the trustees "in and by writing," which was to be indorsed upon the assignment, it was held that the words "and writing" did not mean only one extension of time. *National Union Bank of Boston v. Copeland*, 141 Mass. 257.

VIII. Effect of assent.

a. In general.

When a debtor voluntarily assigns property for the security and benefit of creditors, if the creditors choose to accept the assignment, they must abide by its terms or provisions; they must take it as an entirety, and cannot take in part or repudiate in part; they must either reject or accept it as a whole. *Hatchett v. Blanton*, 72 Ala. 433.

They must either accept or reject it in toto. *Frierson v. Branch*, 30 Ark. 453.

Creditors who assent and affirm an assignment

sent of the creditors necessary, and refuse to presume it from the fact that a beneficial assignment is made directly to them. Under these classes of decisions, all the essentials of contract must exist between an assignor and a creditor, which involves, not only the agreement of parties, express or to be implied from conduct, but also the existence of sufficient consideration. All these classes of decisions

negative the sufficiency of the assent of the assignee, or even his actual acceptance of the trust, to bind the creditor. If the same rule could be applied to the mortgage in question which, under the decisions referred to, may be applied to assignments for benefit of creditors, then the rule applied by the court of civil appeals and by the trial court cannot be sustained; for both courts hold that assent of

with knowledge of the facts cannot afterwards assail it. *Aberle v. Schlichenmeir*, 51 Minn. 1.

By accepting such a deed the creditors tie their hands, and after an express disclaimer of such a deed, a creditor could not accept it without informing the other creditors in time to enable them to accept within a time specified in the deed. *Phippen v. Durham*, 8 Gratt. 487.

And having elected to stand by the deed, he cannot subsequently contest its provisions on the ground of fraud. *Frierson v. Branch*, 30 Ark. 453.

Unless the deed contemplates the assent of all the creditors intended to be provided for, the assent of a less number will, as it respects themselves, be sufficient to validate it *pro tanto*. *Mauldin v. Armistead*, 14 Ala. 702; *Elmes v. Sutherland*, 7 Ala. 282; *Hodge v. Wyatt*, 10 Ala. 271; *Robinson v. Rapelye*, 2 Stew. (Ala.) 86; *Ashurst v. Martin*, 9 Port. (Ala.) 568.

Where an assignment was made to a trustee for the benefit of the creditors signing the same within a certain time and granting a release, it was held good in favor of creditors accepting within the time, and in the absence of deceit operated as a transfer for their use. *Lippincott v. Barker*, 3 Binn. 174, 4 Am. Dec. 433.

In *Elling v. Kirkpatrick*, 6 Mont. 119, where a preferred creditor consented in writing to the assignment which was made in trust, and subsequently sought to attach the debtor's property, it was held that inasmuch as he did not attack the assignment upon the ground of fraud, and was certain to receive his proportion of the property assigned, which was the whole property of the debtor, which statement such creditor did not question, he was prohibited from applying for and procuring an attachment.

Where the intention was that the deed was to operate as to those who should execute it in its then present condition, and be binding upon them, although it was understood that other creditors named were also to execute it, it was held that the instrument was effectual and operative, and its provisions binding upon such as executed it. *Moore v. Hinnant*, 89 N. C. 455, where the deed authorized the trustee to divide the property *pro rata* "amongst the said subscribing creditors, parties of the third part," the deed only being signed by the assignor and trustee.

Where a deed of assignment to a trustee, for the benefit of all the creditors, was set up against an execution issued by a creditor who had not assented to it, it was held, the deed not being recorded, that it was not binding upon such creditor, even though he might have verbally assented thereto. *Paul v. Logansport Nat. Bank*, 60 Ind. 199.

Where it was objected that the assignment was fraudulent, because the creditors were not originally parties thereto, the court held the contention could not prevail, it being sufficient to uphold the assignment that the creditors assenting thereto before attachment, and that a subsequent assent notified to the assignees, gave the creditors not only an equitable but a legal title to their proportion of the trust deed. *Brown v. Minturn*, 2 Gall. 557.

Upon the question whether or not in point of law such an assent was necessary to uphold the 24 L. R. A.

assignment, supposing it good in other respects, no opinion was given. *Ibid*.

In the case of an express stipulation with the assignee, for a *pro rata* distribution of the estate, the creditor will not be permitted to subsequently dispute the assignment. *Aberle v. Schlichenmeir*, 51 Minn. 1.

Before the creditors have elected to take under the deed, the assignee is rather a trustee for the debtor than for them; when they have accepted the assignment by claiming or taking a benefit under it, he is their trustee and they assume the character of lien creditors. *Sharp v. Fly*, 9 Baxt. 4.

b. After attack.

A party attacking an assignment for fraud and endeavoring to destroy its validity, cannot afterwards come in with other creditors and present his claim for allowance and share equally with the other creditors. *Epiphright v. Kauffman*, 90 Mo. 25.

In *Ewing v. Cook*, 85 Tenn. 332, it was held that the creditors who had resisted an assignment made for their benefit were not entitled to subsequent claim thereunder.

In *Ingram v. Kirkpatrick*, 41 N. C. 462, 51 Am. Dec. 423, it was held that the rules of trustee and *cestui que trust*, were constituted by the execution of a deed of assignment in favor of a creditor assenting at the time, or in a reasonable time afterwards, and that such assent was to be presumed until the contrary was shown.

IX. Effect of assignment.

Deeds of trust are often made for the benefit of persons who are absent, and whether they are for the payment of money or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustees, such trust having always been executed on the idea that the deed was complete when executed by the parties to it. *Brooks v. Marbury*, 24 U. S. 11 Wheat. 73, 6 L. ed. 423.

If the assignment be to trustees for the use of creditors, the legal estate passes and vests in the trustees, and chancery will compel the execution of the trust for the creditors benefit, even though they do not assent at the time and immediately become parties to the conveyance, no expression of assent on the parties of the *cestui que trust* ever having been required as a preliminary to the vesting of the estate in the trustee, and in such cases the assent of the creditors to an assignment will be presumed unless their dissent be expressed. *Houston v. Nowland*, 7 Gill & J. 480; *Nicoll v. Mumford*, 4 Johns. Ch. 522, 1 L. ed. 223; *Wallis v. Beauchamp*, 15 Tex. 306; *Montgomery v. Culton*, 18 Tex. 736, 747.

In *Brown v. Burrell*, 1 Root, 252, a general assignment was held not conclusive against creditors dissenting to it.

The effect of an ordinary transfer of property from one person to another, with an agreement on the part of the one who receives such, as contained in the case of *Wallis v. Beauchamp*, *supra*, was upheld in *McMahan v. Harbert*, 35 Tex. 460, the court approving of the principles therein laid down.

In *Martin v. Funk*, 75 N. Y. 124, 51 Am. Rep. 446.

creditors was not necessary, and that acceptance by the trustee was sufficient to bind creditors, although the beneficiaries named in the mortgage were ignorant of its existence at the time attachment was levied. The American decisions holding that assent of creditors is not necessary to bind them by an assignment made for their benefit, and that the acceptance of the trustee is sufficient, are not numerous, although

many are cited by elementary writers as sustaining that proposition. Among those sometimes cited for that purpose are the following: *Brashear v. West*, 32 U. S. 7 Pet. 613, 8 L. ed. 803; *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 118, 10 L. ed. 909; *Marbury v. Brooks*, 20 U. S. 7 Wheat. 558, 5 L. ed. 523; *Brooks v. Marbury*, 24 U. S. 11 Wheat. 78, 6 L. ed. 428.

But, in view of the facts and questions in-

it was held that notice to the *cestui que trust* of a trust created for his benefit was not necessary, the interest sufficiently passing as between the grantor and the trustee.

The legal estate passing and vesting in the trustee who are compellable, in equity, to execute the trust, even though the creditors be not at the time assenting and parties to the conveyance, their assent not being necessary to legalize and give efficacy to the assignment. *Houston v. Nowland*, 7 Gill & J. 480, 492.

An assignment for creditors once accepted by the assignee, is vested for the benefit of the creditors and a subsequent renunciation will not affect its validity. *Clapp v. Shirk*, 13 Pa. 569.

The doctrine follows from the common-law rule, that it is not necessary to the creation of a trust by deed in favor of any persons, that the *cestui que trust* should either be a party or assent to it. *Valentine v. Decker*, 48 Mo. 583.

Such a deed may be valid, although the creditors have not been consulted beforehand, and will vest the estate in the trustee with or without assent. *Danco v. Beaman*, 11 Gratt. 778, 781.

A deed of assignment is in no sense a contract between the debtor and his creditors, and does not depend for its validity in law upon their assent; such a deed is a means or mode permitted by statute for the distribution of the debtor's estate among his creditors, and if executed without fraud in fact, or in law, and the prescription of the acts complied with, it is effectual, even though opposed by a creditor. *Mills v. Parkhurst*, 128 N. Y. 89.

Where an assignment is fair and valid the legal estate passes to the assignee without any express assent by the creditors, so that neither a subsequent judgment or lien creditor can acquire any interest in the property assigned, neither can he attack the assignment except by fraud. *Valentine v. Decker*, *supra*.

The filing and recording of the deed is necessary in order to pass the property to the trustee under the Indiana laws. *Paul v. Logansport Nat. Bank*, 60 Ind. 199; *Eden v. Everson*, 65 Ind. 118.

It is competent for any one to dissent, but such dissent will not destroy the assignment, and if a dissenting creditor summons the trustee, he can only take such surplus as may remain after paying those who did not dissent. *Spinney v. Portsmouth Hosiery Co.* 25 N. H. 9; *Eppright v. Kauffman*, 90 Mo. 25; *Fellows v. Greenleaf*, 43 N. H. 421; *Sharp v. Fry*, 9 Bart. 4.

It must be affirmed, however, before a revocation is made by the debtor. *Gait v. Dibreil*, 10 Yerg. 184; *Robertson v. Sublett*, 6 Humph. 818; *Wallis v. Beauchamp*, 15 Tex. 308.

If the creditors, for whose benefit the deed of trust is made, are not privy thereto, and its existence has not been made known to them, the deed operates merely as a power to the trustee which may be revoked by the assignor. *Mills v. Haines*, 3 Head, 332; *Isaham v. Bolaware*, L. & W. R. Co. 11 N. J. Eq. 227.

Where a bill in equity was filed for the purpose of compelling a trustee under a deed of assignment of personal estate for distribution among creditors of the assignor, it was held that the creditors had a lien upon the fund in the hands of the 24 L. R. A.

trustee, though not parties to the deed, and were entitled to relief in equity, to compel the performance of the trust. *Weir v. Tannehill*, 2 Yerg. 57.

The creditors, however, do not merely by force of the execution of the deed, acquire a lien, or become vested with any absolute rights, it being at their option either to accept or repudiate the trust, to make themselves parties, or to refuse to do so. *Mills v. Haines*, 3 Head, 333.

The lien, however, of a vendor for unpaid purchase money has been held to prevail against a voluntary assignment in trust, for the benefit of antecedent creditors, the bill being filed before anything had been done in execution of the trust and before it was executed, the court holding that the creditors had, at their election, either to accept or repudiate the assignment. *Brown v. Vanler*, 7 Humph. 236.

In *Hudson v. Eisenmayer Sr., Mill & Elevator Co.*, 79 Tex. 407, it was said that where the property was assigned for the benefit of creditors, it ceased to be the subject of seizure and sale, as it ceased to be the property of the debtor, and that the creditors might then enforce such rights as they might have through the assignment, or in the manner prescribed by the statute.

Where a debtor executed mortgages in favor of his creditors without their knowledge, and delivered them to an attorney for the use of the creditors, and the same were filed and the creditors notified, it was held that an attachment issued by other creditors before notice, and assent by such mortgagees prevailed as against the mortgagees. *Weich v. Sackett*, 12 Wis. 243.

An instrument in these words, "Know all men by these presents: That I [the grantor], bargain, sell, and convey the merchandise in my two houses, situated in . . . to the undersigned parties, to satisfy a part of all or certain claims held by them against me, for the following amounts,"—setting out the names and amounts to the creditors, the instrument being signed by the debtor but not by the creditors, was held not to exist, as against attaching creditors even though the creditors assented thereto. *Wallis v. Taylor*, 67 Tex. 431.

In the above case it did not appear that there was any prior undertaking, that a mortgage should be executed until after the attachment was levied, and there was no rule of law by which a subsequent assent could fix a lien on the attached property, which would override the lien on the attaching creditor, but that if there had been an undertaking between the debtor and his creditors, that a mortgage should be executed, it was held that the delivery of the instrument to the clerk of the court for the purpose of recording, would be a sufficient delivery. *Ibid*.

X. The Massachusetts doctrine.

a. Principles of.

Independently of insolvent laws or assignments for the benefit of creditors authorized by statute, voluntary assignments by a debtor in trust for the payment of debts, without other adequate consideration, are invalid as against attachment, except so far as assented to by the creditors for whose benefit they were made. *Pierce v. O'Brien*, 129

volved in each case, such is not the effect of these decisions. The following decisions, however, are understood to so hold: *Nicoll v. Mumford*, 4 Johns. Ch. 529, 1 L. ed. 925; *Halsey v. Faisbanks*, 4 Mason, 206, Fed. Cas. No. 5,964; *Houston v. Nowland*, 7 Gill & J. 480; *Forbes v. Scannell*, 13 Cal. 288; *Cunningham v. Freeborn*, 11 Wend. 250.

The grounds on which these decisions are

based are that by such conveyances the legal title passes to and vests in the assignee or trustee, and that a court of chancery will compel the execution of the trust for benefit of creditors, although they may not have assented to the conveyance. There can be no doubt that, under such conveyance, title vests in the trustee, and that his acceptance of the trust is a sufficient consideration, as between the as-

Mass. 814, 87 Am. Rep. 360; *Widgery v. Haskell*, 5 Mass. 144, 4 Am. Dec. 1.

In *Stevens v. Bell*, 6 Mass. 339, it is stated that in consequence of the Massachusetts' statutes authorizing attachments and the want of chancery jurisdiction in that state, that a debtor could not convey his estate in trust for his creditors generally, without their consent given to such conveyance, but that to creditors consenting, and parties to the conveyance, he might grant all his estate for the payment of their debts, or so secure them, exercising only his right of preference and not defrauding others.

As the debtor may convey property to one or more of his creditors in satisfaction of their debts, so he may convey to a third person, appointed by such creditors and for their use, or appointed in the first instance by the debtor, if the creditor afterwards assents to and ratifies such assignment. *Russell v. Woodward*, 10 Pick. 408.

Such assignment, not assented to by the creditor, is void by the common law. *Edwards v. Mitchell*, 1 Gray, 239; *Grocer's Bank v. Simmons*, 13 Gray, 440.

If assented to by the creditors, they are good at common law, as against attachment, to the extent of the amount due the assenting creditors, unless the assignment is made upon a condition to take effect only with the assent of all, or of a prescribed number. *May v. Wannemacher*, 111 Mass. 202.

In cases of assignments by a tripartite instrument, it is generally necessary that creditors should execute it, such being the intention of the instrument. *Ibid.*

The validity of such assignment must depend upon the assent of the creditors, nothing being paid by the assignee, the consideration as to them must consist in their covenants to execute the trusts. *Fall River Iron Works Co. v. Croade*, 15 Pick. 11.

Independently of the Laws of 1836, such assignments without other adequate consideration, are invalid as against attachment, except so far as assented to by the creditors for whose benefit they are made. *May v. Wannemacher*, *supra*.

A trust created for the benefit of another, of which he has no knowledge, may, however, be affirmed and enforced by him. *Ward v. Lewis*, 4 Pick. 518.

Creditors are not obliged to become parties, nor is their assent to be presumed. *Fall River Iron Works Co. v. Croade*, *supra*.

In the case of an assignment made by the debtor and trustees, not intended for the signature of the creditor, giving no preference and containing no release, the assent of the creditors was not presumed. *Russell v. Woodward*, 10 Pick. 408.

They may prefer to resort to attachments, and the option is to be exercised by them and to be evidenced by some overt act on their part. *Fall River Iron Works Co. v. Croade*, *supra*.

There must be some affirmative act, such as presenting claims, or becoming parties to the written assignment. *Pierce v. O'Brien*, 129 Mass. 814, 87 Am. Rep. 360.

The creditor must be a party, or assenting to the conveyance. If not, nothing will pass to him from 24 L. R. A.

the debtor, and the debtor's estate, intended to be conveyed, will remain liable to attachment by any other creditor. *Widgery v. Haskell*, 5 Mass. 144, 4 Am. Dec. 1.

Assignments in trust for the benefit of creditors, the only consideration for which is the acceptance of the trust, are of no effect against creditors who do not assent to them, and who by trustee process or otherwise attached the property described in the instrument of assignment. *Swan v. Crafts*, 124 Mass. 453; *Russell v. Woodward*, 10 Pick. 408; *Edwards v. Mitchell*, 1 Gray, 239; *Wyles v. Beale*, 1 Gray, 233; *Battles v. Forbes*, 21 Pick. 239; *Dedham Bank v. Richards*, 2 Met. 105; *Stanfield v. Simmons*, 12 Gray, 442.

Such conveyance must be accepted in payment or satisfaction by the creditors and sureties. *Russell v. Woodward*, *supra*.

If they decline or omit to join in the assignment, there are no *cestui que trust*, and so no trusts to be executed, and the consideration fails. *Fall River Iron Works Co. v. Croade*, 15 Pick. 11.

A creditor not being bound, may proceed by way of attachment, for being no party to the conveyance in trust, he can have no remedy upon it at law, and there is no equitable jurisdiction to which he may apply. *Stevens v. Bell*, 6 Mass. 339.

And there is no distinction between a conveyance to creditors with their assent, whether it be by way of pledge, or in trust for their use. *Ibid.*

The assent will not be presumed upon the ground of the apparent benefit and adoption, an affirmative acquisition must be shown. *May v. Wannemacher*, 111 Mass. 202; *Russell v. Woodward*, *supra*.

When execution is not required by the form of the instrument, it is only necessary that creditors should give assent to its provisions, sufficient to recognize and frame the acceptance and possession of the property by the assignee, according to the terms of the assignment. *May v. Wannemacher*, and *Russell v. Woodward*, *supra*; *Everett v. Walcott*, 15 Pick. 94.

Where a verbal assent is shown to the assignment, it is sufficient, where no written assent is called for. *Jones v. Tilton*, 189 Mass. 418.

If creditors present their claims for allowance, for the purpose of distribution according to the terms of the deed, they thereby assent. *May v. Wannemacher*, *supra*.

The mere fact of a debtor informing some of his preferred creditors of his intention to make an assignment, showing them a sketch of the same, was held not to make them parties to it, nor to be evidence of their assent to its provisions. *Fall River Iron Works Co. v. Croade*, 15 Pick. 11.

The evidence of assent to the provision of an assignment is equally cogent, in cases where the deed is of two parties, as it is where it was in three parties. *Everett v. Walcott*, *supra*.

But if the creditors elect to become parties, and their debts amount to as much as the assigned property, the consideration will be complete and the conveyance effectual, even as against other creditors, and the whole property will vest in the assignee. *Fall River Iron Works Co. v. Croade*, *supra*.

Where an assignment was made by an insolvent debtor in trust for the payment of debts, it ap-

signor and himself, to support it; and it has never been held necessary, to give validity to such a conveyance and to secure right to creditors, that they should actually be parties to it, or assent to it, at the time of its execution; but, can it be said that creditors become entitled to take benefit under it, in the absence of contract, express or to be implied from conduct, to be bound by it? All courts hold that they

may repudiate it, and, so long as the right to do this exists, it is difficult to avoid the conclusion reached by the English courts,—that the conveyance is revocable until assented to by creditors. In considering such a question, the inquiry necessarily arises, What is it that binds assignor, trustee, and creditors? To this there can be but one answer. They are bound by contract, or not at all. Assent of

appeared that the debtor had propounded the scheme to one of his creditors, and the assignment practically carried out such scheme, the court held that such creditor could not be taken to have assented, even though preferred, and that an attachment by another creditor prevailed. *Ibid.*

If the debts of the creditors who assent to the assignment, are of less amount than the property assigned, they will constitute a good consideration *pro tanto*. *Ibid.*

In *Shattuck v. Freeman*, 1 Met. 10, it was contended that nothing passed by the assignment, because no creditor had become a party thereto, by expressing formally his assent, but it was held that under the Statute of 1836, chapter 223, such express assent was not necessary, the act having modified the common-law rule which made such formal assent necessary to the validity of the assignment, and rendered it invalid against attaching creditors, until one or more of the creditors had assented thereto.

The first section of the statute referred to, authorizes an assignment of property to the debtor's creditors, or to an assignee for the use of the creditors, and provides that it shall be valid and effectual against any attachment thereafter made. *Shattuck v. Freeman*, *supra*.

The fourth section of the Act also furthers the view above taken, providing that any creditors may become a party to the assignment, provided they apply before the final dividend is declared, but so as not to disturb any dividend already declared. *Ibid.*

In construing the above section, the court in *Shattuck v. Freeman*, *supra*, held that it contained no provision, making the assent of any creditor a prerequisite to the vesting of the property in the assignee, and that it was doubtless so framed, for the purpose of avoiding the evils arising from the old common-law doctrine. *Ibid.*

Where the plaintiff claimed under a mortgage made by a debtor without the plaintiff's knowledge, and which had not been ratified before the debtor assigned his property, under the Insolvent Laws of 1838, it was held that no ratification after such assignment could be of any avail as against the assignees. *Dole v. Bodman*, 3 Met. 189.

In *National Mechanics & Traders Bank of Portsmouth v. Eagle Sugar Refinery*, 100 Mass. 38, the question involved was, the validity of an assignment of property by a debtor to trustees for distribution among creditors, who had become parties to the instrument, where the claims exceeded the amount of the property, and it was held that since the repeal of the Statute of 1838 such a deed could not be avoided by a creditor for his individual benefit without proof of fraud at common law, even though he had not assented.

An assignment of bank funds, the proceeds of the sale of goods consigned to the assignor for sale upon commission, the acceptance of the trust being the only consideration, the court held void as to non-assenting creditors. *Swan v. Crafts*, 124 Mass. 453.

Where the assignment was in trust for such creditors as should, within four months from the date of the assignment, execute a full release of all

their demands, the surplus to be distributed *pro rata* among the other creditors, and the remainder, if any, to be paid over to the debtor, the court held there was only one party to such deed, namely the assignor, the persons named being his agents, until all creditors signed the instrument. *Ingraham v. Geyer*, 18 Mass. 146, 7 Am. Dec 132.

In *Marston v. Coburn*, 17 Mass. 454, the plaintiff claimed, as a trustee for creditors, by virtue of an assignment and as against an attachment upon the debtor's property, made by the defendant after the date of such assignment. The assignment was signed by the assignor and trustees and by some of the creditors, and it was contended that it was incomplete and fraudulent, and void against creditors not parties thereto, and the court held such attachment prevailed over the title of the trustee under the deed.

The court's opinion in the above case was based upon the fact that the manifest intention was that the deed should not stand good unless signed by the creditors, that it was void, and that even if there had been an express agreement that it should be good and absolute without the creditor's assent, yet it was still fraudulent and void, being without consideration. *Marston v. Coburn*, 17 Mass. 454.

In the case of an assignment made to a creditor, in trust for himself and the other creditors who should come in under the deed, it was held that his signature to the deed must be considered as having a double effect, both as trustee and as creditor, and that therefore the deed was formally good and there was no legal necessity, the transaction being bona fide, why such creditor should lose his security because the other creditors refused to come into the measure. *Hastings v. Baldwin*, 17 Mass. 552.

Where the indenture, under which the plaintiff claimed, was a tripartite between the debtor and such other creditors as should sign and seal the same, and was executed by the debtor, it was held a valid assignment, even though not executed by any other creditor, the property assigned not exceeding in value the debt of the creditor to whom the assignment was made. *Ibid.*

Where the indenture was of two parties and executed by two parties only, no creditors executing it professedly as such, although one of the assignees was a creditor, it was held that his signature, although sufficient to make him a party in the character of a creditor, had no effect where the assigned property was much greater than was needed to pay the whole of his debt. *Full River Iron Works Co. v. Croade*, 15 Pick. 11.

An assignment to trustees for the benefit of creditors, in consideration of certain covenants on the part of the creditors and the trustees, intended to be signed by all creditors whose debts were over or above a certain amount, and securing release from the same, and providing that the execution of the deed by the creditors should perfect it and containing covenants by the trustees to execute the trust, and further, a ratification by the creditors and an agreement to accept the dividends in full satisfaction and discharge, to which end the deed was to be full evidence, the unsecured creditors being paid *pro rata*, it was held that such deed

parties to be bound by a contract is essential to its existence, and it is clear that no assent of assignor or assignee, or of both, can bind creditors, unless authority to act for them exists. Such a contract is valid between assignor and assignee, when they assent to it, and because they assent to it; and to hold creditors bound when they have not thus incurred obligation is to disregard the fundamental principles on which such obligation rests. One reason for holding assent of creditors necessary, and for refusing to presume this when property is assigned directly to them, is because, in such case, the burden of executing the trust is imposed upon them, which cannot be done without their consent, even though the instrument make provision for compensating them. This is not the only reason, however; for such assignments, in common with those made to trustees, necessarily involve, on the part of creditors, surrender of right to enforce payment

of sums due them through sale of the debtor's property under legal process. Sometimes this may be more advantageous and less expensive than sale through trustee under the terms of the instrument. Can a creditor be compelled to surrender such a right without his consent, even as to property conveyed to a trustee, unless the assignment be under a statute?

A general assignment may enumerate debts to be paid, and some of these may be such as could not be enforced against the debtor, or against his property, in a contest with other creditors; but, if the assent of creditors be not necessary to the validity of such a conveyance, such claims must be paid, or other creditors must refuse to take under it, and institute proceedings to set it aside, or hostile to it. That a creditor has a right to institute such proceedings would seem to be conclusive that he is not bound, unless by his own assent. If such a conveyance is binding on creditors, without

only bound the creditors who were parties to it, and that they alone could recover the dividends. *Hewlett v. Cutler*, 137 Mass. 285.

Where a debtor and assignee executed a bipartite deed, containing provisions for the sale of the property, and for payment of the expenses of certain debts with the proviso that the balance should be divided between the other creditors ratably, there being no release or provision for the other creditors becoming parties, the court held that such assignees were bound, both as creditors and in their official capacity, and that such assignment,—the whole property being absorbed by the preferred creditors,—was valid as against subsequent attaching creditors. *Everett v. Walcott*, 15 Pick. 94.

b. Time of assent.

Where the terms of the assignment explicitly confined its operations to those creditors only who became parties thereto within a limited time, the cases treated the time as of the essence of the contract, in refusing the creditors the privilege of acceding to or executing the deed after such time has elapsed. *National Union Bank of Boston v. Copeland*, 141 Mass. 237.

Thus under an assignment made to trustees, in trust for the creditors who should execute the instrument within six months, public notice being given so that all had an opportunity of coming in it was held that a creditor, having had such notice could not afterwards become a party to the deed, or share in the distribution. *Phenix Bank in Connecticut v. Sullivan*, 9 Pick. 410.

The trustee is bound to permit such creditors, who applied within the time to execute the deed, and any refusal on his part is a breach of trust for which he is responsible. *Pinegrove v. Comstock*, 18 Pick. 46.

In *New England Bank v. Lewis*, 8 Pick. 113, the principal question was, whether the plaintiff who it was contended had not assented within a reasonable time, had any interest in the trust fund in the hands of the trustee, for the benefit of creditors. The court held that, there being no sufficient evidence to show the plaintiffs had refused or waived the trust in their favor, they had a right in equity to claim the benefit of the trust and the trustees were bound to execute it and pay their demand out of the proceeds.

c. Comity.

There is no comity requiring force to be given to the laws of another state, directly in conflict with the laws of the state wherein the action is brought, to allow the acts of a debtor, resident 24 L. R. A.

in another state, in disposing of his property against his creditors in the latter state, which would not have been allowed if he had lived therein. *Pierce v. O'Brien*, 129 Mass. 314, 37 Am. Rep. 360; *Swan v. Crafts*, 124 Mass. 453; *Osburn v. Adams*, 18 Pick. 245; *Fall River Iron Works Co. v. Croade*, 15 Pick. 11.

An assignment made by a debtor himself in another state, which, if made in Massachusetts would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor, although valid in the place where it is made, and in such cases the subsequent assent of the foreign creditor to the assignment, by proving claim under it, cannot defeat the title to the property acquired by a creditor in this state by reason of attachment. *Pierce v. O'Brien*, *supra*.

In *Ingraham v. Geyer*, 13 Mass. 144, 7 Am. Dec. 132, the question was whether the assignment made by a debtor in Philadelphia was valid in Massachusetts so as to defeat an attachment of the debt in the latter state under the trustee process, and it was held void and as against the creditor in that state who proceeded after the date of the assignment, with notice to the debtor, for the recovery of his debt.

Where a bipartite deed was executed in Rhode Island and signed by the debtor and the assignee, who were citizens of that state, it was held that such deeds were not valid according to the laws of Massachusetts, for the want of assent; yet it was valid according to the laws of Rhode Island, as against a citizen of that state, and that therefore he could not avoid such deed by attachment. *Daniels v. Willard*, 16 Pick. 36.

The same conclusion was arrived at in *Burlock v. Taylor*, 16 Pick. 335, upon an assignment valid according to the laws of New York, wherein it was sought to subject property in Massachusetts to an attachment by a New York creditor.

Where the assignment was made by a bipartite deed with reference to the laws of Pennsylvania, by which such assignment was valid, upon which the creditors to an amount larger than the total assets, presented and proved claims and accepted dividends, thus signifying their adoption, the court found in the acts of the parties sufficient to constitute a legal and valid assignment, good wherever made and effectual to pass the rights of the debtors, even as to property not subject to the local laws of Pennsylvania. *May v. Wannemacher*, 111 Mass. 202.

XI. English decisions.

In *Biron v. Mount*, 24 Beav. 642, 27 L. J. Ch. 191, 4 Jur. N. S. 43, it was held that it was not necessary

reference to their assent, no place is left for election, which implies power and right to assent or dissent. "When a debtor voluntarily assigns property for the security and benefit of creditors, if the creditors choose to accept the assignment, they must abide by its terms and provisions. They must take it as an entirety. They cannot accept in part, and repudiate in part. *Perry, Tr. § 596; Burrill, Assignm. 3d ed. § 479.* The creditor may have rights with which the assignment, so far as it confers rights upon others, is inconsistent. The assignment may derogate from, instead of extending to him, the measure of right to which he is entitled. If that be true, he must elect whether he will accept the assignment, or whether he will reject it, and stand upon the right he may have independent of it. He cannot elect to claim under the assignment the right given by it, and repudiate it so far as it passes rights to others which are inconsistent with independent, distinct rights to which he

may be entitled." *Hatchett v. Blanton*, 73 Ala. 483; *Frierson v. Branch*, 80 Ark. 453; *Pratt v. Adams*, 7 Paige, 641, 4 L. ed. 811.

No decision made by this court supports the proposition that assent of creditors is not necessary to the validity of assignments for their benefit. In *Baldwin v. Peet*, 23 Tex. 723, 75 Am. Dec. 806, it was said that "the American decisions hold, that the assent of creditors to a general assignment will be presumed, so as to give it effect, although they may know nothing of it when it is made." But there was no intimation that this presumption was other than one of fact, to be indulged in the absence of evidence to the contrary. The case of *Wallis v. Beauchamp*, 15 Tex. 803, involved no such question. The question in that case was whether certain property bought from Joseph Wallis by John O. Wallis was subject to a trust in the latter's hands for the payment of his vendor's debts, in consequence of an agreement made at the time of the pur-

for a creditor to execute the deed, provided he acquiesced therein by some act, that the mere standing by and taking no part was not sufficient.

Where an assignment executed by a debtor to a creditor in trust for himself and other creditors, was sent to the creditor, who had no notice thereof, for signature, who received the deed the next day, and on that day an execution was delivered to the sheriff, and the creditor signified his assent in writing, it was held in an issue between such creditor and the execution creditor, the deed being honest and bona fide, that the creditor under the deed was entitled, that the deed being irrevocable the assent of the creditor was not necessary for the purpose of vesting the property in him. *Siggers v. Evans*, 5 El. & Bl. 367, 3 C. L. R. 1209, 24 L. J. Q. B. 705, 1 Jur. N. S. 851.

In *Re Baber's Trusts*, L. R. 10 Eq. 554, an assignment was executed, the consideration being a covenant by the creditors not to sue for three years, and contained a proviso that creditors not executing it within six months should be excluded from its benefits, it was held that a creditor who neglected signing but acquiesced in the deed, and took no proceedings against the debtor, treated the deed as valid and was entitled to its benefits.

In *Acton v. Woodgate*, 3 Myl. & K. 422, where property was conveyed in trust for creditors, not parties nor privies, it was held the deed operated merely as a power to apply the property in payment of debts, and was revocable by the debtor, but the court questioned whether such a deed could be revoked, where it had been communicated to the creditors.

In *Brady v. Sheil*, 1 Campb. 147, an executor called a meeting of the insolvent's creditors, who agreed to a ratable distribution of the estate in consideration of which he executed a deed of assignment, it was held that a creditor could not afterwards refuse to accept such assignment and commence action against the executor.

In *Garrard v. Lauderdale*, 3 Sim. 1, it was held that a deed of assignment to a trustee, for the benefit of schedule creditors who did not execute, or conform to the terms of the deed, could not be enforced by the creditors. *Wallwyn v. Coutts*, 3 Meriv. 707, 3 Sim. 14, to the same effect.

In *Forbes v. Limond*, 4 DeG. M. & G. 296, 18 Jur. 83, it was held that a creditor could not be said in any sense to have acceded to the provisions of a composition deed, unless he put himself in the same situation with regard to the debtor, as if he had actually executed the deed.

But where a composition deed executed by

a debtor and trustee was not signed within the specified time by the creditors, it was held that though such a deed would be void at law, yet the creditors acting under it, even though they had not signed it, could enforce it in equity. *Spottiswoode v. Stockdale, Coop. Ch. 102.*

In *Collins v. Reece*, 1 Colly. Ch. Cas. 675, where an assignment was executed by a debtor to a trustee, for the benefit of creditors, signing or assenting thereto within three months, the court questioned whether a creditor, not signing or assenting until after the date named, could claim under such deed.

In *Watson v. Knight*, 19 Beav. 899, it was held that a creditor prevented by accident from signing a composition deed, within the specified period, might obtain relief in equity, but that such relief would not be granted where he had been guilty of negligence and had set up an adverse title.

In *Dunch v. Kent*, 1 Vern. 220, a deed of trust was executed by a debtor in favor of creditors, and provided for the payment of such creditors as came in within the year. It was held that it did not exclude a creditor not coming in after that time.

In the above case it was also held that a bill might be had after the time mentioned, for the purpose of compelling creditors to come in and renounce the benefits of the trust. *Dunch v. Kent, supra.*

Where the assignment excluded creditors not executing it or assenting thereto in writing before a given date, or such further date, not exceeding a certain number of days as might be specified by the trustee, and the trustee advertised the extended time, the creditor, absent at the time, assented through his attorney, who subsequently received power to execute the deed and apply to the trustees for permission to do so, it was held that such creditor was entitled to come in under the deed, and that the trustee should permit the attorney to execute the instrument. *Raworth v. Parker*, 2 Kay. & J. 163, 25 L. J. Ch. 117.

Where a time is specified in a deed, within which a creditor must become a party in order to avail himself of its benefits, the English courts hold, time is not of the essence of the contract, and permit creditors to accede to, or execute the deed after the time limited has expired. *Whitmore v. Turquand*, 3 DeG. F. & J. 107, 7 Jur. N. S. 377, 30 L. J. Ch. 345, 9 Week. Rep. 483, 4 L. T. N. S. 38.

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chase. The property was held to be subject to the trust, and it was held: "It may be that the trust was unknown to the creditor in this case at the time of its creation. Yet that would not deprive him of the right of its benefit. When a trust is created for the benefit of a third person, although without his knowledge, he may afterwards affirm it, and enforce the execution of it in his favor; at least if not, in the intermediate time, revoked by the person who created the trust." The case of *Montgomery v. Culton*, 18 Tex. 746, involved practically the same question, and it was decided the same way; and the case of *McMahan v. Harbert*, 85 Tex. 460, without having a case before it, approved the ruling made in *Montgomery v. Culton*. The great weight of American authority makes assent of some of the creditors essential to the validity of assignment for their benefit, and recognizes the rule that such assent may be presumed, in the absence of evidence to the contrary, if the instrument entitles all to share pro rata, and imposes no terms which will deprive creditors of some material right.

There is a class of trusts, however, in reference to which it is held by the English and American courts that assent of beneficiaries is not essential to the full vestiture of legal title in the trustee and equitable title in the beneficiary, and that, when so vested, it will continue, in the absence of repudiation by the beneficiary, which, in such cases, is held to operate a retrocession of the equitable right to the creator of the trust. A gift or voluntary conveyance of property in trust, when fully completed and executed, is valid, and will be enforced against all persons except creditors or bona fide purchasers, even though the beneficiary may not have been in existence at the time, or, if in existence, may not have known of or assented to the conveyance. Such has been recognized to be the law in England for more than two centuries. *Thompson v. Leach*, 2 Vent. 198; *Siggers v. Evans*, 5 El. & Bl. 380; *Newton v. Askeu*, 11 Beav. 150; *Standing v. Bowring*, L. R. 31 Ch. Div. 282; *Patterson v. Murphy*, 11 Hare, 88; *Ellison v. Ellison*, 6 Ves. Jr. 656; *Keenich v. Manning*, 1 De G. M. & G. 176.

The same rule as to such trusts is sustained by the American courts, and even by those which hold assent of creditors necessary to validity of assignments made for their benefit, and refuse to presume it. *Viney v. Abbott*, 109 Mass. 800; *Newall v. Roberts*, 115 Mass. 272; *Stone v. Hackett*, 12 Gray, 280; *Sargent v. Baldwin*, 60 Vt. 17; *Martin v. Funk*, 75 N.Y. 134, 31 Am. Rep. 446; *Garner v. German L. Ins. Co.* 110 N. Y. 266, 1 L. R. A. 256; *Light v. Scott*, 88 Ill. 289; *Gulick v. Gulick*, 39 N. J. Eq. 401.

In the case last cited, it was said: "If a voluntary trust, in which the settlor has reserved no power of revocation, is once perfectly created, and the relation of trustee and *cestui que trust* is once established, it will be enforced, though the settlor has destroyed the deed, or has attempted to revoke it by making a second voluntary settlement of the same property, or if the estate, by some accident, becomes re-vested in the settlor. In all these cases, the first perfectly created trust will be upheld, with all its consequences, and the settlor will be declared

to be a trustee. Nor is notice to the *cestui que trust* or to the trustee, and acceptance by him, essential to the validity of a voluntary trust, if it is otherwise perfectly created. *Perry, Tr.* §§ 104, 105; *Ishman v. Delaware, L. & W. R. Co.* 11 N. J. Eq. 227; 2 Spence, Eq. Jur. 881, 882." Some of the expressions in *Marbury v. Brooks* would be applicable to this class of trusts, but evidently were not called for in that case; for, before attachments were levied, one or more of the creditors had knowledge of the assignment, and had accepted under it, and on the faith of it the trustee had advanced money. The difference between such trusts and trusts arising from assignments to trustees for benefit of creditors is obvious and substantial. In one case the transaction is a gift, involving on the part of the donee no surrender of any existing right whatever, while in the other the creditor may, and most frequently will, be compelled to surrender rights more or less valuable, if, by force of law or his own assent, the assignment be made binding upon him. In the one case, necessity for consideration or contract between donor and donee does not exist, while in the other the trust and right to receive benefit cannot become complete without contract actually made, or to be implied from conduct. "In case of a voluntary declaration, the obvious inference is that it is made for the benefit of the persons in whom the maker of the declaration means thereby, for the first time, to create an interest in the property to which it relates. A provision for payment of the debts of the party making the declaration is wholly different in its nature. The trustee of the property of the settlor, which is directed to be applied in payment of debts, may be regarded as standing in the position of a steward or agent of the debtor whose duty is to satisfy the debts according to the directions which he may receive, and hand over the balance to his principal." *Patterson v. Murphy*, 11 Hare, 91. The instrument in question, however, was not an assignment for benefit of creditors, but was simply a mortgage with power to sell. *Wootton v. Wheeler*, 23 Tex. 838; *Malane v. Paschal*, 47 Tex. 866; *Blackwell v. Barnett*, 52 Tex. 338; *Stiles v. Hill*, 62 Tex. 480; *Jackson v. Harby*, 65 Tex. 715; *Watterman v. Silberberg*, 67 Tex. 108; *Hudson v. Eisenmayer, Sr., Mill. & Elevator Co.* 79 Tex. 407; *Willis v. Thompson*, 85 Tex. 801; *Jones, Chatt. Mortg.* 852; *Jones, Mortg.* 63, 1769.

By assignment, title passes to the trustee, while mortgage does not pass title, even though power to sell the mortgaged property may thereby be conferred on the mortgagee or a third person, whereby the lien given may be enforced. Any other conclusion as to the effect to be given a mortgage with power to sell would have rendered the conclusion reached in *Robertson v. Paul*, 16 Tex. 472, and in other cases following that, wholly inadmissible. By the exercise of a power thus conferred, title of a mortgagor may be divested and passed to a purchaser, but the person who exercises such a power, having no title himself, must be deemed, in so far, the agent of the mortgagor, although under obligation to exercise the utmost good faith and fair dealing towards creditors intended to be secured, for whom he may be deemed a trustee as to funds received from

sale of mortgaged property. He is under no obligation to undertake to exercise the power, and his refusal will not invalidate the mortgage; but his acceptance of such an agency, which is his true relation to the mortgagor, cannot render unnecessary the acceptance of the mortgage by mortgagee. The existence or nonexistence of a mortgage contract must depend upon principles applicable to other contracts, and, to their existence, assent of parties is essential. *Wallis v. Taylor*, 67 Tex. 481; *Tuttle v. Turner*, 28 Tex. 773; *Hubbard v. Cox*, 76 Tex. 242; *Dikes v. Miller*, 24 Tex. 433; *Welch v. Sarlitt*, 13 Wis. 256; *Day v. Griffith*, 15 Iowa, 104; *Dole v. Rodman*, 8 Met. 189; *Goodell v. Stinson*, 7 Blackf. 487; *Ornard v. Blake*, 45 Me. 602; *Poster v. Perkins*, 42 Me. 168; *Jewett v. Preston*, 27 Me. 404; *Johnson v. Farley*, 45 N. H. 509; *Woodbury v. Fisher*, 20 Ind. 887, 88 Am. Dec. 325; *Jackson v. Phipps*, 12 Johns. 421; *Jackson v. Rodle*, 20 Johns. 187; *Hutick v. Scott*, 9 Ill. 175; *Younge v. Guilbeau*, 70 U. S. 8 Wall. 641, 18 L. ed. 268; *Parmelee v. Simpson*, 72 U. S. 5 Wall. 86, 18 L. ed. 548; *Com. v. Jackson*, 10 Bush. 429; *Bell v. Farmers Bank of Kentucky*, 11 Bush. 34, 21 Am. Rep. 205. This was expressly held in *Wallis v. Taylor*, and the only difference between that case and this is that in this the instrument confers powers on a third person to sell the mortgaged property and apply the proceeds as therein directed, while in the former case the power was to be exercised by the creditors named. Both instruments would have created mortgages, if consummated; and to hold that the assent of the real parties in interest was not essential in the one case, and essential in the other, would be to disregard substance and give effect to form. To hold that delivery to and acceptance by the person on whom power to sell is conferred will bind the beneficiaries named in such an instrument, in the absence of some prior agreement, is to hold that one person may be bound by the act of another not authorized to act for him.

There are some decisions, however, which seem to hold that assent of mortgagee is not essential. Among them are the following: *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Ensforth v. King*, 50 Mo. 477; *Furman v. Fisher*, 4 Coldw. 626, 94 Am. Dec. 210; *First Nat. Bank of Emporia v. Ridenour*, 46 Kan. 207.

In *Merrills v. Swift* it appears that Swift signed a mortgage to secure a debt due to Merrills, in the absence of, and without the knowl-

edge or consent of, the latter, which was delivered to an attorney for his benefit. After this, and before Merrills had knowledge of the existence of the paper, another creditor of Swift caused attachment to be levied on the property. It is not claimed that the paper was signed and delivered to the attorney in pursuance of any prior understanding, nor that the attorney was authorized to represent Merrills. The court, however, while recognizing that delivery and acceptance were essential to the validity of every deed, and that there could be no delivery without acceptance, held "that neither the presence of the grantee, nor his previous authority to a third person to receive it on his behalf, nor his subsequent express assent to it, is necessary to make the delivery of a deed valid. When there is no such previous authority to receive it, his assent is presumed, when the deed is beneficial to him, although his dissent may be shown, and the deed thereby rendered ineffectual." Such a rule may have application in the class of cases before noticed, but it seems to us wholly inapplicable to mortgages. As before said, mortgages rest on contracts,—contracts between mortgagors and mortgagees,—and, so long as one has right to refuse the security on terms offered, the other is not bound. The reasons suggested why assent of creditors to assignments would seem to be necessary to their validity apply with more force to mortgages such as that in question.

The case of *Bank of California v. Marshall*, 1 Tex. Civ. App. 704, grew out of the same instrument involved in this; but the question presented to the court of civil appeals in that was whether the transaction was fraudulent. From the agreed statement on which the case was tried, we do not see that the question was raised, but in the course of the opinion the court said: "The trustee accepted the terms of the trust, and, in the absence of a repudiation of its terms by the beneficiaries, his acceptance will inure to their benefit." On application here for writ of error, no such question was presented or considered.

In view of the finding before referred to, the judgment of the Court of Civil Appeals and of the District Court will be reversed; but, as the record stands, it is believed that a proper judgment could not be rendered, that would fully and correctly determined the rights of all parties. The cause will be remanded to the district court for further proceedings not inconsistent with this opinion. It is so ordered.

COLORADO SUPREME COURT.

S. Willis FRENCH, *Appt.*,
v.

Cecil A. DEANE.

(.....Colo.....)

1. A complaint which states the ultimate facts, without a statement of the arts

made use of to accomplish the illegal purpose, is sufficient to state a cause of action, either for enticing away plaintiff's wife or for her seduction.

2. Mere intentional doing of a wrong act does not constitute malice within the meaning of a statute permitting exemplary damages for malicious wrongs. To justify such

NOTE.—For other cases as to retrospective statutes, see *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 621; *Hamilton County Comrs. v. Rasche* (Ohio) 19 L. R. A. 24 L. R. A.

A. 584. And as to *ex post facto* laws, see *Anderson v. O'Donnel* (S. C.) 1 L. R. A. 682, and note; *Stato v. Cooler* (S. C.) 3 L. R. A. 181, and note; *Re Tyson*

damages there must be a wrong motive or a reckless disregard of plaintiff's rights.

3. A statute allowing punitive or exemplary damages in a case in which the right thereto did not previously exist, is, so far as it applies to existing causes of action, a violation of constitutional prohibitions of *ex post facto* laws and retrospective legislation.

(March 7, 1894.)

APPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff in an action brought to recover damages for the enticing away of plaintiff's wife. *Reversed.*

Statement by **Hayt, J.:**

Plaintiff, in his complaint, alleges, *inter alia*, his marriage with Clara R. Deane in the year 1870. "That said plaintiff has at all times from the date of his said marriage lived in the city of Denver, with his wife, and has provided her with a comfortable home, and at all times his said wife has lived with him at his said home happily and contentedly until the occurrence of the matters hereinafter set forth. That said defendant about the year 1876 became and was acquainted with the said wife of this plaintiff and shortly afterwards the said defendant commenced to acquire and did acquire and since then has had and now has an improper influence over the wife of said plaintiff; and the said defendant by means of said undue influence, did, maliciously and with the intent to injure the plaintiff, and to deprive him of the comfort, society, and assistance of his said wife, seduce the said wife, and seduce and alienate her affections away from the plaintiff, and to the defendant; and the said defendant, further intending to injure this plaintiff, and to deprive him of the comfort, society, and assistance of his wife, did on or about the 1st day of December, A. D. 1889, entice her away from the said plaintiff, against his consent, by means whereof, among other things, his home has been made desolate and ruined. That by reason of the premises the plaintiff has been, and still is, wrongfully deprived by the defendant of the comfort, society, and aid of his said wife, and has suffered great distress in body and mind in consequence thereof, and is damaged in the sum of \$100,000. Wherefore, the said plaintiff prays judgment against the defendant in the sum of \$100,000, and costs of suit."

The answer puts in issue the allegations of the complaint.

Messrs. O'Donnell & Decker and **Benedict & Phelps** for appellant.

Messrs. Wells, Macon & Furman for appellee:

The law does not require that the acts, promises, deceptions, or artifices used to accomplish seduction should be either alleged or proven.

Rees v. Cupp, 59 Ind. 566; *Brown v. Kings-*

ley, 88 Iowa, 220; *State v. Bieres*, 27 Conn. 320.

The law does not prescribe any fixed amount of damages to be awarded in such cases. The extent of the damages depends upon the circumstances of each particular case. Under some circumstances the injury might be slight. Under others it might be overwhelming. The damages should correspond to the injury. The object of the law is to get all of the facts that would throw any light upon the case fully before the jury.

Cooley, Torts, 224; *Hutchins v. Kimmel*, 31 Mich. 128, 18 Am. Rep. 164; *Wood's, Mayne, Damages*, §§ 690-692; *Hilliard, Torts*, 515; 2 Greenl. Ev. § 55; *Whart. Ev.* § 225; *Taylor, Ev.* p. 1208, also § 583, p. 518; 8 *Phillips, Ev.* p. 441.

Although it is conceded that the courts have the power of granting a new trial in cases of criminal conversation, still, it seems the power has never been exercised. Even in cases where rules of law have been disregarded, or where, for any reason, the verdict of the jury cannot be supported, the power of the court to set aside the verdict of the jury will not be exercised without regard to the justice of the case. The justice of this case is overwhelmingly with appellee.

Sedgw. Damages, 6th ed. p. 765.

The amount of damages depends upon the husband's circumstances and conduct, the terms upon which he and his wife lived together, and the wife's general character.

Moak's Underhill, Torts, p. 327, and authorities there cited.

The amount of damages is left to the discretion of the jury.

8 *Sutherland, Damages*, p. 744.

The rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependent of the plaintiff, or being a man of substance, proof of the plaintiff and his wife having lived comfortably together before her acquaintance with defendant, and of her having always borne a good character then, and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation.

Wood's Mayne, Damages, § 690, p. 664; *Cooley, Torts*, p. 224.

Courts will set aside verdicts for excess.

8 *Sutherland, Damages*, 744; *Duberley v. Gunning*, 4 T. R. 651; *Torre v. Summers*, 2 Nott & McC. 267, 10 Am. Dec. 597.

The pecuniary ability of the defendant is peculiarly the proper subject of inquiry. If the jury are permitted to awe others, by way of example, and to punish the defendant, his wealth and standing in society will in a considerable degree determine the amount of damages. A verdict which, as against one individual, would be sufficient for all purposes, would, as against another, be scarcely felt, by reason of the difference in their ability to respond to damages.

Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88.

(Colo.) 6 L. R. A. 472; *Ex parte Larkins* (Okla.) 11 L. R. A. 418; *Re Wright* (Wyo.) 13 L. R. A. 748; *Com. v. Graves* (Mass.) 16 L. R. A. 256.

The especial interest of the present decision is in 24 L. R. A.

applying the constitutional provision against *ex post facto* laws to exemplary damages in a civil case.

Considered as a civil injury (criminal conversation), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer wherein the damages recovered are usually very large and exemplary.

3 Bl. Com. 139; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Jones v. Jones*, 71 Ill. 566; *Beck v. Dowell*, 111 Mo. 506; *Gaither v. Blowers*, 11 Md. 586; *Bump v. Betts*, 23 Wend. 85; *Dailey v. Houston*, 58 Mo. 361.

When exemplary damages are claimed, the defendant's pecuniary condition is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger. For this purpose actual wealth only can be material.

1 Sutherland, *Damages*, 745; *Brinknap v. Boston & M. Railroad*, 49 N. H. 373.

All that the courts of this state have ever attempted to decide is that, when not controlled by legislation, exemplary or punitive damages, as a punishment or example, should not be awarded in civil actions for injuries resulting from torts, when the offense is punishable under the criminal laws.

Honclett v. Tuttle, 15 Colo. 454; *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 866.

Under the common law of England, which by statute is made the law of this state, Mr. Blackstone declares that for criminal conversation "the damages recovered are usually very large and exemplary."

3 Bl. Com. 139.

It is not true that if a husband, in order to retain his wife's affections or to save her and his children from scandal, lives with her after he learns of her seduction, that he thereby condones with the seducer.

Foot v. Card, 6 L. R. A. 829, 58 Conn. 1; *Clouser v. Olapp*, 59 Ind. 548.

Hayt, J., delivered the opinion of the court:

Among the fundamental rights of husband and wife is that each has the right to the society and companionship of the other. At common law there were two forms of action that might have been maintained by the husband for offenses against the marital relation,—one for enticing the wife away, and the other for seduction,—and these actions, subject to some modifications by statutes in a number of the states, still exist. Whether the present action be treated as one for enticing the wife away, or for seduction, it is sufficient, in either event, to allege in the complaint the ultimate facts, without a statement of the arts made use of to accomplish the illegal purpose. *Brown v. Kingsley*, 38 Iowa, 220; *Hodges v. Bales*, 102 Ind. 494; *Rees v. Cuypp*, 59 Ind. 566.

No objection was made to the complaint by demurrer or motion in the court below. If the defendant desired a separate statement of the causes of action alleged, he should have interposed a motion for that purpose at the first opportunity. At the trial the jury were instructed that the plaintiff might recover without proof of seduction, but that such proof was competent for the consideration of the jury in determining whether or not the

affections of the plaintiff's wife had been alienated, and also in aggravation of damages. Counsel for appellant seem to have been in doubt, until the instructions of the court were read, as to the precise charge upon which damages were claimed. Their requests for instructions contain repeated references to the charge of seduction, and specific instructions are asked thereon. The court, in its charge, however, treats the action as one simply for enticing away the plaintiff's wife. Much uncertainty and confusion might have been avoided, had the issues been clearly defined and understood at the outset. Upon a charge of seduction, we do not think that there is room for serious contention for vindictive or punitive damages, as the law stood at the time the seduction took place, if at all. In fact, if such damages may properly be given in this case at all, it is because of the Act of 1889.

The question of the measure of damages is by far the most serious question for consideration in this case. Dependent upon and secondary to it are many questions with reference to the admissibility of evidence, such as of the financial standing and ability of the defendant. If recovery in this case must, at best, be limited to a liberal rule of compensatory damages, it will be apparent that the financial ability of the defendant has no right place in the controversy, as it is only where exemplary or punitive damages may be recovered that such evidence is admissible. Prior to the change made by the Statute of 1889, no principle was better settled in this state than that punitive or exemplary damages could not be allowed in any civil case. *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 866; *Greeley, S. L. & P. R. Co. v. Yeager*, 11 Colo. 845. The *Murphy-Hobbs Case* is properly regarded as the leading case upon the subject in this state. The opinion was written by Judge Helm. The court, upon a careful review of the authorities, reached a conclusion against the right to award such damages in any civil case where the offense is punishable under the criminal law. The logic and reason of the argument not only served to weave the conclusion into the warp and woof of our law, but to cause the rule to be extended in subsequent cases to the exclusion of punitive damages in all civil actions, of whatsoever nature. In the case of *Greeley, S. L. & P. R. Co. v. Yeager*, *supra*, it is expressly determined that punitive damages should not be allowed in any civil action. The opinion was written by the experienced judge presiding at the trial of the present case in the district court, who was then one of the supreme court commissioners. In the course of the opinion, which was concurred in by this court, the writer says (speaking of the measure of damages): "The rule of compensation is sufficient to give the injured party all that he is entitled to; and to go beyond that, and usurp the powers of the state in the infliction of punishment, may well be challenged as a 'sin against sound judicial principle,' a sin which cannot be made to stand for the right by an adherence to it." The same rule has been announced in a number of recent cases. See *Republican*

Pub. Co. v. Miner, 12 Colo. 77; *Republican Pub. Co. v. Mosman*, 15 Colo. 899; *Hoblett v. Tuttle*, Id. 454. This was the state of the law at the time of the convening of the seventh general assembly. Before considering the change made at that session, we pause to say that the law, as theretofore construed by the court of last resort, was protected by the constitutional inhibitions against *ex post facto* and retrospective laws equally as well as if the decisions had been enacted into statutes. *Wade, Retroactive Laws*, § 177; *Lambertson v. Hogan*, 2 Pa. 22; *Lee County v. Rogers*, 74 U. S. 7 Wall. 181, 19 L. ed. 160; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594; *Kenoisha v. Lamson*, 76 U. S. 9 Wall. 477, 19 L. ed. 725.

If exemplary damages are proper in this case, it is because of the following statute passed by the general assembly, and approved by the governor, upon the 19th day of February, 1889. The statute does not contain an emergency clause, and hence did not go into effect until May 20, 1889. It reads as follows: "Section 1. That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party award him reasonable exemplary damage." *Sess. Laws 1889*, p. 64. The substance of this statute is embodied in the charge given at the trial, but, in addition thereto, the jury were instructed: "In law, a wrongful act, done intentionally, without a legal justification, is done maliciously." This instruction is erroneous. To justify exemplary damages, there must be some wrong motive accompanying the wrongful act, or a reckless disregard of plaintiff's rights. Even when the wrongful act results in the death of a human being, malice is not necessarily to be implied. *Sedgw. Damages*, § 863; *Miller v. Kirby*, 74 Ill. 242; *Inman v. Ball*, 65 Iowa, 543.

The evidence introduced by the plaintiff to support his cause of action shows, among other things: That plaintiff and Mrs. Deane were married in the year 1870. That they lived as man and wife until some time in the fall of 1889, when a separation took place. That defendant, French, became acquainted with Mrs. Deane some time in the year 1877. That for ten years they were more or less intimate. That during this time the defendant frequently took Mrs. Deane out riding, sometimes returning late in the evening. That he frequently called at her residence in the absence of Mr. Deane, and occasionally accompanied her to the theater. One witness testified to seeing Mr. French kiss Mrs. Deane upon one occasion, and that he was seen with her in the sleeping room occupied by Mrs. Deane. That his attentions to her continued without interruption until the fall of 1887. That in the fall of that year the plaintiff and his wife visited St. Louis, upon the occasion of the holding of the annual encampment of the

Grand Army of the Republic. That the defendant took the same train, and several times engaged Mrs. Deane in conversation on the train. That he took rooms near the rooms occupied by the Deanes, and that he did so by a previous arrangement made with the landlord, and that his attentions to Mrs. Deane during their sojourn of a few days in the city of St. Louis were quite marked. That these attentions continued during at least a part of the year 1888. That in the spring of 1889 Mrs. Deane went east, and made a protracted visit, not returning to Colorado until the month of August following. It is but fair to the defendant to say that he denies absolutely the more serious circumstances in evidence against him; claims that his relations with the Deanes were those of intimate friendship; that his relations with Mrs. Deane were known to and acquiesced in by Mr. Deane, and that they were prompted solely by motives of friendship, and not improper; that no inducement was ever held out by him for her to separate from her husband. Other evidence was introduced by the defense tending to show that Mr. Deane was addicted to the use of liquors and morphine; that he quarreled with his wife about property the title to which was in the name of Mrs. Deane; and that he commenced suit to recover the same, or an interest therein. Deane admits the using of morphine, but says that it was prescribed by his physician. The evidence shows that the Deanes separated in October, 1889; that afterwards a reconciliation took place, and the marital relations were resumed; but that a final separation took place in April, 1890. It is not our purpose to enter into the details of the evidence adduced by the parties, except as the same is necessary to show the nature of the proof introduced.

The Act of 1889, in relation to exemplary damages, went into effect May 20, 1889. The evidence shows that defendant discontinued his visits to Mrs. Deane some time in the year 1888. One witness testifies that on an afternoon in April, 1889, he saw them together; that they rode in a street car from some point down town to the Deane residence, where they alighted, and stood for some minutes, talking together, near the front gate. With this single exception, there is no evidence that plaintiff in error met Mrs. Deane after the year 1888, or that any intercourse, of any kind or character whatsoever, took place between them after that date, while the evidence shows affirmatively that no communication passed between the parties after the Act of 1889 took effect. In this state of the record, we are to consider the proper measure of damages in case of recovery. On behalf of appellant, it is claimed that the Statute of 1889 does not apply in this case, that it was not the intention of the legislature to make it applicable to past transactions; and that, if such had been the intention, it would be in violation of both the state and national constitutions. On the contrary, the appellee argues that the facts show a continuing tort, that the cause of action did not accrue to appellee until the separation actually took place, and that the law

in force at the time of such separation should control. It is also contended that the statute is remedial in character, and is applicable to past as well as future transactions. The statute does more than change the form of the remedy. It provides for an increase of the measure of damages *ad libitum*. It is penal in character. Exemplary or punitive damages are allowed as a punishment to the wrongdoer, and as an example to others. Such damages rest upon the right to punish, and not the right of the injured party to compensation for the wrong done. In the case of *Murphy v. Hobbs*, *supra*, it is said, with reference to the form of the action, in considering another provision of the constitution: "When the convention framed, and when the people adopted, the constitution, both understood the purpose of this clause to be the prevention of double prosecutions for the same offense. Yet, under the rule allowing exemplary damages, not only may two prosecutions, but also two convictions and punishments, be had. What difference does it make to the accused, so far as this question is concerned, that one prosecution takes the form of a civil action, in which he is called 'defendant?' He is practically harassed with two prosecutions, and subjected to two convictions, while no hypothesis, however ingenious, can cloud in his mind the palpable fact that for the same tort he suffers two punishments." See also Sedgw. Damages, § 860, and cases cited. Although the prohibition against *ex post facto* laws is aimed at criminal cases, it cannot be evaded by giving a civil form to that which, in its nature, is criminal. The Act of 1889 changed the existing law by authorizing punitive damages in certain cases and, as incidental thereto, it changed the rules of evidence, to the disadvantage of the defendant, by allowing evidence of his financial standing, the admissibility of such evidence depending upon the right of allowing punitive damages. In the *Test-Oath Cases* the Supreme Court of the United States says: "The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings v. Missouri*, 71 U. S. 4 Wall. 377, 18 L. ed. 356. To hold that such a statute as the one under consideration can be made applicable to past transactions would be in violation of the national constitution prohibiting the passage of any *ex post facto* law, and in violation of, not only a similar provision of the constitution of this state, but also of the inhibition against retrospective legislation. It not only permits the damages, in cases controlled by it, to be doubled and trebled, but, as we have said, they may be increased at the will or caprice of the jury. Moreover, in cases of this character, upon a finding by a jury that the defendant was guilty of malice, fraud, or wilful deceit, the plaintiff would be entitled to an

execution against the body of the defendant. *Mills' Anno. Stat.* § 2164. Section 11 of article 2 of our Constitution inhibits the passage of any *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation. The word "retrospective," as here used, has reference to civil cases; and, as to such cases, it is synonymous with the term "*ex post facto*," as applied to the criminal law. In *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, it is said: "This term [*ex post facto*] necessarily implies a fact or act done, after which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases,—to which, alone, the phrase applies,—to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as, to that, *ex post facto*, though whether of the class forbidden by the constitution may depend on other matters. But, so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been, in any adjudged case, held to govern its *ex post facto* character." "A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective or retroactive." Sedgw. Stat. & Const. L. 2d ed. p. 160.

It is contended that the offense charged in this case was not completed until after the Act of 1889 took effect. As we have already said, the charge in this case is not only for alienating the affections of Mrs. Deane, and enticing her away from her husband, but it also includes seduction. The evidence introduced tends to establish both charges. If there was, as a matter of fact, seduction, it was consummated long before the enactment of the statute allowing punitive damages; and it has not been, and cannot be, maintained that upon this charge such damages are warranted in this case. Is it possible that the plaintiff, after bringing forward evidence upon such a charge, may in any case, at the last moment, when met by the rule against punitive damages, shift his base, and evade the law, by instructions such as were given in this case? The charge of seduction is not directly withdrawn from the consideration of the jury, but it is said that seduction, if found, is only to be considered in aggravation of damages. We think this amounts to an evasion of the law which ought not to prevail. While this court has no disposition to curtail the legitimate operation of the Act of 1889, it cannot, on the contrary, extend the statute so as to make the same applicable to transactions that took place before the passage of the act. To do so would be to overturn the fundamental rule requiring all statutes to be construed prospectively, unless a contrary intention is clearly manifest, and also to violate one or

more provisions of the national and state constitutions. Here the entire transaction of which complaint is made took place before the statute took effect. No spoken or written word, no act of French with reference to Mrs. Deane, is shown to have occurred thereafter.

Our conclusion is that, under the facts as presented upon the record, the Statute of 1889 with reference to exemplary or punitive damages has no application; that the plaintiff must be limited in his recovery to a liberal rule of compensatory damages. Under such a rule he may recover "for all direct and proximate losses occasioned by the tort; for the physical pain, if any, inflicted; for his mental agony, lacerated feelings, wounded sensibilities." But he is not entitled to damages assessed merely as a punishment to the defendant, or as an example to others. *Murphy v. Hobbs, supra*.

Of the instructions refused, the twelfth should have been given. By it the defendant sought to have the jury informed that the law of this state did not permit Mrs. Deane to be called as a witness without the consent of her husband, and that, consequently, nothing unfavorable was to be inferred against the defendant from her failure to testify.

The judgment of the District Court must be reversed, and the cause remanded.

Elliott, J., dissents.

Rehearing denied May 7, 1894.

City of PUEBLO, *Appt.*,

v.

William W. STRAIT.

(.....Colo.....)

The building of a viaduct over railroad tracks in a public street, which practically closes abutting property to access by teams from the street, is such an extraordinary and unusual use of the street as could not have been reasonably anticipated at the time of its dedication, and therefore the abutting owner is entitled to consequential damages, under the Colorado constitution, requiring compensation for property taken or damaged, although it is limited by the courts of that state to unusual or extraordinary uses.

(May 7, 1894.)

APPEAL by defendant from a judgment of the District Court for Pueblo County in favor of plaintiff in an action brought to recover damages for the alleged wrongful construction of a viaduct in a public street in front of plaintiff's property. *Affirmed.*

NOTE.—As to the "taking" of property of an abutting owner by a structure in a street cutting off his access to adjoining premises see the recent case of *Garrett v. Lake Roland Elevated R. Co.*, *post*, 398. Also *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370, and *note* to *Egerer v. New York Cent. & H. R. R. Co. (N. Y.)* 14 L. R. A. 381.

For other cases as to owners right to damages 24 L. R. A.

Statement by Hayt, Ch. J.

It is alleged in the complaint: "That on the 14th day of March, 1890, plaintiff was, and still is, the owner of lots 1 and 2 in block 79 in the former city of South Pueblo, now part of the city of Pueblo, said lots being situate at the corner of C and Mechanic streets, and having a frontage of 140 feet on the former and 50 feet on the latter street. That said lots were improved with valuable buildings, and prior to the grievance complained of said property was valuable and desirable for business purposes, and readily rented for such purposes. That the defendant is a municipal corporation. That on or about the 14th day of March, 1890, the city council of Pueblo duly passed and adopted an ordinance entitled 'An ordinance providing for the construction of an iron viaduct or steel viaduct upon C street, in the city of Pueblo, and for granting certain easements and rights to the Denver & Rio Grande Railroad Company.' [Here follows the ordinance in full]. That in pursuance of said ordinance the building of said viaduct 'has been begun, and is now being prosecuted, by authority of the defendant; and that by reason of its height and proximity to the said property of plaintiff abutting on C street the aforesaid buildings are and will be greatly darkened and shut out from the natural light, the free circulation of air, natural to said property, materially obstructed and diminished, and that the approaches to said property are and will be greatly obstructed and hindered; that said viaduct and approaches thereto are being built and will be maintained directly in front of plaintiff's property, whereby the same has been and will be greatly injured and damaged, and the market value thereof reduced and impaired.' That in consequence of the wrongs and injuries complained of the plaintiff has sustained damages in the sum of \$8,000. Prayer for judgment." To this complaint a demurrer was filed and overruled. Afterwards an answer and amended answer were filed. The first, second, and third defenses set up in the amended answer were stricken out on motion. As no error has been assigned to any of the foregoing matters, these defenses will be omitted. The fourth defense reads as follows: "That it [the defendant] admits that it is a municipal corporation, as alleged in plaintiff's complaint; that the C street mentioned in the complaint is a public street in the city of Pueblo, extending from the eastern to the western limits thereof; that the Mechanic and Plum streets mentioned in said complaint are public streets in said city, crossing said C street at right angles, and lying parallel to and distant from each other about twelve hundred feet; that the portion of said C street between said Mechanic and Plum streets is crossed by a large number of

for such injury, see *Egerer v. New York Cent. & H. R. R. Co. (N. Y.)* 14 L. R. A. 381, and *note*; *Jones v. Erie & W. V. R. Co. (Pa.)* 17 L. R. A. 758; *Rauenstein v. New York L. & W. R. Co. (N. Y.)* 13 L. R. A. 768; *White v. Northwestern N. C. Railroad (N. C.)* 22 L. R. A. 627; *Spencer v. Metropolitan Street R. Co. (Mo.)* 22 L. R. A. 668.

See also 24 L. R. A. 396; 26 L. R. A. 246; 27 L. R. A. 551.

railroad tracks, which, long prior to the construction of said viaduct, at the time thereof, and now were and are constantly used by the Denver & Rio Grande and other railroad companies in the prosecution of their business; that prior to the construction of said viaduct, by the frequent passing and repassing of the engines, cars, and trains of said companies over and across said portion of C street, public travel along said C street between said Mechanic and Plum streets was greatly hindered, impeded, and rendered dangerous; that, in order to make public travel over and along said portion of C street safe and convenient, it became and was necessary for the defendant to erect the viaduct mentioned and described in the complaint; that said viaduct was carefully and properly constructed; that both it and its approaches were built wholly within the lines of public streets in said city of Pueblo, and without physical invasion or injury to the property described in the complaint as the property of the plaintiff; that the construction of said viaduct was both lawful and necessary, and was a reasonable and proper improvement and change of said portion of C street and Mechanic street adjacent thereto. Wherefore defendant, not admitting that plaintiff has sustained the damage complained of, says that if the plaintiff's property has been injured, as alleged, by the construction of said viaduct, this defendant is not liable therefor. And for a fifth defense defendant admits that it is a municipal corporation; admits plaintiff's ownership of the property described; admits the passage of the ordinance set forth in the complaint, and the construction of the viaduct pursuant to the ordinance; denies that by the construction thereof the plaintiff's property is injured as complained of, or at all; denies that plaintiff has sustained damage thereby in the sum of \$3,000, or in any sum whatever." The fourth defense was also stricken out upon motion of plaintiff. A jury was thereafter impaneled to determine the issues raised by the complaint to the fifth defense. The only question submitted to the jury was upon the question of damages. The jury returned a verdict in favor of the plaintiff for \$3,000. A motion for a new trial having been interposed and overruled, the cause was brought into this court by appeal.

Messrs. A. M. Nicholas, City Atty., and Dixon & Dixon, for appellant:

Cases recognizing a liability in such cases as this were all decided subsequent to the adoption of our constitution. Consequently it cannot be said that we borrowed the words "or damaged," from any other state with a construction ready made. Such cases, therefore, are not binding upon this court and they are the identical cases with which this court has emphatically said that it could not agree.

Denver v. Bayer, 7 Colo. 118.

As highways are established principally for the public benefit these private rights of access and of light and air are subordinate to the rights of the public in the street, and it follows that the abutting owner cannot complain of any interference with those rights

which result from a proper and legitimate use of the streets by the public as a public highway.

McQuaid v. Portland & V. R. Co. 19 Or. 535.

The municipal authorities by virtue of the paramount right of the public had the right to take without compensation.

2 Dill. Mun. Corp. 3d ed. §§ 989, 990, and notes; *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 493, 39 Minn. 286; *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 107; *Reining v. New York, L. & W. R. Co.* 14 L. R. A. 183, 128 N. Y. 157.

The logic of the main opinion in *Rigney v. Chicago*, 102 Ill. 64, leads to the conclusion that the effect of the words "or damaged" was to invert the relations of the public and abutting owners to a street and declare the rights of the latter paramount to those of the former.

The law presumes an abutting owner to anticipate changes and improvement which, as to their character and means employed, could not possibly be anticipated because not invented.

In cases arising out of street improvements, the words "or damaged" add nothing in effect to the word "taken" in the constitutional provision and this for the reason that the immunity of municipal corporations in such cases rests upon a distinct substantive ground, to wit, the paramount rights of the public arising out of condemnation proceedings or the contract of dedication.

The rights of an abutting owner in a street are superior to those of all persons or corporations who may seek to subject a street to extraordinary uses or subject it to servitudes foreign to street purpose. As against such uses, his easements are property, and if they are cut off wholly or partially by changes or improvements made for such purposes, it is a taking of this property which entitles him to compensation. But when the public steps in with its paramount rights the abutting owner cannot complain if his rights are cut off or impaired by improvements made for the purpose of rendering a street suitable, safe, and convenient for the uses to which it was dedicated.

Story v. New York Elev. R. Co. 90 N. Y. 132, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Silden v. Jacksonville*, 14 L. R. A. 370, 28 Fla. 558.

An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing, that the public shall have the right to thus improve or alter the street, so far as it may be necessary for its use as a street, and they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incident rights, as a mere consequence from the use or improvement of the streets as highways.

Selden v. Jacksonville, *supra*.

The views herein advocated have been sustained by this court.

Denver v. Bayer, 7 Colo. 118; *Denver Circle R. Co. v. Nestor*, 10 Colo. 423; *Longmont v. Parker*, 14 Colo. 889.

Mr. Charles E. Gast, for appellee:

Every state constitution adopted in recent years has limited the power of eminent do-

main in language similar in import to that contained in the Colorado constitution.

Illinois led the way in 1870; West Virginia followed in 1872; Pennsylvania in 1873; Arkansas in 1874; Missouri, Alabama, and Nebraska in 1875; Texas and Colorado in 1876; Washington in 1889.

An injury such as is counted upon in this suit gives a cause of action.

Rigney v. Chicago, 103 Ill. 64.

This court has on several occasions cited the *Rigney Case*, and approved it, as containing a sound exposition of the constitutional provision. *Denver v. Bayer*, 7 Colo. 118; *Denver v. Vernia*, 8 Colo. 400; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 518.

Chicago v. Taylor, 125 U. S. 161, 81 L. ed. 688.

A distinction was intended between those uses to which every street is primarily and reasonably dedicated, and those extraordinary uses which are tolerated in but very few, probably not more than one in a hundred of the many streets required for its convenience by the local public.

Denver Circle R. Co. v. Nestor, 10 Colo. 424.

It is not by any means settled law in Colorado that municipal corporations may raise and lower the grade of public streets at will, and stand exempt from liability to property owners.

Denver v. Vernia, *supra*.

The rule now is, in states having a constitutional prohibition against the damaging of property to give a right of action against cities for a change in street grade.

Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 199; *Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629; *Bloomington v. Brokaw*, 77 Ill. 194; *Elgin v. Eaton*, 88 Ill. 535, 25 Am. Rep. 412; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Johnson v. Parkersburg*, 16 W. Va. 402, 87 Am. Rep. 779; *Atlanta v. Green*, 67 Ga. 886; *Blanchard v. Kansas City*, 5 McCrary, 217; *New Brighton v. United Presby. Church*, 96 Pa. 381; *Montgomery v. Townsend*, 90 Ala. 489; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420; *Fort Worth v. Howard*, 8 Tex. Civ. App. 587; *Brown v. Seattle*, 18 L. R. A. 161, 5 Wash. 35.

Hayt, Ch. J., delivered the opinion of the court:

The question presented by this record may be stated as follows: Is a municipal corporation liable in damages for an injury to abutting property, occasioned by the building of a viaduct in a public street over railroad tracks? The evidence in this case shows that plaintiff's property is located on the corner of O and Mechanic streets in the city of Pueblo; that it was improved, and valuable for business purposes, prior to the erection of the viaduct; that this viaduct was elevated 8 feet above the old sidewalk at one end of plaintiff's property and 22 feet at the other, and that by reason thereof the property was closed to access by teams from either O or Mechanic streets; that by the construction of the viaduct the property was rendered practically inaccessible, except from an alley in the rear. That the property was damaged by the erection of the viaduct is shown by

the uncontradicted evidence introduced at the trial. It is claimed by appellant that the viaduct is a necessary street improvement, and that the injury complained of is not actionable; while the appellee contends that, the injury being conceded or proven, a right of recovery is guaranteed by the following provision of our state constitution: "Private property shall not be taken or damaged, for public or private use, without just compensation." Article 2, § 15. This provision of the fundamental law has received consideration from this court in a number of cases. The result of these cases may be fairly summarized as follows: For injuries resulting from reasonable and ordinary or usual change and improvement of the street by the municipality, the abutting owner cannot recover, provided the change or improvement is made in a careful and skillful manner for the benefit of the public. *Denver v. Bayer*, 7 Colo. 118; *Denver v. Vernia*, 8 Colo. 399; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Denver & S. F. R. Co. v. Dumke*, 11 Colo. 247; *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501.

The doctrine of *damnum absque injuria* has not, however, been applied where the municipal authorities have made an unreasonable change in the street, or put it, or allowed it to be put, to an extraordinary or unusual use. See, in addition to the cases above cited, *Jackson v. Kiel*, 13 Colo. 378; *Longmont v. Parker*, 14 Colo. 386. The insertion of the word "damaged" in addition to the word "taken" first appears in the amended constitution of Illinois adopted in 1870. It has since been incorporated into the constitutions of West Virginia, Pennsylvania, Arkansas, Missouri, Alabama, Nebraska, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas. In a majority, if not all, of these states, except Colorado where a construction has been had, the courts have given the provision a literal interpretation, allowing a recovery in all cases where private property has sustained substantial damage by the making of a public improvement. We shall not undertake to cite the cases supporting this conclusion, as the number forbids it. Reference to a majority of such cases may be found in the recent case of *Brown v. Seattle*, 5 Wash. 35, 18 L. R. A. 161. In that case, after review of the authorities, the conclusion is stated as follows: "Every court in which the point has been raised has decided in favor of the private citizen; but, were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity of the case, and the constitution makes the hitherto disregarded equity now the law of it." *Denver v. Bayer*, *supra*, is the leading case in this state upon the question. Although the right of recovery was somewhat restricted from the rule announced in Illinois and some other states, it was expressly held that the word "damaged" was inserted in the constitution for a purpose,

which purpose was to add an additional right of action. In Colorado the right of recovery has been limited to those unusual uses to which but few streets are subjected. This construction has been influenced to some extent, no doubt, by the peculiar wording of our constitution, under which just compensation is also required where private property is damaged for private use. This novel provision is relied upon by the writer of the opinion in the *Bayer Case*, *Mr. Justice Helm*, in the *Nestor Case*, in 10 Colo., at pages 524 and 525, as a ground for qualifying the rule announced in other states. The opinion concludes as follows: "A distinction was, in my judgment, intended between those uses to which every street is primarily and necessarily dedicated and those extraordinary uses which are tolerated in but very few—probably not more than one in a hundred—of the many streets required for its convenience by the local public." The court, as then constituted, while expressly refusing to extend the recovery in accordance with the rule in Illinois and a few other states, in which the provision had at that time received judicial consideration, was of opinion that it was a recognition of a new right of action, not necessarily known to the common law; and this principle has been recognized since in several of the cases cited *supra*. In the *Bayer Case* a right of recovery was recognized for any injury or annoyance occasioned by a railroad to an abutting property owner, injuriously affecting his property without injuring that of his neighbor; and it was held that the owner of property abutting on a street had a special property—an easement—in the street not common to the general public, that entitled him to free ingress and egress from the street to his property, and that, if such easement was taken away or injuriously affected, he was entitled to just compensation therefore. In the case of *Jackson v. Kiel*, *supra*, a railroad company was held liable for damages occasioned by blocking the space or intersection with another street, thereby preventing ingress and egress to plaintiff's property for a considerable portion of the time. In *Longmont v. Parker*, *supra*, it was decided that the owner of abutting property had rights in the street not shared by the general public, and that, if the highway was obstructed or impaired as a means of ingress and egress to his property, the abutting owner was entitled to recovery for the depreciation of the value of this property occasioned thereby. See also *Union Pac. R. Co. v. Foley*, 19 Colo. —. Under these decisions the plaintiff is entitled to recovery in this class of actions in cases where the damages suffered are different in kind from those suffered by the general public, while a recovery is denied for those damages common to all; and when damages are occasioned an abutting owner by an improvement in the street in front of his property, whereby ingress and egress to the premises is injuriously affected, this is a kind of injury not common to the general public.

By the fourth defense it is alleged, in substance, that the viaduct was a reasonable and proper street improvement, and it is claimed 24 L. R. A.

that this constituted a complete defense to plaintiff's action. This claim is not supported by the decided cases in jurisdictions having a constitutional provision similar to the one under consideration. In the case of *Bigney v. Chicago*, 103 Ill. 64, like arguments were advanced to those urged by appellant. The conclusion was that the building of a viaduct in a public street by the city rendered the city liable in damages to the owner of abutting property where the effect was an impairment of some right which the private owner enjoyed in connection therewith; such, for instance, as the right of ingress to and egress from the same. Although the result was concurred in by only a bare majority of the court, it has since been recognized as the settled law in the state of Illinois. In *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638,—also a viaduct case,—the Supreme Court of the United States reached a similar conclusion without a dissent. Although this result may have been influenced by the prior decisions of the state court, the opinion declares that the constitutional provision could have been inserted with no other intention than that expressed by the state court. The case of *Selden v. Jacksonville*, 28 Fla. 558, 14 L. R. A. 370, not necessarily opposed to the foregoing views, the decision in that case being based upon a constitutional guaranty that private property shall not be "taken" or "appropriated" without compensation. It was held that this provision did not embrace mere consequential damages resulting to property abutting on a street from a change of grade of the street or other improvement thereof, made by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the property. It is not necessary to question the correctness of the foregoing decision, based as it is upon a dissimilar constitutional provision from that here in force. It is not controlling under the peculiar provisions of our constitution. Moreover, it narrows the right of recovery within limits not universally recognized, even where constitutional provisions are in force similar to that found in the state of Florida. *Spencer v. Metropolitan Street R. Co.* (Mo.) 23 L. R. A. 668. A strict application of this rule would hold the dedicatory as having consented to a use of the street that totally destroys the value of his property although no human foresight could have anticipated such an unusual use. Under it the results of a life of toil and frugality, if invested in town or city property as a provision for old age or dependent families, might be lost as the result of an improvement erected for the benefit of the general public. The rule is certainly more reasonable and just which requires compensation to be made by the municipality out of the common fund for an injury occasioned by an improvement for the public convenience, than to require the individual to suffer the entire loss. Moreover, the constitutional provision in force in this state is remedial in character and for the purpose of giving property holders additional security; and, under well-settled canons of construction, it should be liberally

construed. *Denver Circle R. Co. v. Nestor, supra; Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746. The building of a viaduct in a public street is such an extraordinary and unusual use of the street as could not have been reasonably anticipated at the time of the dedication, and we think the owner of the property abutting on the street is entitled to consequential damages occasioned to such

property by the improvement. It follows that the facts alleged as a fourth defense constituted no defense to plaintiff's action, and the defense was, therefore, properly stricken out. Nothing remained for the jury to determine but the amount of the damages.

It is not claimed that the damages allowed are excessive, and the judgment is accordingly affirmed.

MARYLAND COURT OF APPEALS.

Robert GARRETT, *Appt.*,
v.
LAKE ROLAND ELEVATED R. CO.

(.....Md.....)

1. There is no "taking" of the property of an abutting owner by the erection in the bed of the street by an elevated railroad company of a stone abutment nine feet high, which reduced the width of the street in front of his premises to less than ten feet, interfering with light and air and nearly destroying access to his property from the street.
2. The abutment and elevated structure of an elevated railroad, built under legislative authority, are not a nuisance, although they may create a liability for consequential damages.

(*Bryan, J., dissents.*)

(June 19, 1894.)

APPEAL by complainant from a decree of the Circuit Court of Baltimore City dismissing his bill in a suit brought to enjoin the maintenance of a bridge approach in a public street in front of his premises, until compensation should be made to him for the injuries caused to him by it. *Affirmed.*

The facts are stated in the opinions.

Messrs. John E. Cowen and E. J. D. Cross for appellant.

Messrs. Steele, Semmes & Carey for appellee.

McSherry, J., delivered the opinion of the court:

This case was argued during the last October term, and then, by direction of the court, it was argued at the present April term. Upon both occasions the discussions at the bar displayed great research and signal ability, and the briefs show unusual care, skill, and thoroughness in their preparation. After several consultations a majority of us have reached the conclusions which, having first briefly stated the material facts, we will proceed to announce.

The appeal is from a decree dismissing the appellant's bill of complaint filed by him in

the circuit court of Baltimore city, against the Lake Roland Elevated Railway Company. The record shows that Mr. Garrett is the owner of certain unimproved lots situated on and bounded by the west side of North street, and fronting four hundred and thirty-six feet thereon, and lying between the north side of Eager street and the south side of Chase street in Baltimore city. He also owns other lots likewise fronting on the west side of North street, between Chase and Biddle streets; but with these we are not now concerned. North street is sixty feet wide between the building lines and thirty-six feet between the curbs; and no part of it is included within the outlines of Mr. Garrett's deed. By section 5 of Ordinance No. 23, approved April 8, 1891, the North Avenue Railway Company, one of the several roads by the consolidation of which the Lake Roland Elevated Railway Company was formed, was authorized to bridge the Northern Central Railway Company's tracks on North street by means of an elevated structure extending, including the necessary approaches thereto, along North street from the corner of that and Eager streets to the corner of North and Saratoga streets. A stone abutment, forming an inclined plane, to carry on its perpendicular or highest side the iron superstructure and to serve, on its surface, as the northern approach to the elevated road, has been erected nearly in the centre of North street, between Chase and Eager streets, directly in front of part of the first named lots of Mr. Garrett. It is eighty-three feet and two and a half inches in length and fifteen feet and eight-tenths feet in width, and starts at the street grade and gradually rises to a height of nine feet, and leaving a distance or drive way between its western face and the curb line contiguous to Mr. Garrett's property of nine feet and eight and a quarter inches. It is alleged that the construction of this abutment of solid masonry in the bed of North street and the elevated structure will, by reducing the width of the street in front of the appellant's lots to less than ten feet, destroy the access to his property from North street, and prevent him from reaching the same with vehicles ordinarily used in Balti-

NOTE.—As to whether or not there is a "taking" of property by destroying access of an abutting owner to the street the cases from different states are in conflict, see note to *Egerer v. New York Cent. & H. R. Co.* (N. Y.) 14 L. R. A. 381, also *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370.

White v. Northwestern N. C. R. Co. (N. C.) 22 L. R. A. 627, allows damages in such a case although 24 L. R. A.

there is no constitutional provision in that against taking for public use without compensation.

Compare also the preceding case of *Pueblo v. Strait*, ante, 392, in which compensation was allowed for injuries caused by a similar structure under a constitutional provision requiring compensation for damaging property.

more. It is charged that the destruction of his right of access to his property as aforesaid renders such property entirely unsalable and deprives him of the market value thereof, and constitutes in fact and in law a taking of his property without making compensation therefor, as required by the constitution of the state of Maryland. It is further claimed that this structure deprives the premises of light and air, and that this, too, is a taking of the property within the prohibition of the constitution. It is averred that the mayor and city council of Baltimore and the General Assembly of the state had no power to authorize the construction of the said abutment or to permit the operation of the road thereon, because these acts create a new and additional servitude upon the street and upon the appellant as an abutter thereon, and are a nuisance. It is likewise insisted that Ordinance No. 23 and the Acts of Assembly of 1892 chapter 112, confirming that ordinance, are in conflict with section 40 of article 3 of the constitution and void. The bill prays for an injunction to restrain the completion of the abutment and a mandatory injunction requiring the appellee to demolish and remove so much of it as had then been built.

The appellee answered the bill and considerable evidence was taken.

The proposition distinctly presented by the record and earnestly contended for by the appellant's distinguished counsel is, that the erection by the appellee of this abutment on property not owned by the appellant, but in the bed of a public city thoroughfare upon which his lots abut, destroys the access to his land, interferes with light and air, imposes a new and additional servitude upon his property and deprives him of the benefit of the use of the same; and amounts in law to a taking of his property, that is in fact not trespassed upon or touched, and is illegal until compensation shall have been first made therefor.

Though there has been no physical invasion of the appellant's property, still if the act complained of constitutes, by reason of its consequences, a taking of the appellant's private property for a public use within the meaning of section 40 of article 3 the constitution of Maryland which prohibits the taking of private property for public use except upon just compensation being first paid or tendered, then the injunction should have been granted. But if, on the contrary, this was not such a taking as the constitution has reference to and injury has been done the appellant, then his remedy is in another and a different forum; and the ninth section of the ordinance heretofore alluded to makes ample provision for the prompt and effective enforcement of such judgment, as a court of law, in an appropriate proceeding, may pronounce.

That there was no actual appropriation of, or entry upon, a single foot of land contained within the outlines of the appellant's deed is admitted and could not be denied; and, therefore, to support the theory of the bill, the consequences which it is asserted will result to the appellant from the occupancy

by the railway of contiguous land, forming part of the bed of a highway and owned by some one else but subject to an easement in the public and which consequences are not physical invasions of the plaintiff's soil nor an ouster of him therefrom, are treated by the appellant as a taking of that which is confessedly neither encroached upon nor used at all. The consequential damages resulting from the act complained of—the incidental injuries to the owner—are thus charged to be a taking of private property for a public use though the property itself remains unappropriated and unapplied to that use in any way whatever.

While the constitution of the state has prohibited the taking of private property for a public use without compensation being first paid or tendered, it has not undertaken to define or declare what shall be a taking within its terms.

True, there is some conflict among adjudged cases as to what amounts to such a taking, but the overwhelming weight of authority accords with the conclusions which this court announced in two cases that will be fully referred to later on. Apart from the decisions of the supreme court of Ohio (see *Crawford v. Delaware*, 7 Ohio St. 460), which rest upon a doctrine peculiar to that state and the recent New York decisions in the Elevated Railway Cases (*Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268), which are hopelessly in conflict with the principles announced in other cases in the same state (*Radoliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453), and the decisions in Minnesota (*Adams v. Chicago, B. & N. R. Co.* 89 Minn. 286, 1 L. R. A. 493; *Lamm v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 71, 10 L. R. A. 268), and a few cases in Mississippi (*Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 785), and possibly one or two other states, all substantially following the New York Elevated Railway Cases; there is practically an unbroken current of adjudged cases broadly and clearly marking and defining the difference between an incidental injury to and an actual taking of private property. An injury to and a taking of such property are distinct things. Every taking involves an injury of some kind, though every injury does not include a taking. "Property is taken by entry upon and appropriation of it, as in the ordinary case of location. It is injured by obstructing access, as in *Dunoon's Case*, 111 Pa. 352, or drainage as in *Ziemer's Case*," 124 Pa. 560; *Jones v. Erie & W. V. R. Co.* 151 Pa. 80, 17 L. R. A. 758. In *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 836, the court said: "Persons appointed or authorized by law to make or improve a highway are not responsible for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine also universally accepted alike in England and this country, *British Cast Plate Glass Mfrs. v. Moredith*, 4 T. R. 794; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Ormerod*, 2 Barn. & C. 708; *Green v. Reading*, 9 Watts,

883, 86 Am. Dec. 137; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Callender v. Marsh*, 1 Pick. 418; *Smith v. Washington*, 61 U. S. 20 How. 185, 15 L. ed. 858.

The decisions to which we have referred were made in view of Magna Charta, and the restrictions to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of the government powers, and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. And this was affirmed in *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638. The constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequently injured. *Ottawa, O. & C. G. R. Co. v. Larsen*, 40 Kan. 801, 2 L. R. A. 59; *Omaha Horse R. Co. v. Cable Tramway Co.* 82 Fed. Rep. 727; *Heiss v. Milwaukee & L. W. R. Co.* 69 Wis. 555; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62, 81 Am. Rep. 806; *Crosby v. Ouenaboro & R. R. Co.* 10 Bush, 289; *Dorman v. Jacksonville*, 18 Fla. 545, 7 Am. Rep. 253; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294; *Spencer v. Pt. Pleasant & O. R. Co.* 23 W. Va. 407; *Richardson v. Vermont Cent. R. Co.* 25 Vt. 465, 60 Am. Dec. 283; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 337.

This distinction between consequential damages and an actual taking, thus firmly settled, was frequently severe in its results, particularly when the power of eminent domain had been exercised by municipal corporations, and with a view of relaxing its rigors to some extent, many of the states of the Union changed their organic law so as to require compensation to be made for incidental injuries, precisely as though there had been a physical taking of the property. Thus the constitutions of Pennsylvania of 1878 and of Alabama of 1875 provided that when private property is taken for public use, just compensation shall be made for the property taken, injured, or destroyed; that of Arkansas of 1874, that private property shall not be taken, appropriated or damaged; that of Illinois of 1870, West Virginia of 1872, Missouri of 1875, Colorado and Texas of 1876, Georgia of 1877, and California of 1879, that it shall not be taken or damaged. *Selden v. Jacksonville*, 28 Fla. 558, 14 L. R. A. 375. Such changes would have been wholly unnecessary if the view of the appellant as to what constitutes a taking of private property had prevailed.

But the immunity which protects from liability governmental agencies in the proper and skillful performance of their public functions does not extend to private persons or mere quasi public corporations, and therefore, whilst in both instances the same distinction between an actual taking of private property and consequential injuries to it when not taken is applicable, a private person or a quasi public corporation is liable

in damages to the individual incidentally injured, though the act complained of and occasioning the injury was itself lawful. Hence, for such injuries as are complained of here, though they do not amount to a taking of property, if found to exist, there is a remedy in a court of law. *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117.

The ninth section of the ordinance authorizing the construction of the abutment and the elevated road expressly provides that if any judgment recovered against the company for such injuries as are here complained of shall remain unpaid for sixty days, "all the rights" of the company under the ordinance "shall cease and be in abeyance until the judgment shall be paid," and the right to operate the road "shall only be revived after the payment thereof."

In the case of *Cumberland v. Willson*, 50 Md. 148, the distinction between consequential injuries and an actual taking of property was considered, and it was distinctly held that damages done to a water-power of a mill by means of an increased flow of water, carrying debris into the race caused by the grading and paving by the city of one of its public streets, was not a taking of property. Property thus injured is not, in the constitutional sense, taken for public use," p. 148. And again in *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 368, 13 L. R. A. 126, the question now before us was directly presented. There the plaintiff was an abutting owner on the east side of Howard street, in Baltimore city, with no freehold or leasehold estate in the bed of the street, and he claimed that by reason of his abutting proprietorship he had such an interest in the street as to entitle him to compensation according to the provisions of article 8, section 40 of the Constitution, for the injury occasioned him by the act of the railroad company in constructing its road in an open cut on the west side of Howard street and opposite his property. Because he had not been paid or tendered compensation he filed a bill in equity praying for an injunction to restrain the construction of the open cut. The precise question for determination was "whether the use of the street by the railroad company, in the manner proposed and under the conditions stated, would be such taking of private property of the plaintiff as is forbidden by the constitution of this state, except upon payment of just compensation being first made." And in the course of the opinion it was said: "But, notwithstanding the railroad company may be liable on common-law principles, the question still remains to be answered, will the cutting and use of the street, as proposed by the railroad company, be the taking of private property, in respect of the rights of the plaintiff as abutting lot owner, within the meaning of the constitution? As already stated, it is not charged that there will be any invasion of or physical interference with any part of the plaintiff's lot, in the construction of the road. The most that he claims for is that he will be deprived of the full use of the street, as it now exists, and that his property will be depreciated in value by the construction of

the road. This, however, is but an injury, to whatever extent it may be suffered, of an incidental or consequential nature. . . . In such case as this, therefore, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the constitution of the state; and hence there is no ground for any preliminary proceeding by way of condemnation."

We must either adhere to these two decisions in 50 and 74 Md., strictly in accord as we have shown them to be with the decided weight of judicial opinion on this subject, or else, receding from them, adopt the Ohio or the New York doctrine. We see no reason for departing from or for modifying our former deliberate judgments. The Ohio doctrine is peculiar to that state alone, *O'Connor v. Pittsburgh, North Transp. Co. of Ohio v. Chicago, supra*, and is so admitted to be in *Crawford v. Delaware, supra*. The New York doctrine involves this inextricable dilemma, viz: If the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken in the constitutional sense but if a railroad company in lawfully constructing its road does precisely the same thing that the city did in grading the street, then the abutter's property is taken though not physically entered upon at all.

"The house and lot are the same; the street is the same; the acts done are the same; the use for which they are taken is a public use in each case, and yet the court must hold that there is a taking of property in one case and not a taking of property in the other." Mr. Cowen's brief in *O'Brien's Case, supra*.

The abutment and elevated structure having been built under legislative authority are not a nuisance. *O'Brien v. Baltimore Belt R. Co. supra*.

"That cannot be a nuisance such as to give a common-law right of action, which the law authorized." *Northern Transp. Co. of Ohio v. Chicago, supra*.

"It may be stated as a general rule that whatever is authorized by statute within the scope of legislative powers is lawful and therefore cannot be a nuisance." 3 Wood, Railway Law, 970. The structure is, therefore, a lawful one. It does not destroy the street as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and the other injuries complained of are purely incidental and consequential; though the appellant is not without a remedy therefor. Whilst it is stated as a general rule that no action will lie by an abutting lot owner, who does not own the fee in the street; for injuries which merely result from the legal and reasonable use of a public street by a railway company and which leaves his rights of egress and ingress reasonably sufficient (*Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L. R. A. 622), still, the statute law of Maryland and the ordinance to which we have alluded (and the terms of which the appellee has accepted) provide an ample remedy for all such dam-

ages as the appellant may be able to show he has sustained. The North Avenue Railway Company, one of the corporations forming the Lake Roland Elevated Railway, was incorporated under article 28 of the Code, and section 169 of that article holds every railroad company laying its tracks upon any public street responsible for "injuries done to private property" lying upon or near to such street "by such location;" and the damages thus occasioned may be recovered by civil action. Section nine of the ordinance No. 28, already referred to makes the payment of such damages, when judiciously ascertained, absolutely certain or suspends the operation of the road.

Upon a full and most careful consideration of the whole case we are of opinion that the decree dismissing the bill of complaint was properly passed and it will therefor be affirmed.

Decree affirmed with costs above and below.

Bryan, J., dissenting:

Robert Garrett is the owner in fee simple of a lot of ground in the city of Baltimore, situated on the west side of North street, between the north side of Eager street and the south side of Chase street, fronting about four hundred and thirty-six feet on North street, with a depth of one hundred and sixty-eight feet westerly to Hunter alley. He also owns in fee another lot on the western side of North street, with a frontage thereon of about three hundred and fifty-six feet, and running back westerly about one hundred and sixty-eight feet to Hunter alley, and extending from the north side of Chase street to the south side of Biddle street. He does not own the fee in the bed of North street. The Lake Roland Elevated Railway Company has erected on North street a stone abutment in front of the first mentioned lot. This abutment is eighty feet long and fifteen feet and eight tenths wide, and is distant about nine feet and eight inches from the curb-line on the western side of the street. It commences at grade at the northern end, and ascends at an inclined plane until it reaches the height of nine feet at its highest point. It is distant about ten feet six inches from the curb-line on the eastern side of the street. North street is a public highway, having a width of thirty-six feet between the curb lines on the opposite sides of the street.

The stone abutment above-mentioned was erected shortly before the commencement of proceedings in this case. Since that time an iron superstructure has been placed upon it for an elevated railroad. Garrett filed a bill in equity for an injunction to restrain the Lake Roland Company from placing its elevated railroad structure on the abutment and praying for its demolition and removal and for general relief. The Lake Roland Company claims the right to erect this abutment under the authority of an ordinance of the mayor and city council of Baltimore. The court below dismissed the bill of complaint. Before we examine the ordinance let us inquire what are the rights of the complainant independently of its provisions. When North street was opened two thirds of

the expense of its construction was assessed upon the property benefited by the opening of the street. The existence of the street enhanced the value of the coterminous property, and the proprietors were required to pay the price of this enhancement by contributing two thirds of the expense of the improvement. They paid for something quite distinct from the rights which all other inhabitants of the city had in the street. They of course, had the same right of using the street as belonged to the general public; but beyond and in addition to this right they acquired great advantages and conveniences by having a wide public street in front of their lots of ground. These advantages and conveniences were bought and paid for; and the money was paid for the purpose of increasing the value of their property. These advantages and conveniences, comprising among other things facility of access, adapted the ground to those uses for which in a large city is most desirable. Ordinance No. 23 of the mayor and city council of Baltimore (approved April 8, 1891), authorized the construction of an elevated railway by the corporation to whose rights the Lako Roland Company has succeeded.

The fifth section of this ordinance enacted that the said corporation should have power to bridge the tracks of the Northern Central Railway Company, from the corner of Eager and North streets to the corner of Saratoga and North streets; and to make the proper and necessary elevated structure for the purpose of effecting said crossing and the approaches thereto. This ordinance has been ratified and confirmed by the Act of 1892, chapter 112. We may assume for all the purposes of this discussion that the structure in question has been erected in conformity with the requirements of the ordinance. Its effect upon the condition of the street is very obvious. It very seriously impedes travel and transportation. And with respect to the complainant it erects an impassable barrier in front of a portion of his property, and takes away from it the value derived from a frontage on an open public street thirty-six feet wide. The available space is reduced to about ten feet. We do not at present find it necessary to make an estimate of the damage thus inflicted. The testimony shows it to be very great. If this structure had not been authorized by legislative authority it would have been a public nuisance of aggravated character. But as a matter of course it cannot be so regarded after it has received the sanction of the general assembly and the mayor and city council of Baltimore. Private rights, however, are not affected by any legislation, which has taken place. They are amply secured against infringement by the declaration of rights. According to the nineteenth article "every man for an injury done to him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right . . . according to the law of the land." And the twenty-third article declares that "no man ought to be . . . deprived of his life, liberty, or property but by the judgment of his peers, or by the law of the land."

24 L. R. A.

The legislature has paramount authority over all public highways, and may direct the mode in which they are to be used. It has seen fit to confer on the mayor and city council of Baltimore the power to regulate the use of the streets in that city. But it has never been supposed that either the legislature or the mayor and city council could exempt a private corporation from responsibility for any wrongs done in using the streets under their authority. And no such proposition has been maintained in the argument of this case. When the city in the exercise of its corporate powers proceeds to close a street it is required to ascertain by due process of law the amount of damage which will be done by closing it, and to pay over to each one who is injured the amount he is entitled to receive, or invest it in city stock for his benefit, before the street is closed. Public Local Laws, art. 4, § 806. In this way those persons are indemnified, who, by the closing of a street, are deprived of the advantages, conveniences and valuable legal rights dependent on its existence as a public highway. It is true that North street has not been closed by the proceedings in this case. But other injuries are to be redressed by the remedies which the law has prescribed as appropriate to their particular circumstances. Where a railroad company had a right to make a tunnel in a street, and in the careful exercise of this right it damaged the walls of a house, it was held that the owner of the house was entitled to recover compensation for the injury, even although it were the natural or inevitable consequence of the act which was authorized by law. *Reaney's Case*, 42 Md. 117. In the present case the abutment to the extent of its dimensions subverts and destroys every possible use for which a street is intended; it obstructs the access to the property adjacent to it, and makes it impossible for the owner to use it in the manner in which he has a right to use his property.

The street for a distance of eighty-eight feet has disappeared, and a narrow alley has been substituted in its place. Now, admitting this to be an injury which must be redressed, the inquiry is, what remedy has the law declared to be appropriate to such a case. If the ordinance and the ratifying statute cannot exempt the Lake Roland Company from responsibility for injuries committed, it must follow as a consequence that it is liable to the same proceedings as any other wrong-doer under similar circumstances. The appropriate remedy for obstructing a right of way is an injunction to remove the obstruction. This was clearly decided in *White v. Flannigan*, 1 Md. 525, 54 Am. Dec. 668. In general terms, the rule in equity is stated to be that an injunction will not be granted "when a trespass is fugitive and temporary, and adequate compensation can be obtained in an action at law." But the rule does not imply that where a trespasser is destroying the property of another person, equity will refuse to interfere, because the value of the property might be recovered in an action at law. Every man is entitled to the use and enjoyment of his prop-

erty in any lawful manner which suits his wishes and purposes. Hence there is a necessary limitation or explanation to the general rule. An injunction will be issued where the trespass reaches to the substance and value of the estate, and goes to the destruction of it in the character in which it enjoyed, or where it would impair the just enjoyment of it in the future. *White v. Flannigan*, 1 Md. 545, 54 Am. Dec. 668; *Shipley v. Ritter*, 7 Md. 418-415, 61 Am. Dec. 871; *Story*, Eq. Jur. § 928. In *White v. Flannigan* it was said: "We have seen that the complainant is entitled under an implied covenant to a right of way over the forty-five foot street. Any obstruction which denies the exercise and use of this right works irreparable mischief to the street, as a street. The thing ruined by the obstruction is a street, and as in the case of the mine, the complainant on the principle there recognized has a right to the aid of a court of equity. What he complains of is the destruction of the street. He is entitled to the enjoyment of it as a street."

In *Corning v. Lowerre*, 6 Johns. Ch. 439, 2 L. ed. 178, a bill was filed for an injunction to restrain the defendant from obstructing Vestry street, in the city of New York, averring that he was building a house upon it, to the great injury of the plaintiffs, as owners of lots on and adjoining that street. Chancellor Kent granted the injunction, saying that it was "a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs." Of course, in the present case the complainant cannot maintain that the obstruction is a public nuisance, but he is entitled to protection against "a special grievance affecting the enjoyment of his property, and the value of it." In *Hart v. Buckner*, 2 U. S. App. 488, 54 Fed. Rep. 925, the court says: "Owners of lots abutting on and adjacent to a public street of a city, even if not owners of a fee in the street, have the right of access and the right of quiet enjoyment, and such rights are property which may be protected by injunction when invaded without legal authority." From many other cases illustrating this point, we will select two from the Supreme Court of the United States.

In *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74, the complainant alleged that the railroad company was constructing a railroad track over and along a public street, levee and landing in front of certain real estate in the city of St. Paul, belonging to him, and that the purpose was to run cars thereon for the transportation of freight and passengers, and if this purpose should be carried into effect the street, levee and landing could not be occupied and used for the purposes for which they were constructed, and to which they were dedicated, and that his premises would be rendered useless and valueless. The railroad company denied that Schurmeier was the owner of the fee in the street, and set up title in itself as grantee of the state of Minnesota. It was shown in evidence, among other things, that

the person under whom Schurmeier claim title had by certain formal proceedings dedicated to the public the street, levee and landing; and it was contended that thereby under the laws of Minnesota the entire fee was vested in the state. It was also shown that the city of St. Paul claimed entire control over the said premises, and had established a grade for the same. In reference to the statute which was alleged to vest the fee in the state, the court said: "Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defence to the suit, because it is nevertheless true, that the municipal corporation took the title in trust, impliedly, if not expressly designated by the acts of the party in making the dedication. They could not, nor could the state, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

It was decreed that the railroad company should be enjoined from the further prosecution of its work, and that it should remove from the street, levee and landing in front of Schurmeier's premises all tracks, trestle works, buildings and obstructions of every kind which it had constructed for railroad purposes. In *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, it appeared among other things that a railroad company had erected in Water street, in the city of Keokuk, a permanent and substantial building, and that it covered the whole of the front of the plaintiff's lots binding on the street. The circuit court decided that the railroad company had acquired from the municipal authorities a right to lay down their tracks in the street, but the assent of the municipality could not confer the right to erect this building in the street. The supreme court said: "The construction of a permanent freight depot in Water street was an unauthorized and improper occupation of that street. It was a total obstruction of the passage; and this, as we have said, cannot be created or allowed. It is subversive of and totally repugnant to the dedication of the street, as well as to the rights of the public." It may be said that in this case the complainant is not entirely deprived of the use of the street. This is true. But there is a very serious impediment to the use of the street by vehicles; although the obstruction is not total. A solid stone structure eighty-eight feet long and about sixteen feet wide, ascends from the grade of the street to a height of nine feet. Before its erection there was an open street in front of Garrett's lot measuring thirty-six feet from curb to curb; the open space in front of his lot has been so much reduced that it measures less than ten feet. He is not deprived of all use of his lot, but he is prevented from the advantageous use of it which he has a right to make, and upon which its value very largely depends.

It cannot be said that his property has been destroyed; but in the language of the authorities the injuries reaches to the very substance and value of the estate, and goes to the destruction of it in the character in

which it has been enjoyed. And it impairs the just enjoyment of the property in the future. This last circumstance is one of the tests given by *Judge Story* to determine the propriety of an injunction. *Story, Eq. Jur. § 928*. If an individual should blockade the access to the complainant's lots, and say to him, "you may sue me for damages and recover full compensation for the injury which I have done to you;" a court of equity would not tolerate such an excuse for the trespass, but would order the removal of the obstruction. In whatever way the city council may authorize the public use of the streets for railroad purposes, it can in no manner diminish or disparage private rights in connection with them. These are under the protection of the law of the land and any invasion of them must be redressed by the ordinary process of the tribunals of justice. It is not competent for the city council (with or without the sanction of the legislature) to debar an injured party from a resort to the ordinary remedies provided by the law of the land for the protection of property, and to restrict him to an action for damages. If any such effect be attributed to the ninth section of the Ordinance of the mayor and city council of April 8, 1891, it must be determined that for such purpose it is simply void.

In *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363, 13 L. R. A. 126, it was decided that as there had not been a physical invasion of the property of the complainant by the railroad company there was no taking of private property within the meaning of the constitution, and that therefore there was no ground to require a condemnation before proceeding with the work of the railroad. The complainant was the owner of property abutting on a street in which the railroad company was making a cut so as to provide an entrance to a tunnel, which it was authorized to construct. The injury to the complainant was not regarded as serious. It would not therefore, according to the principles above stated, have justified an injunction. Let us quote from the language of the court: "It is not charged or in any way claimed that the plaintiff will be deprived of, or seriously hindered in the right of access to his property from the street by the making of the cut. . . . The street after the cut is made, will still remain in front of the plaintiff's property on the east side of the cut, about forty one feet wide. There is no question therefore, presented here as to the right of the plaintiff to compensation for obstructing access to his property from the street," page 371. This passage shows a marked difference between that case and the present case.

I see nothing to defeat the complainant's right to such relief as a court of equity is able to give him, unless he has lost it by delay in instituting these proceedings. The evidence does not show the precise time at which the abutment was completed; but the plans for the elevated road were approved by the city commissioner July the twenty-eighth, eighteen hundred and ninety-two, and the bill of complaint was filed November the fifteenth, of the same year. The superstructure was placed on the abutment after 24 L. R. A.

the filing of the bill. There could not have been much delay on the part of the complainant in instituting these proceedings; certainly not so much as would defeat his right to relief on the ground of laches, or acquiescence in the construction of the abutment. The usual course would be to decree a removal of the obstruction, and this ought to be done in the present instance, if it were necessary, for the protection of the complainant's interests. But a court of equity, in the exertion of its powers, is always governed by a benignant sense of justice, and never even in the redress of wrongs inflicts needless injury. The removal of the abutment would prevent the Lake Roland Company from making efficient use of its road, and would cause incalculable damage to its business. We ought, therefore, to forbear to order the removal if it will repair the injury which it has produced. It has been often said that the granting or refusing an injunction is a matter resting in the sound discretion of the court. This may, perhaps, be considered rather a vague statement. But, however, in exercising this jurisdiction, the courts take into view all the facts affecting the rights of the parties concerned, and frame their decisions in such manner as to do complete justice between them.

They may grant an injunction on terms, and they may dissolve it on terms. We do not fail to see that in this case a rigid application of abstract rules of procedure would do more injustice than it would remedy. But by reason of the plastic character of equity practice, we are enabled to mould our decree in this case in such manner as to attain substantial justice. A notable instance in which the relief was modified to suit the circumstances of the case may be found in *Green v. Drummond*, 31 Md. 71, 1 Am. Rep. 14, although it was entirely different from that prayed in the bill of complaint. A bill in equity was filed for the specific performance of a contract for the purchase of real estate. The court decided that specific performance could not be decreed; but, nevertheless, as the complainant had expended money on the faith of the contract, it decreed him pecuniary compensation. The complainant contends that the Lake Roland Company has no right to deprive him of the means of access to his property, and of the other benefits of the street, without first making him compensation to be agreed upon between them, or to be ascertained by condemnation under the right of eminent domain. According to the decision in *O'Brien v. Baltimore Belt R. Co.*, we cannot sustain his position that this is a case for the exercise of the right of eminent domain. If, however, there had been a condemnation of this kind, he would have been awarded a sum of money sufficient to compensate him for the rights taken from him. If we render a decree in his favor for this amount, we will satisfy the demands of justice as fully as we are able to do under the circumstances of this case. We ought, therefore, to compute from the evidence the amount of the damage which has been done to him, and decree that the Lake Roland

Company shall pay this sum to him. If it shall not be paid within ninety days, we ought to order the abutment to be removed.

Sarah VAN WITSEN *et al.*, *Appts.*,

Bertha GUTMAN.

(.....Md.....)

The easement of an abutting owner in a public alley, laid out by the original grantor of the land, who conveyed it, with reference to the alley as a boundary, cannot be taken away for private use by an ordinance closing the alley.

(June 20, 1894.)

APPEAL by complainants from a decree of the Circuit Court, No. 2, of Baltimore City in favor of defendant in a suit brought to enjoin defendant from erecting an obstruction across an alley. *Reversed.*

The facts are stated in the opinion.

Messrs. W. B. Trundle and Gans & Haman, for appellants:

If one sells lots fronting on a public road and the road be afterwards vacated, and the rights of the public cease, he may not close it up against his vendees, for his grant estops him.

Plitt v. Cox, 43 Pa. 488; *Parker v. Smith*, 17 Mass. 418, 9 Am. Dec. 157; *Parker v. Framingham*, 8 Met. 267; *Washb. Easem.* 14th ed. pp. 86, 266.

The grantees of the lots are entitled as purchasers to have the interval or space of ground left forever open as a street, and to the right of using the way for every purpose that may be usual and reasonable for the accommodation of the granted premises. Neither the corporation of the city nor state authorities nor the grantor can do any act to impair their right or restrict the grantees in the enjoyment of it.

White's Bank of Buffalo v. Nichols, 64 N. Y. 65; *Bisell v. New York Cent. R. Co.* 23 N. Y. 64; *Baltimore & O. R. Co. v. Gould*, 67 Md. 63.

The public may abandon its right without impairing the private easement.

Lewis, Em. Dom. § 184.

Whether this particular ordinance provides for a condemnation of the private rights of the appellants in Jew alley for a public use, a use by the public, or for a private use, a use by a private person, is a judicial question.

New Central Coal Co. v. George's Creek Coal & Iron Co. 37 Md. 561.

It is to be decided, not by the language of the ordinance, but by the nature of the use to which the land to be condemned is to be applied.

Re Deansville Cemetery Assn. 66 N. Y. 569, 23 Am. Rep. 86; *Re Townsend*, 39 N. Y. 174;

Coster v. Tide Water Co. 18 N. J. Eq. 54; *McQuillen v. Hatton*, 42 Ohio St. 202; *Re Niagara Falls & W. R. Co.* 108 N. Y. 875; *St. Joseph Terminal R. Co. v. Hannibal & St. J. R. Co.* 94 Mo. 586; *Re Spirit Rock Cable Road Co.* 58 Hun, 851.

"Incidental benefits" to the public, where the primary purpose of the law or ordinance is the promotion of private advantage or prosperity, do not constitute the use for which the property is to be condemned, a public use.

Citizens Sav. & L. Assn. of Cleveland v. Topeka, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Varner v. Martin*, 21 W. Va. 584; *Cooley, Const. Law*, pp. 653, 654.

Public use is use by the public.

Lewis, Em. Dom. § 165.

It is said that the property of the appellants in the alley may have been taken for public use. The fact that the appellee is now about to build or extend her warehouse upon it, is immaterial. This position is untenable.

Belcher Sugar Refinery Co. v. St. Louis Grain Elevator Co. 83 Mo. 121; *People v. Palatine Highway Comrs.* 53 Barb. 70; *West River Bridge Co. v. Dir.* 47 U. S. 6 How. 507, 12 L. ed. 535.

When the mayor and city council of Baltimore pass an ordinance to condemn private rights for what the courts will declare to be a private purpose, they are not acting within the scope of their powers.

Baltimore v. Clunet, 28 Md. 467; 3 Am. & Eng. Encyclop. Law, p. 678; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Alberger v. Baltimore*, 64 Md. 6.

Any one injured by the attempt to assert a supposed right founded upon an unconstitutional law, has the right to protect himself in a direct proceeding against the person asserting the supposed right.

Norris v. Abingdon Academy, 7 Gill & J. 7; *Williar v. Baltimore Butchers Loan & Annuity Assn.* 45 Md. 546; *Bradshaw v. Lankford*, 11 L. R. A. 532, 78 Md. 428.

The mayor and city council have no right to condemn private rights, except for public use.

Hoye v. Swan, 5 Md. 244.

Messrs. Steele, Semmes & Carey, for appellee:

Laws authorizing municipal corporations to open or close public streets and alleys or portions thereof, when, in their opinion public welfare or convenience may require, are constitutional, and such opening or closing is a public use.

2 Dill. Mun. Corp. § 666; *Elliott, Roads & Streets*, p. 664; *Baltimore v. Bouldin*, 23 Md. 828.

Jew alley is a public alley, and, therefore, the mayor and city council of Baltimore have full power and authority, under sections 806-808, article 4, Public Local Laws, to close any

NOTE.—In connection with the above case which emphasizes the limitation of public authority over highways to public purposes, see, as showing the same limitation, *Smith v. McDowell* (Ill.) 22 L. R. A. 393; *Schopp v. St. Louis* (Mo.) 20 L. R. A. 733; *New Haven v. New Haven & D. R. Co.* (Conn.) 18 L. R. A. 265.

For right of abutting owner to compensation 24 L. R. A.

when highway is closed by the authorities, see *Buhl v. Fort Street Union Depot Co.* (Mich.) 23 L. R. A. 382; *Levee Dist. No. 9 v. Farmer* (Cal.) 23 L. R. A. 383, and note to *Selden v. Jacksonville* (Fla.) 14 L. R. A. 370.

Compare also on the question of use of alley for private purposes the case of *Field v. Barling*, post, p. 403.

portion thereof, which, in their opinion, the public welfare or convenience may require.

There being a grant by the legislature of express power to the mayor and city council to close up, in whole or in part, any street or alley in Baltimore city, which, in their opinion, the public welfare or convenience may require; and the mayor and city council having declared, by the passage of the ordinance, that, in their opinion, the public welfare or convenience requires the closing of Jew alley in part, this court cannot inquire into the question as to whether or not that discretion was properly exercised unless it be charged that the ordinance was the result of fraud, or a corrupt bargain, and this having been disclaimed by the plaintiff's counsel, there is nothing to give this court jurisdiction.

Methodist Protestant Church v. Baltimore, 6 Gill, 391, 48 Am. Dec. 540; *Baltimore v. Ounet*, 28 Md. 449; *Baltimore v. Bouldin*, 28 Md. 375; *Brooks v. Baltimore*, 48 Md. 265; *Alberger v. Baltimore*, 64 Md. 1; *Central Sav. Bank of Baltimore v. Baltimore*, 71 Md. 515; *Friedenwald v. Shipley*, 74 Md. 224; *Elliott, Roads & Streets*, p. 664, 2 Dill. Mun. Corp. § 600; *Lewis, Em. Dom.* § 238; 1 Dill. Mun. Corp. § 328, and note on p. 396; *Polack v. San Francisco Orphan Asylum Trustees*, 48 Cal. 490; *Spiegel v. Gansberg*, 44 Ind. 418; *Transylvania University v. Lexington*, 3 B. Mon. 25, 38 Am. Dec. 178; *McGee's App.* 114 Pa. 470.

The ordinance having provided due compensation for the damage done the appellants by the closing of the alley, the effect of said closing is to vest the fee of the bed of that portion of the alley either in the heirs of the original grantor or in the owner of the abutting property absolutely free from any claim for any public or private right therein, and may be used by such owner as any other property.

Luani v. Brown, 75 Md. 481; *Peabody Heights Co. v. Sadtler*, 68 Md. 533, 52 Am. Rep. 519; *Kimball v. Kenosha*, 4 Wis. 321; *Rensselaer v. Leopold*, 106 Ind. 39.

It is somewhat difficult to understand how an ordinance passed in the precise terms of the act, giving the power, can be in excess of the power so given.

Dill. Mun. Corp. § 601.

The legislature has given the power. The city has declared that the necessity for its exercise exists. What more is needed? Wherein lies the excess?

1 Dill. Mun. Corp. § 328; *Haynes v. Cape May*, 50 N. J. L. 55, and authorities heretofore quoted to sustain the appellee's fourth proposition.

The subsequent use of the bed of the alley or street is immaterial.

Whitsett v. Union Depot & R. Co. 10 Colo. 243; *Spiegel v. Gansberg*, 44 Ind. 418; *Anderson v. Turbeville*, 6 Coldw. 150; *McGee's App.* 114 Pa. 477; *Rensselaer v. Leopold*, 106 Ind. 39.

Conceding for the sake of the argument that Mrs. Gutman does derive a peculiar benefit from the closing of the alley, still this does not make the ordinance bad.

New Central Coal Co. v. George's Creek Coal & Iron Co. 37 Md. 537.

The fact that certain persons are benefited

and others damaged by the proposed appropriation of property to public uses does not invalidate the proceedings.

McGee's App. 114 Pa. 470; *Re Center Street*, 115 Pa. 247; *Shinkis v. Covington*, 83 Ky. 420.

Bryan, J., delivered the opinion of the court:

The appellants were complainants in the court below. They filed a bill in equity in the circuit court No. 2, of Baltimore city against Mrs. Bertha Gutman. It was alleged that she was engaged in erecting a permanent stone and brick wall across the southern part of Jew alley in the city of Baltimore, and that this wall will completely deprive complainants of their right of way over a portion of said alley. The prayer of the bill of complaint was that the defendant should be perpetually enjoined from obstructing the alley, and that she should be required to take down and remove the wall which had been erected. The defendant filed her answer, and after testimony and hearing, the court dismissed the bill with costs.

All of the parties to this suit deduce their title from the same grantors through sundry mesne conveyances. In 1839, the trustees for the owners of a tract of land in the city of Baltimore made a plat of the property, and on said plat laid off and designated certain lots, and an alley running through said property from north to south. Mrs. Gutman is now the owner of ten of these lots; five of them bounding on the east side of the alley, and five lying directly opposite on the west side. The complainants own other lots bounding on the eastern side of the alley. The first deed in point of time, mentioned in the record, which conveys any of these lots is a lease from the trustees to Skipwith H. Coale for ninety-nine years, with the usual covenants for renewal. It is dated October 31, 1839. It described one of the lines as running "to a public alley laid out by the trustees, and called Jew alley; thence bounding on said Jew alley southerly, etc., etc." All of the conveyances under and through which the complainants claim contain certain references to this alley as one of the boundaries of their lots. This alley runs from Marion street on the south to Lexington street on the north, and is eighteen feet wide at the southern and twelve feet wide at the northern end. Mrs. Gutman's lots lie at the southern end, fronting seventy-three feet five inches on each side of it. Her deeds do not appear on record, but her title is admitted by agreement of counsel. We infer that it is leasehold, but its character is not distinctly stated; nor is it of any consequence in enabling us to decide the question in this case. On May 3, 1893, the mayor and city council of Baltimore passed two ordinances. The first authorized and directed the condemnation and closing of that portion of Jew alley which bounds each side of the lots of Mrs. Gutman. Proceedings for the closing of the alley have been conducted according to the regular forms required by law. And claiming authority from the ordinance and the proceedings thereunder, Mrs. Gutman has commenced to build the wall in the bed of the alley, which the

complainants seek to abate. She also claims the title to the bed of the alley in fee. The mayor and city council of Baltimore have kept this alley in repair for more than twenty years, and have exercised control over it during all that time.

The questions in the cause have been argued on both sides with remarkable ability by the respective counsel. The court is fully mindful of their great importance, and of the delicate nature of the duty which it is required to perform. We think that the alley in question was dedicated to the public as a highway by the lease to Coale in 1829. The lot is described as bounding on a "public alley," designated as Jew alley. Now, under the accepted authorities, there ought to be no question as to the meaning of this description. It was in legal effect an implied covenant that Coale should have a right of way over the alley as a public alley. This question was decided in *Flannigan's Case*, 1 Md. 525, 54 Am. Dec. 668; and in *Moale's Case*, 5 Md. 814, 61 Am. Dec. 276. In *McMurray v. Baltimore*, 54 Md. 108-112, the legitimate consequences of this ruling was stated. The court said: "Where an owner of land exhibits a map of it, in which a street is defined, though not yet opened, and sells building lots with front or rear on the street, and makes no express reservation, he dedicates the street for public use, and if in a city surrenders it for all public purposes." And in *Baltimore & O. R. Co. v. Gould*, 67 Md. 60-63, it was considered as settled that under such circumstances there was a dedication of a street to the use of the public as a street. It is thought that no one will suppose that there can be any difference between the modes of dedicating a public alley and a public street. As a matter of course, whatever rights in the alley may have been conveyed subsequently to the lease to Coale, they were subordinate to the public right acquired by the dedication. The city of Baltimore accepted the dedication, and dealt with the alley as one of its highways. The mayor and city council of Baltimore has the general power to close any street or alley, or any part of any street or alley, according to their discretion. They are to be governed by their own opinion of the public welfare and convenience. But they must provide for ascertaining the amount of damages to any owner or possessor of land, which will be caused by the closing, and for paying compensation to him, or investing the amount of it in city stock for his benefit, before the closing shall take place. Public Local Laws, art 4, § 806. It is recognized by the statute that abutting owners have interests in the street or alley which are valuable, and that these cannot be taken for the public use without compensation. It is believed that no one will contend that they can be taken for private use on any terms whatsoever. Certainly such a doctrine has never at any time found any toleration in this state. The Supreme Court of the United States in *Wilkinson v. Leland*, 27 U. S. 2 Pet. 667, 7 L. ed. 553, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional ex-

ercise of legislative power in any state of the Union." Another high authority has said that such a transaction would be a robbery and not legislation. As the appellant's property cannot be taken from them by any power known to the law, except for the public use, they must necessarily have a right to the protection of the courts, if an attempt should be made to take it for any private purpose. Wherever the legislative body has not unlimited power, every suitor must have a right to obtain from the courts the decision of the question whether it has exceeded its powers in dealing with his property. And wherever this power is limited, the courts must so declare, and restrain it within its legitimate boundaries. There seems to be a general concurrence of opinion that the court must determine whether the use for which a citizen's property is taken be public or private. It is so held by the Supreme Court of the United States, *Shoemaker v. United States*, 147 U. S. 298, 87 L. ed. 184. And it is certainly the doctrine of this court. It was very tersely expressed by Chief Justice Alvey in *New Central Coal Co. v. George's Creek Coal & Iron Co.* 87 Md. 587. He said, "Whether the use, in any particular case, be public or private, is a judicial question; for otherwise the constitutional restraint would be utterly nugatory, and the legislature could make any use public by simply declaring it so, and hence its will and discretion become supreme, however arbitrarily and tyrannically exercised." After this decision of our court, it is unnecessary to cite any of the multitude of other cases to the same effect. The mayor and city council of Baltimore is required to condemn, among other things, the rights of the abutting owners on a street or alley before it can be closed. This condemnation cannot be made except for a public use, and therefore in the case only of such a use is the closing lawful. We will proceed to inquire into the character of the use for which these interests have been condemned. And we shall lay out of our view all the testimony respecting the arguments made before the committee of the city council, when the advocates and opponents of the ordinance appeared before them. We shall found our opinion upon the facts and circumstances which exhibit the nature and character of the ordinance and the objects and results which it would accomplish. As has been already stated, Mrs. Gutman owns lots on both sides of this alley at its southern extremity. The ordinance enacts that the portion of the alley shall be closed which lies between her lots. And on the same day another ordinance was passed, which directed the same alley to be widened for a distance of twenty-five feet northerly from Mrs. Gutman's property, so as to add seven feet to its width; and it was provided that Mrs. Gutman was to convey the land to the city for the purpose of this widening. These two ordinances relate to the same subject, tend to consummate the same object, and must be considered as parts of the same transaction. The result of them would be that Mrs. Gutman would have access to her property by Marion street on the south, and immediately north of her property the alley

would be twenty-five feet wide for a distance of twenty-five feet, from that point, the original width of the alley would continue to Lexington street; while all the other lots on the alley would be debarred from the access to them from Marion street. It is shown by the condemnation proceedings, and by agreement of counsel, that Mrs. Gutman is to pay the whole expense incurred by the closing of the alley, including the benefits arising therefrom. The money paid her for benefits is, of course to be applied in satisfaction of the damages sustained by the complainant and others in consequence of the closing. They lose their easement in the closed portion, and she is thereby enabled to erect a building upon it. This is palpably and plainly taking their private property for her private use. In other words it is a forced sale to her of their property. The extinguishment of their interests does not appear to inure in any way to the public service; nor tend to the relief of any public necessity; nor to promote any public interest; nor to subserve any public purpose; nor to be connected with anything used by the public; nor in short, to have, any relation to the public convenience or welfare. The legislature has power to direct that private property shall be taken for the public use, if just compensation be made in the manner prescribed

by the constitution. It lies in its discretion to determine to what extent, on what occasions, and under what circumstances this power shall be exercised. The courts have no right to review or control its decisions on these points; but it is indispensable that the use for which private property is taken should be of a public nature. And as we have said whether the use is public or private, is a question for the judiciary to decide. In the opening and closing of streets, the mayor and city council of Baltimore is the legislative power invested with the right to determine when private property shall be taken for the public use. In this matter its judgment and discretion are final and exempt from the control of the courts. But where its ordinances are drawn in question, it is the duty of the judiciary to decide whether the use for which private property is taken, is public or private, in the same manner and on the same principles as it would decide in the case of an act of the state legislature.

It will be seen that we consider the ordinance for closing Jew alley invalid. The decree of the circuit court must be reversed with costs, above and below, and the cause remanded, in order that a decree may be passed in accordance with the prayer of the bill of complaint.

Decree reversed and cause remanded.

ILLINOIS SUPREME COURT.

Marshall FIELD *et al.*, *Appts.*,

Henry A. BARLING *et al.*

(149 Ill. 554.)

1. The right of an abutting owner who has bought with reference to a dedicated public alley or street, to have it forever kept open, includes the enjoyment of light and air from the space above extending unobstructed to the sky.
2. The right to make a bridge or overhead crossing over a public alley for private use cannot be granted by city authorities, although the fee of the alley belongs to the city.
3. Special damages are caused to an abutting owner by an overhead bridge across a public alley or street, when the light and air passing to his property over such alley will be seriously diminished by the structure.

(April 2, 1894.)

APPEAL by defendants from a decree of the Circuit Court for Cook County enjoining defendants from maintaining a bridge over an alleged highway in such a manner as to interfere with the light and air coming from the highway to complainant's property. *Affirmed.* The facts are stated in the opinion.

NOTE.—The above case is an attempt to accomplish a similar result in a somewhat different way from that resorted to in the preceding case of *Van Witsen v. Gutman*. For references to authorities on the subject of closing or obstructing a highway, see the notes to that case.

24 L. R. A.

Mr. John P. Wilson for appellants.

Messrs. Wilson, Moore & McIlvaine, for appellants:

Appellees are not entitled to a decree in a court of chancery enjoining any bridge across Holden place, without alleging and proving that they would sustain a special and substantial injury therefrom.

McDonald v. English, 85 Ill. 232.

The title to the land in Holden place vested in fee in the city of Chicago.

Illinois v. Illinois Cent. R. Co. 146 U. S. 462, 36 L. ed. 1048.

A private party can not obtain relief in a court of equity for an alleged obstruction of a public street, unless he sustains a special injury, different in kind from the public, and substantial in its nature.

Union Coal Co. v. LaSalle, 19 L. R. A. 326, 186 Ill. 128; *Quincy v. Bull*, 106 Ill. 849; *Chicago Municipal Gas Light & F. Co. v. Lake*, 180 Ill. 54; *McDonald v. English*, *supra*.

The special injury is the gist of the action, and unless it is alleged and proved there can be no recovery.

Dunning v. Aurora, 40 Ill. 481; *Francis v. Schoellkopf*, 58 N. Y. 155; *Pierce v. Dart*, ? Cow. 809; *Lake View v. Lets*, 44 Ill. 81; *Clark v. Donaldson*, 104 Ill. 639.

There is no difference or distinction in the rights or interest of an abutting owner in a street dedicated, from that acquired by condemnation.

Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 289; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625; *Mercer v. Pittsburgh, Ft. W. & C. R. Co.* 86 Pa. 103.

The permanent occupation of a part of the surface of a street, even for a municipal purpose, is an unauthorized and illegal obstruction of the street.

Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77.

The rights of the public and of the abutting lot owners extend to the air and light above, as well as to the surface.

Barnett v. Johnson, 15 N. J. Eq. 481; *Reimer's App.* 100 Pa. 182, 45 Am. Rep. 873; *Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146; *Schworer v. Boylston Market Assn.* 99 Mass. 285; *Salisbury v. Andrews*, 128 Mass. 386; *Atty. Gen. v. Algonquin Club*, 11 L. R. A. 500, 153 Mass. 447.

The power of a city to regulate the use of a street is limited to regulations affecting its use for the particular purpose for which it was dedicated.

Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77; *Slack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619.

If the owner of land exhibits a plat of a town or addition or subdivision, on which a street is defined, and sells lots abutting on such street, and with clear reference to the plat, the purchasers of such lots acquire, as appurtenant to their lots, the right to have the street kept open as a street.

Earll v. Chicago, 136 Ill. 285; *Zearing v. Raber*, 74 Ill. 409; *Maywood Co. v. Maywood*, 118 Ill. 61; *Lake View v. LaBahn*, 120 Ill. 92; *Newell v. Saxe*, 142 Ill. 104.

The right thus passing to the purchasers is not a mere right that the purchaser may use the street, but that all persons whatever, as their occasion may require or invite, may so use it.

The sale and conveyance of lots according to the plat imply a grant or covenant to the purchasers of lots, and their grantees, binding on all abutting lot owners claiming title from the original proprietor as the common source, that the public street indicated upon the plat shall be forever open for use as a street, free from all claim or interference of the proprietor, or those claiming under him inconsistent with its use.

Appellees' right is not a mere common-law right to light, air, and passage. It rests on grant and covenant. The jurisdiction of equity to protect, by injunction, a legal right of this character from continuous infringement, is well established.

Earll v. Chicago, *Zearing v. Raber*, *Schworer v. Boylston Market Assn.* *Salisbury v. Andrews*, and *Newell v. Saxe*, *supra*; *Dill v. Camden Board of Education*, 10 L. R. A. 276, 47 N. J. Eq. 421.

The right vested in appellees is in the nature of an easement in the land itself—an easement of light, air, and passage.

Story v. New York Elev. R. Co. 90 N. Y. 123, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Lake View v. LaBahn*, *supra*.

The right to an injunction to prevent a threatened interference with an easement is well settled.

Newell v. Saxe, 142 Ill. 104.

In case of a dedication by plat, the title, whether vested in the municipality or remain-

ing in the original proprietor, is held in trust and the abutting lot owners are beneficiaries, as well as the public at large, and have a vested estate, which a court of equity will protect by enforcing the trust.

Carter v. Chicago, 57 Ill. 288; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *Maywood Co. v. Maywood and Earll v. Chicago*, *supra*.

The very fact that the injury will be continuous, and that the only remedy at law will be repeated actions, each of which may only result in a recovery of nominal damages, is in itself a recognized ground of jurisdiction in equity.

Cloves v. Staffordshire Potteries Waterworks Co. L. R. 8 Ch. App. 125; *Wahle v. Reinbuch*, 76 Ill. 326; *Newell v. Saxe*, 142 Ill. 104; *Dill v. Camden Board of Education*, 10 L. R. A. 276, 47 N. J. Eq. 421; *Elliott, Roads & Streets*, 497.

Mr. George L. Paddock, for appellees: "*Cujus est solum, ejus est usque ad celum; et ad inferos.*" This maxim is applicable to the rights of the public in the streets or alleys of a city.

The proposed construction would be contrary to the statute and the ordinance on the subject of constructing streets.

R. S. Crim. Code, chap. 88, §§ 221, 222; Charter, City and Village Act; art. 5, § 1; Chicago Mun. Code, para. 1643, 1649.

By the plat and the making of sales thereunder to the respective grantors of the parties to this suit, there has resulted a relation, based upon grant or contract, establishing mutual rights and duties among the different owners of the lots, and entitling complainants, as owners of one of such lots to an interest in the nature of an easement appurtenant to their lot not only to use Holden place as a street, but to demand that all persons may use it within the limits marked on the plat free from obstruction on the part of any other lot owner.

Herbert v. Rainey, 54 Fed. Rep. 250; *Carter v. Chicago*, 57 Ill. 288; *Zearing v. Raber*, 74 Ill. 409; *Maywood Co. v. Maywood*, 118 Ill. 61; *Earll v. Chicago*, 136 Ill. 277; *Newell v. Saxe*, 142 Ill. 104; *Frewin v. Lewis*, 4 Myl. & C. 249; *Smith v. Bangs*, 15 Ill. 400; *Peoria v. Johnston*, 56 Ill. 45; *Green v. Oakes*, 17 Ill. 250; *Snell v. Buresh*, 123 Ill. 151.

Nor is it an element of special damage that it must result in all cases from some obstruction in the street in front of the party's land.

Rigney v. Chicago, 103 Ill. 64; *Green v. Oakes*, *Peoria v. Johnston*, *Smith v. Bangs*, and *Snell v. Buresh*, *supra*.

Injury to the freehold, even if slight, would be deemed in law material if to be suffered in perpetuity.

Kerr, Inj. 398.

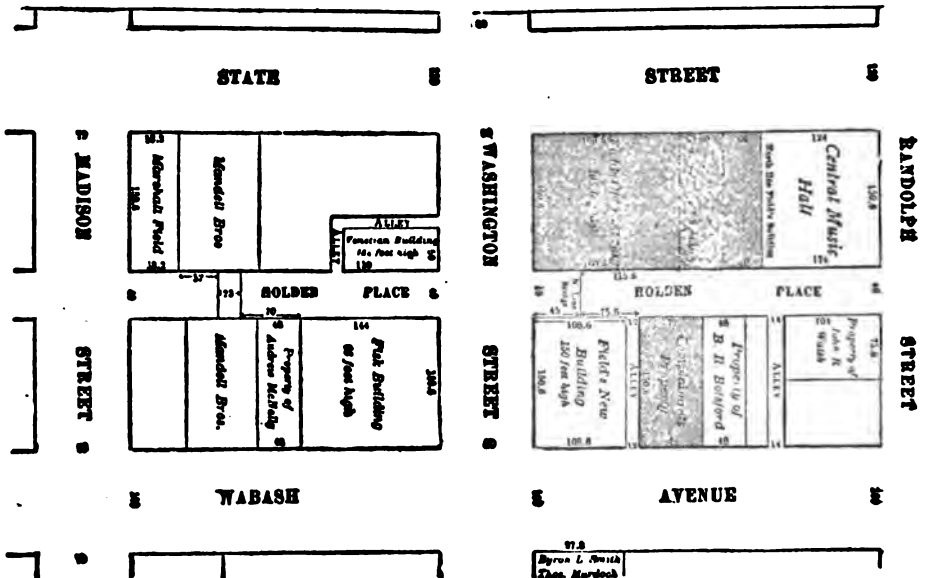
Mr. J. J. Herrick also for appellees.

Craig, J., delivered the opinion of the court:

This was a bill brought by Henry A. Barling, Edward H. Green, and Edward D. Mandell, trustees under the will of Edward Mott Robinson, deceased, against Marshall Field et al. to enjoin them from building or constructing any building, bridge, passageway, or other construction on, upon or across the alley known as Holden place or Court,

between the north line of Washington street and complainant's property described in the bill. The block in the city of Chicago bounded by Wabash avenue, Randolph, State and Washington streets is known as block 13 of Fort Dearborn addition to Chicago. The land when platted belonged to the United States, and the plat of Fort Dearborn addition was executed and recorded in June, 1839. The following plat shows State street, Washington street and Wabash avenue and Randolph street as originally laid out; also Holden place. The plat also shows the location of complainant's property and the location of Field's old building and the new one, and the point where it was proposed to erect the bridge across Holden place connecting the two buildings.

the answer was to be eighteen feet above the surface of Holden place, three stories in height, extending north from Washington street over the alley, the entire width of the alley, the distance of forty-five feet, and upward fifty-five feet, or seventy-three feet above the ground. It is charged in the bill that the effect of said construction of such connecting building, if the same be not prevented by this honorable court, will be to deprive your orator's said building and the occupants thereof, to a great extent, of sunshine, light, air and warmth, which they have hitherto enjoyed by reason of the opening and keeping open of said court or alley from the time of said platting and subdivision down to the present; will give said alley an appearance of a private gateway and pas-



Holden place as will appear from the plat is forty feet wide extending north and south through blocks 18 and 14 with lots on each side. Those on the east fronting on Wabash avenue, those on the west fronting on State street. Holden place has been used as a public place or street for many years. The defendants' lots on the northeast corner of Washington and State streets have a frontage of 160 feet on State extending back to Holden place, covered by a six story building occupied by Marshall Field & Co. for several years as a dry goods house. The defendants have acquired lots on northwest corner of Wabash avenue and Washington street with a frontage of 108 feet on Wabash avenue extending back to Holden place. On the latter lots the appellants commenced the erection of a new building nine stories high. At the time of the filing of the bill the new building had been erected six stories high, and the appellants were about to commence the erection of a bridge or passageway over Holden place connecting the old and new buildings. The bridge or passageway as disclosed by

sage; will hinder and deter traffic, and in many other ways cause serious and continuing damage to your orators and their property; that such damage will amount to many thousands of dollars, and will be beyond legal remedy or relief if not prevented by this court.

It is also alleged that orators and Marshall Field & Company and the other defendants held their respective lands on said block 13, under a common source of title, viz.: The United States by patents made by the United States, in pursuance of a subdivision, plat and sales by the United States. That by reason of the exhibition and publication of the said subdivision and plat, and by the sale of lots thereunder to the respective grantors of your orators and the said defendants. Marshall Field & Company or said Marshall Field, for their use, there has resulted, as between your orators and the said Marshall Field & Company, or such of them as own the said properties so fronting south on Washington street, on either side of said alley, a right in law to have the said alley

remain absolutely and wholly open forever, of the same dimensions and to the same extent as delineated by the United States upon the subdivision and plat aforesaid, viz.: from the north line of Washington street forty feet in width to the south line of Randolph street, and upward to the sky.

In the answer the appellants admit the intention to build the proposed bridge or structure over and across Holden place, but deny that it will interfere with the light, air and ventilation of complainant's premises, or that it will in any manner injure complainants. The appellants also set up and rely upon an ordinance set out in complainants' bill passed by the city of Chicago, June 6, 1892. Section 1 of the ordinance is as follows: Be it ordained by the city council of the city of Chicago.

Section 1. That permission and authority be and is hereby given to John M. Pashley and his assigns to construct and use a bridge or covered passageway across the alley running between lots 9, 10, and 11 on one side, and lot 6, in assessor's subdivision of lots 6, 7 and 8, etc., on the other, all in block 18, Fort Dearborn addition to Chicago: Provided, the lowest portion of said bridge or passageway shall not be lower than eighteen feet above grade of alley, and shall be so constructed that free and unobstructed passage may be had under the same, and provided, that said bridge or passageway shall be constructed of incombustible material and to the satisfaction of the commissioner of buildings.

Section 2 provides that Pashley or his assigns and all persons who shall occupy the buildings which the bridge is to connect shall indemnify and save the city of Chicago harmless from all damages which it may become liable for by reason of the passageway granted. It will not be necessary to cite authorities in support of the proposition that a private individual can not appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use. Before Holden place was dedicated to the public as a street, the title of the United States, the original proprietor was not confined to the surface of the ground, but its title extended upward embracing the light and air as well as the soil. And the dedication of the strip of land for a public street embraced not only the surface of the ground, but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil. In *Barnett v. Johnson*, 15 N. J. Eq. 481, where it was proposed to obstruct light and air over ground dedicated to the public, it is said:

"When the strip of land is declared a public highway the adjoining owner has the right to light and air from it. The column of light and air above the roadbed, whether of land or water, is as much a part of the highway as the roadbed itself. Take them away and there would be left no public passage. By its being declared a highway by the sovereign power, the light and air above it become again the common property of all, which all may breathe and use whenever they

may legally touch it, whether in the road or along its sides. . . . When cities and villages have been built up along a public highway, the right to light and air from it become vested, and even the legislature would have no more right to deprive them (abutting owners) of it without compensation than they would have to draw off the water from a navigable stream."

But the city of Chicago passed an ordinance which purported to authorize the construction of bridge or passageway, and it becomes competent to argue in what manner the ordinance affected the rights of the parties interested. The ordinance does not purport to grant the right for any public purpose. The use to be made of the street is a private one, solely for appellants' benefit in the transaction of their private business. Clause 7, § 62, chap. 24, Rev. Stat. confers power on cities organized under the general incorporation act as is the city of Chicago to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharfs, parks, and public grounds and vacate the same. But there is nothing in this section of the statute or in any other portion of the general incorporation act which confers the power on the municipality to devote a street or any part thereof to a mere private use. By the making of the plat in conformity to law there was a statutory dedication. The fee of the street passed to the city of Chicago, but the city held the fee in trust for the public and for no other purpose.

While the city had ample power to control, regulate, and improve the street in such manner as the demands of the public required, the law conferred no authority on the city to devote the alley to private uses. In the late case of *Smith v. McDowell*, 148 Ill. 51, 29 L. R. A. 393, where a city passed an ordinance to vacate a portion of a street for the purpose of allowing a private individual to use that portion for a part of a building about to be erected, it was held that the city had no power to devote the streets to that purpose. It is there said:

The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it. In *Alton v. Illinois Transp. Co.*, 12 Ill. 88, 52 Am. Dec. 479, we said, in treating the subject there under consideration: "Whatever title to these public grounds may be vested in this city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she can not alien or otherwise dispose of them. At most, she but holds them in trust for the benefit of the general public." In *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243, after quoting with approval the foregoing language, it is said: "It is the unquestioned duty of the city, in

controlling and improving the streets, to prepare them for public use as streets, . . . as the public necessity may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the streets, which might in any way interfere with the duty of preparing them for public use." And in *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, in considering the power of the municipality to grant rights in the public streets of the city, it was said: "It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize as unquestionable law that the use of the streets . . . must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them, for private purposes." In *Glasgow v. St. Louis*, 87 Mo. 678, under power "to establish, open, vacate, alter, widen, extend, pave, or otherwise improve all streets," etc., it was held that an ordinance to vacate a portion of one of the streets of the city for the use of private parties was *ultra vires*. See also *Reimer's App.* 100 Pa. 182, 45 Am. Rep. 373; *St. Vincent Female Orphan Asylum of Troy v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 127; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 486. And we held that the city cannot acquire land by condemning the same for a street when the real purpose is to devote it to private use: *Ligare v. Chicago*, 139 Ill. 46. In *Belcher Sugar Ref. Co. Case*, *supra*, the court held that the corporation could not condemn property for a public use, to be appropriated to a private use.

But it is claimed that appellees are not entitled to a decree unless they allege and prove they would sustain a special and substantial injury. It is conceded that both parties in this case derive title to their lots from a common source, the original proprietor of Kinzie's addition; that the conveyances were made with reference to the plat; that the streets and the alley in question, Holden place, all appear on the plat. It is claimed on behalf of appellees that where the owner of lots exhibits a plat of a town or addition, on which a street has been laid out and dedicated, and sells and conveys lots abutting on such street with a clear reference to the plat, the purchasers of such lots acquire as appurtenant to their lots the right to have the street kept open and maintained as a street. In *Zearing v. Raber*, 74 Ill. 409, where a similar question arises, the court quotes from and indorses what is said in *Smith's Leading Cases*, as follows:

"If the owner of land lays out and establishes a town, and makes and exhibits a plat of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plan represents as belonging to them as part of the

town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchaser may use these streets, or other public places, according to their appropriate purposes, but a right vesting in the purchasers, that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plat, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use."

In *Earll v. Chicago*, 136 Ill. 277, the above case is quoted with approval and the same doctrine is announced.

In *Lake View v. LeBahn*, 120 Ill. 92, when a lot owner filed a bill to enjoin the town from prosecuting him for an alleged obstruction of a strip of land, in what was deemed to be a platted street, on the ground that the dedication was invalid. The court directed the dismissal of the bill, and among other things, said:

"Each block was thus (by the plat and conveyance with reference to it) burdened with the easement of a street upon a strip of land thirty-three feet wide around it, and entitled to the benefit of the easement of a street of like width upon the adjoining side of the opposite block, so far as there was a block opposite, thus making a street sixty-six feet wide around each block. . . .

In taking the several blocks of land with the arrangement of this system of streets, there were implied mutual agreements that the streets should ever remain as platted, a dedication to the public use of the ground laid out as a street as effectual as could have been made by deed solemnly executed. . . .

He (the adjoining lot owner claiming to the center of the street) took and held an estate upon the condition of its being burdened with the easement of the streets, and the public authorities on opening and improving the streets, act as for the representatives of the lot owners with others in so doing." *Newell v. Saw*, 142 Ill. 114, is also a case in point. There a bill was filed by a lot owner to enjoin the owner of another lot in the same subdivision from obstructing an alley. The defendant set up among other things that complainant was not injured; that she had no right to an injunction, and that there was a remedy at law. In the decision of the case it was among other things, said:

"Appellants invoked, as against this decree, the rule that equity will only interpose to prevent a threatened nuisance where the injury will be irreparable, where the complainant's right is clear, and where proof of the facts upon which the complainant rests is of the most convincing character. There is here no question as to the character of the act threatened, and complainant's right does not seem to be seriously contested. The execution of the plat under which complainant claims her easement and the sale of lots afterwards in conformity therewith, are clearly proven. . . . Appellants seem, at the

time of filing the answer, to have been under the impression that appellee could derive no rights under the plat unless it had been accepted by the city or the public, and hence denied that there had ever been such acceptance. But appellee's right is established by showing that she owns an easement—the right of passage as an incident to her ownership of her lot. It is not necessary, in such case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial therefor. *Othak v. Klekr*, 117 Ill. 648.

"Irreparable injury," as used in the law of injunctions, does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one. *Elliott, Roads & Streets*, 497. . . . And this court has, in harmony with these authorities, held that injunction will lie to prevent obstruction to a private way, on the ground that the party has no adequate remedy at law. *McCann v. Day*, 57 Ill. 101."

The same rule has been adopted in other states. In *Dill v. Camden Board of Education*, 47 N. J. Eq. 421, 10 L. R. A. 276, an injunction, at the suit of a lot owner was sustained, restraining an obstruction of the light and air from an alley dedicated by plats. In the decision of the cases it is said: "The right to have the alley thus described, forever preserved as a street, is a private right annexed as an appurtenant to the ownership of the land conveyed, and is entirely distinct from and in addition to the rights of the owner as a citizen at large, to use the street after it should become a public street by acceptance by the public authorities. But while it is a private right, it is, in my judgment, co-extensive with the public right just mentioned, in that it goes the length of requiring that the alley should be preserved in all respects as if it were actually a public street." See also *Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146; *Salisbury v. Andrews*, 128 Mass. 386; *Schworer v. Boylston Market Assn.* 99 Mass. 285.

We do not understand that appellee's right to have Holden place kept free and clear of all obstruction, rests on any personal covenant of the appellants, although that expression may be found in some of the cases. But when the original proprietor of the subdivision made the plat dividing the land into blocks and lots, streets and alleys, and sold and conveyed the lots with reference to that plat, a right arose in favor of the purchasers of lots fronting on Holden place of having the street forever kept open; not that it should be kept free from obstruction on the surface of the soil alone, but to the sky. No grant or covenant was required to create this right. The dedication of the street by the plat, the sale of lots with reference to it, conveyance of abutting lots and the payment of the money for the conveyances were elements sufficient

to create the right. The right may be regarded in the nature of incorporeal hereditament; it became appurtenant to the lots. As to the rights secured they are plain. To have the street kept open so that free access may be had to and from the lots abutting on the street, and that light and air may pass unobstructed across the open space between the surface of the street and the sky.

Whether this right extends to all the streets in a subdivision or is confined to streets which afford direct access to or egress from a particular lot is a question which does not arise in this case. Here appellee's lots front on Holden place, and the obstruction is placed in the street between appellees' lots on Washington street at a point affording the only means of access to and from Washington street, from which also light and air are derived.

We have been referred in the argument to *McDonald v. English*, 85 Ill. 232, and many other cases of that character holding as to obstructions in streets not resulting in special injury to the individual, the public only can complain. Under the facts as they appear in *McDonald v. English*, we find no fault with the law as laid down in that case, and the same may be said of other similar cases cited by counsel; but in those cases the question presented by the record in this case did not arise. No question arose in regard to the effect of a plat and conveyances in reference to the plat, and the rights and obligations of lot owners who had purchased with reference to streets and alleys appearing on the plat, and no such question was considered or decided.

One other question remains to be considered, and that is, whether the erection of the proposed structure will result in special damage to appellee's property different in character from that sustained by the public at large. The proposed bridge or structure as has been seen was to be built from a point eighteen feet above the surface of the alley, fifty-five feet high and forty-five feet wide, extending from the north line of Washington street to within seventy-five feet of the south line of appellees' building. The character of the structure as disclosed in the answer is as follows:

It will be built of steel, supported by steel and cast-iron columns of the old and new buildings; the columns in both buildings, the steel girders, and the steel beams in all floors will be fire-proofed with hard burned fire-clay; the north and south walls will be of terra cotta, and the roof covered with three inch book-tile of fire-clay; the roof will be framed heavily, like a floor, and the fire-clay supported on "T" irons, on eighteen-inch centers. The windows on the north side will be protected with rolling steel shutters. Each wall on each story will be practically a continuous window so as to intercept light as little as possible.

In view of the size and character of the structure erected over the entire street, a main entrance to appellees' property for the transaction of business, and so near the property it would seem that much additional evidence could not be required to establish that

appellees would sustain special damages. But evidence was introduced tending to prove that the obstruction would seriously interfere with the light and the circulation of air at appellees' building. R. W. Hyman, a real estate agent in Chicago, of many years' experience, who was well acquainted with this property, testified that the erection of the structure would materially diminish the amount of air and light passing into said alley, and of the light and air derived by complainants' said building from said alley, and would darken and impede the approach to said building from Washington street, by way of said alley and in different ways would prevent the public from entering said alley as a means of access to said building from Washington street; "that the erection and maintenance of such a structure will, in affiant's opinion, materially damage said complainants' property, and materially diminish its rental and other value, and that the damage to said property and its value will be continuous, and of such a character that it is not practicable to estimate the amount of the same with accuracy." Other evidence of a similar character was introduced. And on the other hand there was evidence that appellees' property would not be damaged but would be benefited. But from an examination of all the evidence, we are satisfied that erection of the structure would result in serious damage to appellee's property, different in character from that sustained by the public. In the bill of complainant it was alleged, that appellants intended to construct a certain bridge or passageway connecting the old and new buildings which was described according to the information shown in the possession of the appellees.

The answer of appellants admitted the intention to build the proposed bridge or passageway for the purpose alleged, and described in detail the particular structure proposed to be built, giving the location, the height, width and other dimensions of the proposed structure, Abst. 21-23, but denied appellees' right to an injunction.

The court on the hearing rendered a decree enjoining appellants from construction of any bridge across Holden place and it is claimed the decree should have been confined to the particular kind of a bridge described in the answer.

The object of the bill was to prevent the threatened injury, and a decree confined to a bridge or passageway of some particular description or dimensions, might have opened the door to litigate this whole controversy over again by an attempt on the part of appellants to construct a bridge a foot narrower or two feet lower or varying slightly in some other respect from the bridge first contemplated. If, under the facts presented by the records, appellees were entitled to an injunction to prevent the threatened obstruction, as we think they were, it was the duty of the court to render a decree which would settle the controversy, and we think the decree rendered was the proper one, and it will be affirmed.

Affirmed.

Rehearing denied June 13, 1894.

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City of CHICAGO, *Appt.*,

v.

William BLAIR.

(149 Ill. 310.)

1. The determination of corporate authorities as to what is a local improvement is the subject of review by the courts.
2. The basis of a special assessment or a special taxation is the enhancement in value of the property to the extent of the burden imposed.
3. The sprinkling of streets is not a local improvement for which a special assessment can be laid on abutting property.

(October 31, 1893.)

APPEAL by petitioner from a judgment of the Cook County Court in favor of defendant in a proceeding brought to enforce payment of a special assessment for sprinkling streets. *Affirmed.*

NOTE.—Right to impose on abutting owners the duty or expense of sprinkling, sweeping, and cleaning streets or sidewalks.

That the right to charge an abutting owner with the expense of improving property in front of his premises is based on special benefits received by him, is established in most jurisdictions. See note to *Re Bonds of Madera Irrigation Dist.* (Cal.) 14 L. R. A. 755.

That the apportionment of benefits may be made by the frontage rule has been also quite generally decided. See note to *Raleigh v. Peace* (N. C.) 17 L. R. A. 320.

The further question whether abutting property may be charged with the expense of the improvement in front of it specifically is, on the other hand quite generally denied, except in the case of sidewalks. On this subject, see note to *Davis v. Litchfield* (Ill.) 21 L. R. A. 563.

Very few decisions have yet been made in respect to charging the abutting owner with the duty or expense of cleaning, sweeping, and sprinkling streets or sidewalks in front of his premises. And while the decisions are very few, they are not agreed. But it will be noticed that in each case of difference the Illinois decisions are the only ones that are out of harmony with the rest.

Street sprinkling.

The main case, *CHICAGO v. BLAIR*, denies that street sprinkling is an improvement, within the meaning of the constitutional provision for special assessments to pay for local improvements. While it recognizes the rule that special taxation or assessment are based on special benefits to the property, it denies that such benefits are received by street sprinkling, because the sprinkling is only useful while the work is continued, and in a few hours the beneficial effects are gone and the property worth no more than before. In respect to the claim that occupation of adjacent property is, by sprinkling the street, rendered more enjoyable and comfortable, and that the property is therefore enhanced in value, it compares street sprinkling with the placing of vases of flowers in the street, or open air concerts. The court does not mention the Minnesota case decided directly to the contrary, and which is the only prior case on the subject.

This Minnesota case (*State v. Reis*, 38 Minn. 371), expressly decided that street sprinkling is "a local improvement," for which assessments may be made, under the Minnesota Constitution, article 2, section 1, authorizing legislation under which mu-

Statement by Shope, J.:

This was a proceeding to confirm a special assessment upon the property of appellee and others for local improvement of the street upon which the property was situated. The objectors appeared in the county court and filed objections, which, among the questions raised, deny the power of the city to make the assessment for the purposes designated in the ordinance. The ordinance provided that the roadway of certain named streets, between specified points thereon, should be sprinkled with water four times a day during the period commencing April 15, 1893, and ending November 15, 1893; the first sprinkling each day to be completed before 9 o'clock A. M., the second between 9 A. M. and 12 M., the third between 12 M. and 3:30 P. M., and the fourth between 3:30 and 6 P. M.,—there being at least an hour's time between the sprinklings of any street. The

ordinance then provides for the manner of sprinkling, and that it shall be at the rate of at least one gallon for every 40 square feet of roadway; the work to be done under the superintendent of public works. Section 2 of the ordinance provides that said improvement shall be paid for by special assessment upon property benefited, in accordance with article 9 of the Cities and Villages Act. Section 3 appoints commissioners to make an estimate of the cost of said improvement, including labor, materials, and all other expenses attending the same, and the cost of making and levying the assessment, etc. The commissioners appointed returned an estimate as follows: "Cost of the improvement, \$12,000.80; inspection and superintending, \$360; cost of making and levying assessment, \$370; total cost, \$12,730.80,"—which was approved by the city council. A petition was filed in the county court for the

municipal corporations may levy assessments for local improvements upon property fronting upon, or to be benefitted by such improvements, without regard to cash valuation of the property, and in such manner as the legislature may prescribe. The court, in respect to the claim made also in that case, that the benefits were not permanent said: "If permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement?"—and added that it was "unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays or has to be built every few years."

The Minnesota court laid down the rule that "the only essential elements of a local improvement are those which the term itself implies, that it shall benefit the property on which the cost is assessed in a manner local in its nature and not enjoyed by property generally in the city."

That street sprinkling in this case benefit the abutting property was regarded by the court as a matter of common knowledge.

Street sweeping.

Substantially like street sprinkling in principle is the case of street sweeping, in respect to which the supreme court of Indiana in *Reinken v. Fuehring*, 15 L. R. A. 624, 130 Ind. 382, decided that assessments upon abutting property owners for the expenses of sweeping streets, including crossings, could be upheld on the ground of special benefit to such abutting property, even when the abutting owners were taxed generally with the balance of the public for cleaning other streets in which the public alone have an interest. The court said if the abutting owner has a special interest in the improvement of the street and sidewalk, and in keeping them free from snow and ice, he has a special interest in keeping them free from accumulating filth. Also that keeping a street clean adds to the rental if not to the permanent value of property located thereon, thereby giving the abutting property owner a special interest in such cleaning not enjoyed by the general community.

It was also said: "It is matter of common observation, of which we must take notice, that property located upon well improved streets, kept clean, is more desirable than property on unimproved streets where mud and filth are permitted to accumulate and obstruct their use."

Compelling removal of ice and snow from sidewalks.

Differing from the above cases in respect to an 24 L. R. A.

attempt to levy assessments on abutting owners, but like them in respect to the charge on abutting owners for keeping passageway in front of their premises in proper condition, are the cases concerning ordinances which compel abutting owners to remove snow and ice from sidewalks, or in default thereof to pay a fine, or at least the expense of procuring it to be done.

In respect to such ordinances the Illinois courts have held that the abutting owner cannot be compelled to clean the sidewalks of snow and ice, and that such an ordinance cannot be supported on the principle under which assessments are made against the owner for building sidewalks. *Gridley v. Bloomington*, 88 Ill. 554, 30 Am. Rep. 566; *Chicago v. O'Brien*, 111 Ill. 582, 58 Am. Rep. 640.

But elsewhere such ordinances have been upheld. The leading case on the subject is *Carthage v. Frederick*, 10 L. R. A. 173, 122 N. Y. 268, in which an ordinance compelling property owners to remove ice and snow from sidewalks within a certain time after it accumulates is held a valid exercise of police power and not unconstitutional as a taking of private property for public use without just compensation.

An earlier decision to similar effect was *Re Goddard*, 16 Pick. 504, 28 Am. Dec. 259, in which such a municipal by-law, requiring owners to clear off snow from sidewalks, was held sustainable by reason of the special benefit to their property, and not void on the ground that it was partial or unequal.

In *People v. O'Brien*, 45 Hun. 540, such an ordinance was involved, and it was held to be within the power of the city of Albany to enact, but the question raised was merely in respect to the charter power, and not with respect to the constitutionality of the ordinances, which was evidently assumed.

Such ordinances have also been considered in other cases, which did not present any question of their constitutionality. Thus, it has been held that such an ordinance does not relieve a city from liability for injuries sustained by a person in consequence of the failure of the abutting owner to remove the snow or ice. *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Taylor v. Yonkers*, 105 N. Y. 202, 50 Am. Rep. 492.

And that such ordinances does not make the abutting owner liable to the person who is thus injured by the owner's failure to remove such snow or ice. *Moore v. Gadsden*, 98 N. Y. 12; *Kirby v. Boylston Market Assn.*, 14 Gray, 232, 74 Am. Dec. 682; *Van Dyke v. Cincinnati*, 1 Disney (Ohio) 533.

R. A. R.

appointment of commissioners to extend the assessment upon property benefited. Commissioners were appointed, who returned an assessment roll, apportioning said cost upon property by them deemed specially benefited by the proposed improvement. On motion of objectors the assessment was annulled by order of the court, and the petition dismissed. The city appeals.

Messrs. Adolph Kraus and M. W. Robinson, with Mr. F. W. C. Hayes, for appellant:

The common council has the power to determine that the cost of any local improvement be paid by special assessment.

Section 9, article 9, of the State Constitution of 1870 (Starr & C. Anno. Stat. p. 149): "The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise."

Section 1, article 9, chapter 24, of the Cities and Villages Act, passed April 10, 1872 (Starr & C. Anno. Stat. p. 487) reads as follows: "That the corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment, or by special taxation, or both, of contiguous property or general taxation or otherwise, as they shall by ordinance prescribe."

By that act the general assembly vested the corporate authorities of cities, towns, and villages with full power to make local improvements.

It is solely for the local authorities to determine which method shall be adopted for paying the cost of such improvement.

White v. People, 94 Ill. 604; *Falch v. People*, 99 Ill. 187; *Lake v. Decatur*, 91 Ill. 596.

The term "local improvement" is defined as signifying improvements made in a particular locality, by which the real property adjoining or near such locality is specifically benefited.

13 Am. & Eng. Encyclop. Law, p. 986, and authorities there cited; *Wilson v. Chicago Sanitary Dist. Trustees*, 183 Ill. 443; *Guild v. Chicago*, 82 Ill. 472; *Sterling v. Galt*, 117 Ill. 11.

The term "improvement" signifies changes in the condition of property, by which changes its value is increased.

Bouvier, L. Dict.; Abbott, L. Dict.

Street sprinkling is a local improvement.

State v. Reis, 38 Minn. 371.

The question "local improvement" is a question of fact and not of law—one to be determined, and only, upon evidence and testimony as to the character and effect that the proposed improvement will have upon the market value of property assessed therefor.

It is for the corporate authorities to determine the question as to what shall be considered a local improvement, and not for the courts.

Louisville & N. R. Co. v. East St. Louis, 184 Ill. 656; *Fagan v. Chicago*, 84 Ill. 227; *Murphy v. Peoria*, 11 Ill. 509.

Section 7 of article 5, confers the power "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets,

alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate same.

Starr & C. Anno. Stat. p. 463.

Section 13 also grants the power "to provide for cleansing of the same."

The power thus given is broad and comprehensive. It would be unnecessary and quite impossible for the legislature to specify each and every method of improvement, or manner of cleansing the same. The power to otherwise improve and cleanse includes all methods that the common council deem wise.

Murphy v. Peoria, *supra*.

The effect upon the market value of property must be ascertained from evidence.

The court below, in granting the motion of appellee without hearing evidence, was compelled to assume the fact that the proposed improvement would have no effect upon the market value of the property assessed. This was erroneous.

Wilson v. Chicago Sanitary Dist. Trustees, *supra*.

The influence of the proposed improvement upon the market value of the property assessed in this case was clearly one for a jury, and to be determined upon evidence.

Fagan v. Chicago, 84 Ill. 227; *Kankakee Stone & Lime Co. v. Kankakee*, 128 Ill. 176.

Messrs. Wilson, Moore & McIlvaine, for appellee:

The right to levy special assessments on private property depends upon the question of benefits; in other words, upon the question of compensation by increase in value of the land assessed, and special assessments can be maintained on no other theory.

If a special assessment were levied without benefits or without reference to benefits, it is then a tax pure and simple, and cannot be sustained unless uniform.

Tide-Water Co. v. Oster, 18 N. J. Eq. 527; *Cooley*, Taxn. chap. 20, par. 1, p. 416; *Schenley v. Com.*, 36 Pa. 29, 78 Am. Dec. 359; *McGonigle v. Allegheny*, 44 Pa. 118; *Washington Avenue Case*, 69 Pa. 860, 8 Am. Rep. 255; *Paterson v. Society for Establishing Useful Mfrs.*, 24 N. J. L. 400.

To assess for a local improvement without reference to the actual benefits is unconstitutional.

St. John v. East St. Louis, 50 Ill. 92; *Lee v. Ruggles*, 62 Ill. 427.

The true inquiry in all such cases is, What will the influence of the proposed improvement be upon the market value of the property claimed to be benefited thereby.

Kankakee Stone & Lime Co. v. Kankakee, 128 Ill. 176.

The question whether the improvement is one for which by the constitution and statutes a special assessment may be levied is a judicial question, and is not within the control of the legislative body.

Lake View v. Tate, 6 L. R. A. 268, 130 Ill. 247.

The sprinkling of streets, as a public work, is not one of the powers committed to the common council.

Dill. Mun. Corp. 4th ed. § 89; *Wright v. Chicago*, 20 Ill. 252; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361.

*Messrs. George H. Taylor, Young, Ma-
keel & Bradley, Montgomery & Mont-
gomery, Runyan & Runyan, Walker,
Judd & Hawley, Winston & Meager,
Wolsley & Heath, C. S. Darrow, A.
W. Pulver, W. J. Hynes, Mason Bros.,
J. R. Geary, W. S. Hefferan, D. H.
Horne, J. F. Clare, A. Hertig, Osborne
Bros. & Burgett, W. A. Phelps, Bayley
& Waldo, J. A. Peterson, W. T. Under-
wood, A. H. Tyrrell, Rich & Stone, Otis
& Graves, R. B. Twiss, Pedrick, Daw-
son & Clarke, N. N. Cronholm, H. W.
Brandt, Felsenthal, D'Ancona & Ring-
er, James Maher, C. M. Hardy, C.
H. Mitchell, C. M. Osborne, Ripley &
Ailing, Tatham & Webster, E. U. Flich-
man, F. B. Packard, Kirk Hawes,
Cohrs & Green, and C. E. & D. G. An-
thony for the objectors.*

Shope, J., delivered the opinion of the court:

The question presented by this record is whether the municipal authorities in cities and villages, organized under the general law for the incorporation thereof, have power to provide that the cost of sprinkling the streets of the city or village shall be paid by special assessment. In other words, is the sprinkling of streets a local improvement within the meaning of the statute authorizing cities and villages to make local improvements by special assessment? Section 9, article 9, of the Constitution authorizes the general assembly to vest corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise; and, in pursuance thereof, the legislature has vested such authorities "with power to make local improvements by special assessment, or special taxation, or both, of contiguous property, on general taxation or otherwise as they shall by ordinance pre- scribe."

It is contended that under this statute the corporate authorities alone are to determine what is and is not a local improvement, and, they having determined in this case that the sprinkling of the streets designated in the ordinance was a local improvement, their decision is final, and not the subject of review. The case of *Louisville & N. R. Co. v. East St. Louis*, 184 Ill. 656, is cited in sup- port of this contention. There the city passed an ordinance for the construction of a viaduct in one of the streets of the city over the tracks of the railway, and also spanning Calokkia creek. The objection was that the building of the viaduct in the street was "not a local improvement within the mean- ing of the statute authorizing the levy of special assessments;" and it was held that, the city being empowered "to lay out, es- tablish, open, alter, widen, extend, grade, pave and otherwise improve streets," and "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof" (Rev. Stat., pars. 7-28, § 1, art. 5, chap. 24), the city council had power to de- termine that the construction of the viaduct in the street was a local improvement, and

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to order the same to be paid for by special assessment. The language quoted by coun- sel was used in respect of the facts of that case, and, as applied thereto, was entirely accurate, but the decision cannot be regarded as authority for the contention in this case. The power of the city council to declare what shall be local improvements is neces- sarily implied from the power to make the same in the mode and by the means pre- scribed. But this implication can arise only in respect of improvements they are author- ized to make by special assessment or special taxation. So long as the attempted exercise of the power relates to such public work as was within the legislative contemplation when giving the authority to the municipali- ty, a reasonable exercise of the implied power in declaring such work a local im- provement will be sustained (*Bloomington v. Chicago & A. R. Co.* 134 Ill. 451), and in such cases the method of construction, the materials used, and whether it shall be treated as a local improvement, to be paid for in whole or in part by special assessment or special taxation, or is to be paid for out of the general revenues of the city or village, are matters resting within the legislative dis- cretion of the municipal authorities. *Fagan v. Chicago*, 84 Ill. 227; *Louisville & N. R. Co. v. East St. Louis*, 184 Ill. 656. Improve- ments authorized to be made by this species of taxation are public improvements (Cooley, Taxn. 67-416; Burroughs, Taxn. 10 *et seq.*; *Davis v. Litchfield*, 145 Ill. 827, 21 L. R. A. 563), and an attempt by the municipal au- thority to declare a purely private work a local improvement within the meaning of the statute would be *ultra vires*, and the courts would be compelled to so declare. A local improvement within the meaning of the statute is a public improvement which, by reason of its being confined to a locality, en- hances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burden imposed. Cooley, Taxn. chap. 20; Dill. Mun. Corp. 596; *Davis v. Litch- field*, *supra*; *Kuehner v. Freeport*, 148 Ill. 92, 17 L. R. A. 774; *Chicago v. Larned*, 34 Ill. 267; *Chicago v. Baer*, 41 Ill. 306. If, there- fore, from an inspection of the ordinance au- thorizing the making of the improvement it appears, from the nature of the work pro- posed, that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement within the meaning of the statute, and no declaration of the cor- porate authorities could make it so. On the other hand, if the property is or may be benefited by the improvement, the extent of such benefit, and hence the amount to be as- sessed upon the property in proceedings for special assessment, is a question of fact, to be determined in the mode prescribed by the statute. *DeKoon v. Lake View*, 181 Ill. 641.

It remains to consider whether the sprink-

ling of the streets as contemplated by the ordinance is a local improvement that may be made, and the expense thereof paid, by special assessment upon adjacent property. "It is," says Mr. Dillon, "a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." Mun. Corp. 4th ed. § 8; *Wright v. Chicago*, 30 Ill. 252; *Eaton v. Chicago*, 40 Ill. 514, 89 Am. Dec. 861; *Cook County v. McCrea*, 93 Ill. 236. The authority to municipalities to impose burdens upon persons or property is wholly statutory, and, where its exercise may result in divestiture or transfer of property, the right to exercise it must be clear, and strictly pursued; and this rule applies to proceedings under the taxing power, including special assessment and special taxation. *Davis v. Litchfield*, *supra*.

No express power is granted to make special assessment for the particular work proposed. But it is insisted that, as by clause 7, section 1, article 5, of the Act, power is given "to lay out, open, alter, widen, extend, grade, pave and otherwise improve streets," etc., by the words "or otherwise improve" power is conferred upon the municipal authorities to determine what character of improvement, other than those enumerated, shall be made; and, if they determine that the streets shall be sprinkled, it is therefore an improvement within the meaning of article 9 of the Act. This is a misapprehension. The city may undoubtedly, in the sense in which the word "improve" is here used, repair the streets, sprinkle, sweep, and cleanse them, as in their discretion the public necessity and convenience may require. But the term "local improvement," prior to the adoption of the constitution and passage of the act in question, had, by common usage, a well-defined meaning, and it will be presumed to have been employed in the sense thus attributed to it. It was understood, as applied to a street, as signifying the improvement of the street as such, and for the purposes for which it was designed, made in a particular locality, by reason of which the real property, abutting or adjacent, was specially benefited in its market value. *Cooley*, Taxn. 109, 110; *Dill. Mun. Corp.* 596, 597. This court, in numerous cases decided before the adoption of the present constitution, as well as in many since, gave the like signification to the term. *Illinois & N. Canal Trustees v. Chicago*, 12 Ill. 403; *Higgins v. Chicago*, 18 Ill. 276; *Ottawa v. Macy*, 20 Ill. 418; *Lill v. Chicago*, 29 Ill. 81; *Chicago v. Larned*, and *Chicago v. Baer*, *supra*; *Scammon v. Chicago*, 42 Ill. 193.

Further citation will be unnecessary. Used, as it is, in connection with special assessments, which are necessarily based upon

the idea of equivalent benefits to the property owner, the idea of permanency in the improvement is necessarily involved. That is, the benefit must flow from the actual or presumptive betterment of the street, and must be of such character as to enhance the market value of the property. *Kankakee Stone & Lime Co. v. Kankakee*, 128 Ill. 176. It cannot, we think, in any just sense be said that street sprinkling is an improvement within the contemplation of article 9 of the Cities and Villages Act. In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material,—are evanescent, and that in a few years at most they will necessarily require renewing; and that it makes no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing access to property, do in fact enhance its market value. It is, however, insisted that the sprinkling of the street during the summer months renders the occupation of the adjacent property more enjoyable and comfortable, and that therefore the property is enhanced in value. Doubtlessly, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers; or by open-air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So, the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of the grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment and, possibly, the healthfulness of the locality. These all might be improvements, and increase, while they continued, the desirability of property in their locality. But they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment.

The tendency of municipal government to arrogate to itself power, and to encroach upon the rights of the citizen, has led to the establishment of salutary rules of construction, limiting their powers to those expressly granted, or arising by reasonable and necessary implication from the grant. It cannot, we think, be assumed that the legislature intended by the language employed to confer power upon the municipality to require work of the class provided for in this ordinance to be done by special assessment, even though it be held to be public work which the municipality is authorized to perform. Such power does not arise by implication from the powers expressly conferred, nor is it essential to the

declared objects and purposes of the corporation. We are of opinion that the county court decided correctly in annulling the assessment

and dismissing the petition, and its judgment will be affirmed.

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

MORROW SHOE MANUFACTURING
CO. *et al.*, *Appls.*,

NEW ENGLAND SHOE CO. *et al.*

(57 Fed. Rep. 685.)

1. A person obtaining goods by fraudulent pretenses is guilty of a tortious taking and no demand for possession is necessary to enable the person defrauded to maintain replevin for them unless they have passed to a third person holding them bona fide for a valuable consideration without notice.
2. Concealment of insolvency with no reasonable expectation of paying renders a sale fraudulent and entitles the seller to possession as against the purchaser or his voluntary assignee.
3. A seller of goods procured from him by fraud has the burden of showing participation by a subsequent purchaser in the fraudulent acts by which the goods were procured.
4. A purchaser of goods is affected by the fraudulent acts and intents of the seller in procuring them from a third person if he has knowledge thereof or of the existence of such facts and circumstances as are naturally and justly calculated to awaken suspicion in the mind of an honest man of ordinary care and prudence and lead him to inquiry.
5. Persons who deal in goods obtained by a third person recklessly and with knowledge of such facts and circumstances as would have put cautious and prudent men on inquiry are chargeable with the value of the goods obtained by them from the fraudulent purchaser which they convert to their own use although they have paid the full value and the property has passed beyond the reach of the process of the court.
6. An auctioneer who sells goods for a fraudulent purchaser thereof under such circumstances as charge him with notice that they have been obtained by fraud is liable for the value of the goods equally with the fraudulent purchaser and not merely for the amount of commissions received by him upon the sale, although he has accounted for the proceeds of such goods to his principal.
7. Proof that a pledgee of goods from a retail dealer knew that the latter was being pressed by his creditors and was pledging goods not paid for, that the goods were in larger quantities than was called for by the business, deposited in a warehouse away from such business with all marks erased from the original packages; and that the goods were transferred on such terms as precluded redemption without any inquiry on the part of such

pledgee; and that the latter made false statements as to previous loans to a receiver of the property of the pledgor,—is sufficient to throw upon such pledgee the burden of explaining the transaction and showing himself to be a bona fide holder.

8. A state statute permitting a simple contract creditor to file a bill in equity without reducing his claim to judgment, for the purpose of reaching assets to pay the debts of an insolvent corporation, is not applicable to proceedings in the federal courts.

(Dunn, District Judge, *dissents.*)

(October 2, 1893.)

APPEAL by complainants from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a bill filed by creditors of the New England Shoe Company to reach assets which were alleged to have been transferred to certain of the other defendants in fraud of the company's creditors. *Reversed.*

Statement by Baker, District Judge:

This suit was brought in the court below by the Morrow Shoe Manufacturing Company, appellant, on its own behalf and for the benefit of all other creditors, against the New England Shoe Company, an insolvent corporation, which was impleaded with George P. Gore, H. H. Heimerdinger, Merrick F. Prouty, and Hiram B. Peabody, appellees herein, and certain others not parties to this appeal. The New England Shoe Company, an Illinois corporation, purported to be organized with an authorized capital of \$50,000, divided into 500 shares of \$100 each, of which 498 shares were owned by Charles C. Davis, who was its president and treasurer, one share was owned by his son, Charles A. Davis, who was its secretary, and one share was owned by Henry W. Sawyer. These three composed its board of directors. The bill was taken *pro confesso* against the New England Shoe Company and Charles C. Davis, and on final hearing it was dismissed as to the other defendants. The cause was heard and decided on its merits on the facts presented in the record, and the decree dismissing the bill was placed on the ground that notice or knowledge of the fraudulent acts and intent of the New England Shoe Company and of Charles C. Davis had not been sufficiently proven to justify a decree against any of the appellees.

The New England Shoe Company was organized August 20, 1887, with a nominal capital of \$50,000. During its business existence, which was a little more than two

NOTE.—The above case very strongly presents the rights of defrauded sellers of goods as against third parties who have obtained the goods with reason to suspect the fraud, and also as to an auc-

tioneer who sells them with such notice. As to the effect of purchasing goods without intention to pay for them, see *note to Childs v. Merrill* (Vt.) 14 L. R. A. 264.

years, there were only three meetings of the directors, the first for organization, August 29, 1887, and the other two, on March 28 and December 9, 1889, to adopt certain resolutions which C. C. Davis wished to have adopted. The other two directors paid no attention to the business affairs of the company, and acted simply to carry out the purposes of C. C. Davis. The company did a small retail business, under the sole management of C. C. Davis, in a basement on the northwest corner of State and Madison streets, in Chicago. The only other business done by it or them was to make the alleged fraudulent sales and pledge hereinafter mentioned. For about two years its purchases were made mostly, if not wholly, from or through the auction and commission house of George P. Gore & Co., in Chicago. During this time other purchases than those made from George P. Gore & Co. were made through this firm, which advanced the money to pay for them, and it deducted from the amount paid over to the manufacturer the same commission as on goods consigned to it. For about twelve years, and up to the latter part of 1888, Davis had been in the employ of Gore & Co. as a salesman and solicitor of consignments. In the latter part of 1888 he appeared to have dropped his connection with Gore & Co., and he began to make extensive purchases from manufacturers for the New England Shoe Company, independently of Gore & Co. In order to obtain credit he pretended that \$80,000 of the company's capital stock had been paid in in cash, and was then in the business; that its business amounted to over \$70,000 a year, and was highly profitable; that its stock on hand amounted to \$25,000, and his and the company's debts to \$500, all told, and that he was worth individually \$88,000. By means of these representations, which were false and fraudulent, made to manufacturers and their agents, either directly or through the reports of commercial agencies, he was enabled to obtain large quantities of goods for the shoe company on credit from numerous manufacturers. Forty-three of them identified goods that they had shipped to it, and which were unpaid for, among those of which the receiver took possession in the Sibley warehouse. These goods, with some others similarly identified, and found in a loft which had been rented by the shoe company, brought at the receiver's sale \$20,912.97. These goods had been recently bought, and, with the exception of perhaps \$3,000 worth, were wholly unpaid for. The complainant and other intervening creditors have proved unpaid bills to the amount of between \$15,000 and \$18,000. About the time that the goods so ordered began to arrive, Davis began to dispose of them otherwise than by sales in the basement store. He made these sales with a studied purpose to keep the parties from whom the goods were purchased in ignorance of what he was doing. How many channels he employed for this purpose is not known. Three are clearly shown. Beginning with December 14, 1888, and ending with December 11, 1889, he sold through the auction house of George P. Gore & Co. goods, which, at their auction

prices, netted \$14,555.48. Prior to June 22, 1889, these sales amounted only to \$1,650.94, and were made for account of Charles C. Davis individually. After that date the sales were made for account of the New England Shoe Company, and the bulk of them, amounting to \$11,235.75, were made between October 1 and December 11, 1889. A comparison of the checks drawn by George P. Gore & Co. in settlement of these sales with the credit entries in C. C. Davis' bank account shows that he deposited to his individual account in the First National Bank in Chicago \$9,610.75 of the proceeds of these sales, and that the payments of \$1,200 and \$425 in settlement of the last two sales were not deposited there. Besides the proceeds of these sales through Gore & Co., he made other large deposits on his individual account, viz.: October 9, \$1,783.35; November 2, \$2,033.04; November 26, \$2,500; November 29, \$1,978.21; a total of \$8,294.60. All of these deposits, except that of November 2d, correspond with payments made to Davis by Heimerdinger, through George P. Gore & Co. These goods were sold almost entirely at auction, along with other and larger consignments, some of which were on account of manufacturers. The prices obtained were fair auction prices, not jobber's nor manufacturer's prices, running sometimes as much as 20 per cent below the prices at which jobbers ordinarily sold to retailers. The sales were quick, and somewhat forced, and prices corresponded. They were largely below the prices at which retailers could purchase from wholesale dealers.

The firm of Gore & Co. consists of George P. Gore alone, but Prouty and Heimerdinger respectively conducted, at Gore's store, businesses at his expense for storeroom, clerk hire, and capital, and at his risk for credit, every transaction including somewhere in its course a sale by Gore & Co. on commission. Prouty had the general management of Gore & Co.'s business; giving special attention to boots and shoes, and personally directed most of these sales. He drew a fixed salary as manager, and at the end of each year had an accounting with Gore & Co., as the result of which frequently an additional allowance was made to him on a basis which he was unwilling or unable to explain.

Besides the \$14,555.48 of sales made through Gore & Co.'s auction house, Davis, in the name of the New England Shoe Company, sold directly to Prouty, in Prouty's branch of the business, within two weeks of the failure, goods for which he received in advance \$4,692.95. One purchase, consisting of 171 cases of shoes, was made by Prouty November 26th or 27th, for which he gave \$4,858.48, after some bickering, in which an auctioneer of Gore & Co. was employed to make the final bargain; and the last purchase, of December 5th, within a week of the collapse, consisted of 258 cases of rubbers, for which Davis received \$1,103.47. Both sales were made at low prices, and were paid for December 7, 1889. Heimerdinger, in his branch of the business carried on at the auction house of Gore & Co., made five purchases through Davis of the New

England Shoe Company's goods, beginning September 17 and ending November 30, 1889, paying in all \$7,310.88. Heimerdinger intimates that these purchases belonged to that class of his business which consisted in buying "bankrupt lots, and lots that go at sacrifice prices." Heimerdinger and Prouty were well acquainted with Davis, and knew the place and nature of his business. In October, November, and the first few days of December, 1889, Davis thus sold at low prices to or through Heimerdinger, Prouty, and Gore goods of the New England Shoe Company which netted him \$23,509.08, and for which the company evidently was indebted in a much larger sum. To the books of account, which appear to have been of the most meager and imperfect character, no one had access except Davis himself, and they disappeared when he did. Once during the latter part of October, and again in November, 1889, for several days on each occasion, he employed Edward Stephenson, an accountant, to write up the books. On the occasion of his first service, Stephenson entered between ten and fifteen invoices of goods bought on credit, and again in November he entered twenty or more additional invoices for larger amounts than those which he had entered in October, and about two thirds from parties who did not appear to have dealt with the company before. He estimates that these invoices amounted to between \$50,000 and \$60,000. All the purchases which Stephenson found there were on credit, while all the sales made by Davis were for cash. The reason assigned by Davis for making such large purchases of goods was that he intended and was endeavoring to rent a storeroom on the grade of the street, and failing to accomplish this, it became necessary to make sale of the goods.

From the Morrow Shoe Manufacturing Company, complainant, Davis bought on behalf of the New England Shoe Company, in November, 1889, \$2,418 worth of goods, which were shipped to it on the 12th and 18th of November; and they have never been paid for. Intervening petitioners have proved claims to the amount of over \$18,000 for goods, the greater part of which were shipped in October and November, and are all unpaid for. These evidently constitute only a small part of the goods so ordered and received. Some of Davis' purchases were made from salesmen who came to his store, and he frequently requested them not to let other people know that he was buying of them. He made several visits to the east. Near the end of July he was in Philadelphia, where he placed an order of about \$1,700, and gave a flattering, but untruthful, account of the condition and prospects of the basement store, with no allusion to any contemplated grade store. He asked Mr. Hill, to whom he gave the order, to put no marks to indicate the manufacturers, either on the goods or the boxes inclosing them. Early in November he visited the office of the Morrow Shoe Manufacturing Company in New York, and ordered goods which he said he needed for the holiday trade. He there represented that the New England Shoe Company had a paid-up capital exceeding all its liabilities, and that he personally

was worth \$38,000 over all his debts. A few days later he was in Boston, where he placed a number of orders, and represented that his business was prosperous.

On the 30th of October, 1889, at the New England Shoe Company's store and in the Palmer House, Chicago, in order to gain credit and to procure the Hocker-Manus Shoe Company of Cincinnati, Ohio, to manufacture and deliver certain goods which had been previously ordered. Davis represented to an agent of the Cincinnati house that the statement he had made to a salesman was correct; that he was worth \$30,000; that he owed little or nothing on his stock; that he had fully \$30,000 worth of stock; that he had \$2,000 worth of Chicago street-railway bonds, and \$3,500 in the bank.

During the two or three months preceding the failure, Davis was rapidly filling up with shoes bought on credit a loft in the rear of 118 State street, some distance from the basement store. No business was done at this loft, to which nobody, except Davis, ever had access, except on rare occasions. He began to occupy it about May or June, but the most of the goods stored there came in within a month or two prior to December 11, 1889. Prouty was there in August, and again in October, to examine some of the goods stored there, which were offered for sale by Davis. He saw that there were more goods there in October than in August; "that the room was pretty well filled; that the rubbers were piled high, and also some of the shoes." The room was 60 feet long by about 30 feet wide and something more than 16 feet high. The cases of goods were mostly brought there on railroad trucks. About December 1st, after the large quantities taken therefrom to the auction house of Gore & Co., "the room was pretty full, boxes piled nearly to the ceiling." About the same time the stock in the basement store was gradually running down, receiving small additions which Davis himself brought over from time to time from the loft.

In November, 1889, a traveling salesman happened to see in a retail store in Indianapolis some goods which his employer, the Heywood Boot & Shoe Company, had sold to the New England Shoe Company. The Indianapolis merchant told him that he had bought them from George P. Gore & Co. at a less price than that for which the Heywood Company had sold them to the New England Company. Upon the salesman reporting this to his employer, an attorney for some of the eastern creditors was sent to Chicago to inquire into the matter, and Davis was invited to a conference on December 4, 1889. After indulging in some abuse and vituperation, Davis stated that a little while after receiving the Heywood Company's goods he had at Heimerdinger's request, and as a matter of favor to him, let him have a small quantity of goods, including some of the Heywood manufacture, which Heimerdinger needed to fill an order from a western customer of his; that a few weeks afterwards Heimerdinger came to him, saying his western customer had refused the goods, and asking him to take them back, which he refused to do, and

that Heimerdinger thereupon peddled them out for whatever he could get, and in this way some of them had probably come to the hands of the Indianapolis dealer. He referred the inquirers to Heimerdinger for corroboration. The next day, another customer, who had learned of the discovery and of Davis' explanation, called on Heimerdinger, who corroborated the story, adding that it was a trifling matter of a few pairs of shoes, only a single case, and that was the whole basis for whatever rumors might be afloat of Davis' forcing his goods off through Gore & Co's auction sales; and as a friend he further assured Mr. Morrow, who represented appellant, that Davis was sound and trustworthy, and that there was nothing in any rumors unfavorable to him. This story was wholly unfounded. Heimerdinger has testified to all of his transactions with Davis and the New England Shoe Company, and there is none of this kind among them. Heimerdinger, while testifying, fails to give any explanation or excuse for his repeating the next day the same fabricated story previously told by Davis. Both, on different occasions, and when apart repeat the same story, each knowing it to be false.

Mr. Barrett, a shoemaker who worked for the New England Shoe Company, testified that somewhere along in November and December, shortly before the failure, Davis used to give him a note sometimes, and tell him to go up on Fifth avenue, and watch for Mr. Prouty coming down from Wells street depot, and to give the note to Mr. Prouty; that Davis told him not to go to Gore's, but to meet Mr. Prouty on Fifth avenue, between Madison and Wells street depot; that he did this two or three times in pursuance of instructions from Davis; that Mr. Prouty took these letters from him, and said nothing. Mr. Prouty made no denial of these occurrences while on the witness stand, and offered no explanation.

The stock of goods in the basement store was seized by the sheriff on December 10, 1889, by virtue of two executions issued upon judgments confessed by the New England Shoe Company on the same day; one in favor of Van Weisenfluh for \$5,530.33, and the other in favor of Cudworth for \$5,000 and costs. Van Weisenfluh, in his testimony, describes himself as a speculator in real estate and horses, and had been employed by Peabody in his stock exchange, commonly known as a "bucket shop." Cudworth, who says his business in speculating, was, like Peabody, a creditor to a large amount of the unfortunate jewelry house of Clapp & Davies, whose affairs are under consideration by the Illinois supreme court, and was employed by Peabody to close out its stock. He declined, by advice of counsel, to answer questions touching his connection with the Clapp & Davies suit. He had known Peabody for ten years, and he says "some might call it intimately." All three had been at one time or another in the shoe trade, and had become familiar with the Gore establishment, and also with Davis. As no appeal has been taken from so much of the decree as dismisses the bill against Cudworth and Van Weisenfluh,

it is not necessary to go into the facts relating to their claim against the New England Shoe Company, or their relations with Davis. It is sufficient to say that their dealings with Peabody, Davis, and the New England Shoe Company are calculated to arouse suspicion.

On the 5th, 6th, 7th, and 9th of December, 1889, Davis' son and another young man were employed in the State street loft scraping off the names and marks from the boxes there stored, and as fast as they were thus prepared they were carried to the Hiram Sibley warehouse, on the north side, only about eight cases being left in the loft. All of the 686 packages removed from the loft to the warehouse had been sold and shipped to the New England Shoe Company. Davis took warehouse receipts in his individual name for 513 cases, and in the name of the New England Shoe Company for 174 cases only. These receipts show that the last delivery to the warehouse was made on Monday, December 9, 1889, the same day on which the attorney of Cudworth and Van Weisenfluh received from Davis, for them, the judgment notes upon which, the next day, judgments were entered, and executions were issued and levies were made on all the goods in the basement store. On Tuesday, December 10, 1889, the appellee Peabody arrived in Chicago. He had been in New York for about a week preceding. For nearly a year prior thereto he had been absent on a European tour. He reached his office about noon, and found Davis waiting for him there, with the nine receipts issued by the Sibley warehouse, and which Davis claimed covered goods worth from \$35,000 to \$40,000, on which he asked a loan of \$20,000. After a little conversation, Peabody asked his bookkeeper if they had that amount to spare, and being informed that they had he took the receipts, and with his bookkeeper went to the warehouse, and there inspected the cases, just enough, he says, to ascertain that there were probably about as many cases as the receipts called for, and then returned to his office. He does not say whether he noticed that the names and marks were all recently scraped off the case or not, although the evidence shows that such scraping was plainly apparent. In about five minutes after his return to his office, Davis came in again, and the loan was at once agreed upon. The bookkeeper wrote out a check for \$20,000, payable to the order of the New England Shoe Company. Davis took the check, and gave the New England Shoe Company's note for ninety days at 7 per cent, pledging the receipts as security, and indorsing the note as guarantor. The note authorized its holder to sell the receipts before maturity if in his opinion the securities had depreciated, and to apply the proceeds to the payment of the note and expenses. Davis then went away. Peabody left his office soon after, and went to the bank, and was at the paying teller's window while Davis was receiving \$20,000 in currency for the check. His presence was noted on the check of the paying teller. Peabody claims that his presence was a mere coincidence. He says that on his way to the hotel he had stopped at the bank to call upon some of the officers of the bank, who were his

friends, and that seeing, Davis there, from a mere impulse of sociability he stepped up near to him. He claims that he did not know whether Davis was getting the cash on his check or not, nor did he make inquiry. He admits that if he had known it was his check, he would have thought it a little irregular to draw out the currency instead of depositing the check; and if he had known that Davis kept his own account there he would have had a decided suspicion of something wrong. Peabody says that when Davis first applied for the loan he told him he wanted it in order to avail himself of a large discount which some of his creditors had offered him if he would cash their claims. He said that some of his creditors had offered him as high as 10 per cent, some as high as 13 per cent, for cash. He says that it would be an irregular way of doing to get all the currency into his hands, instead of depositing the \$20,000 check, and then drawing his own checks in favor of his creditors. The form of the note was notice to Peabody that the goods which it pledged belonged to the New England Shoe Company, and not to Davis, its president. He also admits that he was so informed by Davis. The receipts for 512 cases of the goods pledged to Peabody were issued to Davis individually. Peabody did not ask nor obtain any explanation of this. He made no inquiry whether the directors of the New England Shoe Company had authorized Davis to pledge its stock in trade. As a matter of fact the pledge was never authorized by the directors. Peabody says that Davis told him that the goods pledged were not all paid for. The receipts issued to Davis individually were indorsed by him in his individual name only. Peabody admits that he was told by Davis, before the receipts were pledged to him, that all the goods covered by them belonged to the New England Shoe Company. He told the receiver that when applying for the loan Davis told him that some of his creditors were pressing him. He afterwards wished to retract this statement, and it was crossed out of the written memorandum which the receiver took down. He denied in his interview with the receiver that he had ever before loaned Davis any money, but when testifying in his own behalf he claimed that he had made him a previous loan of \$5,000. Peabody admits that he had been in the basement store operated by Davis for the New England Shoe Company. Before making the loan, he made no inquiries about the business of the shoe company. He says: "I asked Davis how he happened to put his goods in the warehouse; why he hadn't put them in the store. He said that he had engaged a store on State street, a large store, and had got disappointed in it, and so put them in the warehouse."

Before Woods, *Circuit Judge*, and Bunn and Baker, *District Judges*.

Messrs. E. O. Brown and H. H. Miller for appellant.

Messrs. F. J. Smith and W. J. Foster for appellees.

24 L. R. A.

Baker, *District Judge*, delivered the opinion of the court:

It is contended by counsel for the appellant that the court below erred in dismissing the bill against the appellees for the reason that the evidence clearly shows that the New England Shoe Company and Charles C. Davis, its president, obtained large quantities of goods from the appellant and numerous other parties by means of false and fraudulent representations, without any intention of paying for the goods so obtained, and that the appellees had actual or constructive notice of the fraudulent acts and intent of the New England Shoe Company and of its president. The charges made against the appellees Gore, Heimerdinger, and Prouty, by the bill of complaint, and the proofs in their support, have no immediate connection with those made against the appellee Peabody. The case against Gore, Heimerdinger, and Prouty was tried in the court below, and has been argued here by the same counsel; while the case against Peabody was tried in the court below, and has been argued here by counsel solely representing him. It will be most convenient to follow the same course in determining this appeal.

It is suggested, rather than argued, by counsel for Gore, Heimerdinger, and Prouty, that the bill of complaint is not broad enough, even if the evidence justified it, to warrant a decree against them compelling them to account for the proceeds of the goods belonging to the New England Shoe Company which are traced into their possession. The suggestion would have deserved careful consideration if the question had been called to the attention of the court below. If the objection had been presented below, the trial court could, and in furtherance of justice, should, have permitted the bill to be amended to conform to the case made by the proofs upon such terms as were just and equitable. *Neale v. Neale*, 76 U. S. 9 Wall. 1, 19 L. ed. 590; *The Tremolo Patent*, 90 U. S. 28 Wall. 518, 23 L. ed. 97; *McArtee v. Engart*, 13 Ill. 242. Under the circumstances the bill ought to be treated as amended here, so far as needful, to enable the court to decide the case on its merits. The practice of presenting in the first instance in this court some alleged defect or insufficiency in the bill of complaint or answer which would have been properly amendable in the court below is not to be commended.

There is no serious controversy touching the false and fraudulent representations of Davis, as the manager and president of the New England Shoe Company, in obtaining goods from the appellant and numerous other parties, nor in regard to his intention not to pay for them, nor that the corporation was insolvent. The systematic frauds of the one and the insolvency of the other are established by the most abundant and convincing evidence. Indeed, they were not controverted by counsel for appellee, who made no attempt to deny or palliate the criminal conduct of Davis, who, upon the collapse of the New England Shoe Company, fled to Canada, presumably to avoid criminal prosecution. The purchaser who by fraud purchases goods

has no protection in law against the party defrauded. The seller, on discovering the fraud, may affirm the sale and sue for the price, or he may disaffirm it, and reclaim the goods, or he may proceed criminally. *Donablon v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Parriah v. Thurston*, 87 Ind. 437; *Gray v. St. John*, 85 Ill. 239; *Boven v. Schuler*, 41 Ill. 193; *Blanchett v. Kimbark*, 118 Ill. 121; *Sargent v. Sturm*, 28 Cal. 359, 83 Am. Dec. 118; *Tilcomb v. Wood*, 88 Me. 563; *Hill v. Freeman*, 8 Cush. 259; *Nichols v. Michael*, 23 N. Y. 266, 80 Am. Dec. 259. A person obtaining goods by fraudulent pretenses is guilty of a tortious taking, and no demand for possession is necessary to enable the person defrauded to maintain replevin for them, unless they have passed to a third person holding them bona fide for a valuable consideration, without notice. *Bussing v. Rice*, 2 Cush. 48; *Thurston v. Blanchard*, 23 Pick. 18; *Butters v. Haughtout*, 42 Ill. 18, 89 Am. Dec. 40; *Bruner v. Dyball*, 42 Ill. 84; *Ryan v. Brant*, Id. 78. When no questions are asked, no false pretenses and no artifices are resorted to, mere silence is not fraud; but concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent, and the seller is entitled to possession as against the purchaser or his voluntary assignee. *Davis v. Stewart*, 8 Fed. Rep. 503.

The New England Shoe Company and Davis, its president, according to the undisputed evidence, obtained possession tortiously and wrongfully of the goods which subsequently came into the possession of the appellees. Unless the goods came into their possession bona fide, for a valuable consideration, without notice, their possession was wrongful, and they must return the goods, or account for their reasonable value. The appellees assert that they were bona fide purchasers for value, without notice, and that, consequently they acquired an unimpeachable title to the goods. It is not enough that the appellees were purchasers for value. They must also be innocent purchasers. The law raises this presumption in their favor, and casts the burden on the appellant to show that the appellees were guilty of participation in the fraudulent acts of Davis. The law justly imposes on every person the duty of exercising ordinary care and prudence in his business transactions. It imputes to him notice or knowledge of every fact which an ordinarily cautious and prudent man, in the same situation, would naturally have observed. He may not except at his peril, purposely or negligently omit to give heed to what is audible and visible by the exercise of ordinary care. He must not fail to make such inquiries as an ordinarily cautious and prudent man, under the same circumstances, would have made. It follows that the appellees will be affected by the fraudulent acts and intent of Davis, if they had knowledge of them, or of the existence of such facts and circumstances as were naturally and justly calculated to awaken suspicion in the mind of an honest man of ordinary care and prudence, and lead him to inquiry. The law is well stated by *Chancellor Zabriske*:

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"Any sale in which the object of the debtor that prompts and determines him to make it is to hinder, delay, or in any way put off his creditors, is void if made to any one having knowledge of his intent; and this knowledge need not be by actual positive information or notice, but will be inferred from the knowledge, by the purchaser, of facts and circumstances sufficient to raise such suspicions as to put him on inquiry."

Atwood v. Impson, 20 N. J. Eq. 156; *Clements v. Moore*, 73 U. S. 6 Wall. 299, 18 L. ed. 788; *Bartles v. Gibbon*, 17 Fed. Rep. 293; *The Hollanday Case*, 27 Fed. Rep. 880; *Singer v. Jacobs*, 11 Fed. Rep. 559; *Walker v. Collins*, 4 U. S. App. 406, 50 Fed. Rep. 737.

Gore, Heimerdinger, and Prouty had long been intimately associated together, all occupying and doing business in the same rooms, and with and through each other. All their business was carried on through the books of George P. Gore & Co. They were well acquainted with C. C. Davis, who had been employed as a salesman and solicitor of consignments in the auction house of Gore & Co. for fully twelve years. They were acquainted with the basement store of the New England Shoe Company, and its business as conducted and managed by Davis. Mr. Prouty was the general manager of Gore & Co. and had almost exclusive control of the shoe business conducted by it. Heimerdinger and Prouty knew, as early as September, 1889, that Davis was storing large quantities of goods in an out-of-the-way loft on State street. They say that Davis gave as a reason why he had bought and stored in the loft such large quantities of goods that he had arranged for a grade store on State street, which he had been disappointed in securing. He gave this as the reason for selling in the course of about sixty days before the failure, to or through Gore, Heimerdinger, and Prouty, at prices below their cost, goods which netted over \$23,000. This story of a grade store was accepted without inquiry or question as a sufficient explanation for the purchase and storing in the loft of goods which certainly aggregated more than \$50,000 in value. They knew of the purchase and storing of these goods. They knew that Davis was selling at Gore's auction house, or to them personally, goods in large quantities, and at prices below the price for which he could obtain them from wholesale dealers. These sales were made to or through them in large quantities and in rapid succession, so that they knew, or ought to have known, that they were being made by a man anxious to convert the goods into money. Heimerdinger gave a false and fabricated account of his dealings with Davis. Prouty received letters from Davis under circumstances of suspicion, and failed to produce them, or to give any explanation of their contents. There is no evidence that Davis arranged for or engaged a large storeroom on State street, and the story was evidently devised as a part of his scheme of fraud. These facts and circumstances, with many others disclosed in the statement of the case, which were within the knowledge of these parties, were clearly sufficient to

have put them on inquiry. The mind cannot well avoid the conclusion that if they did know of the fraudulent purposes of Davis it was because they were willfully blind. Such facility of belief, it has been well said, invites fraud, and may justly be suspected of being its accomplice.

When the complainant learned that a few shoes, which it had sold to the New England Shoe Company, had been sold by it through Gore & Co's auction house to a shoe dealer in Indianapolis for less than their cost, it created such suspicion of fraud that an attorney was sent from Boston to Chicago to investigate the matter. This single fact was sufficient to create suspicion in the minds of the eastern creditors of Davis, and to cause inquiry. The numerous facts calculated to excite suspicion known to the appellees were disregarded on the pretense of Davis that he had failed to secure the storeroom which he claimed to have arranged for or engaged. When the facts and circumstances are such as to put a reasonably prudent and cautious man on inquiry, that obligation is not satisfied by an inquiry addressed to the chief actor in the suspected fraud, who has every motive for concealing the truth, when better and more reliable sources of information are open to him. Whether these parties were guilty of actual participation in the fraudulent scheme of Davis or not, they certainly did deal in the goods obtained by fraud recklessly, and with guilty knowledge, or, which is the same thing, with knowledge of such facts and circumstances as would have put prudent and cautious men on inquiry. Heimerdinger and Prouty bought the goods of the New England Shoe Company, through Davis, under such circumstances as to charge them with knowledge of the fraud of the shoe company and its president. On the plainest principles of equity they are chargeable with the value of the goods obtained by them from Davis and the shoe company, and which they have converted to their own use. Although they may have paid the full value, and the property may have passed beyond the reach of the process of the court, equity regards them as trustees, and charges them accordingly. The cardinal principle in all such cases is that the property obtained by fraud shall not be placed beyond the reach of the party defrauded, either by the fraudulent vendee or others chargeable with the knowledge of the fraud. To permit it would be to allow the party to profit by his fraud. *Clements v. Moore*, 78 U. S. 6 Wall. 299, 18 L. ed. 786.

Gore intermeddled with these goods by selling them for Davis as an auctioneer, under such circumstances as to charge him with notice that they had been obtained by fraud, and the question remains whether such agent and auctioneer, who has sold goods and accounted for the proceeds to the guilty principal in the fraud, can be compelled to account to the parties defrauded for the goods or their value. That such auctioneer can be compelled to account to the extent of the commissions received and retained by him is settled by authority, and is not open to debate. Can he be compelled to account to the parties defrauded for the proceeds of the

goods after he has accounted to the party from whom he received them? On principle, he ought to be held to account. Having sold the goods, and put them beyond the reach of the parties aggrieved, with notice of the fraud, he occupies no better situation than his bailor. He is chargeable on the principle that he knowingly aided and assisted the fraudulent vendee in depriving the vendor of the opportunity to reclaim his property. He thereby becomes a *particeps criminis* with the fraudulent vendee, and is liable for the value of the goods equally with him.

It is firmly settled that if an agent delivers to his principal money or property after demand and notice that they belong to another, he will be compelled to account therefor to the true owner. Payment after demand and notice is wrongful. *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Jefts v. York*, 10 Cush. 392, 12 Cush. 196. Having knowledge that the goods had been obtained by fraud, it became the duty of Gore not to meddle with them, or, having received them, to retain them or their proceeds for the benefit of the true owners. Equity regards the fraudulent vendee as holding the goods in trust for the party defrauded. It has been held, where an agent aids a trustee in making or procuring the conversion or unauthorized transfer of property held in trust, that he is liable for the loss sustained by the *cestui que trust*, although he acted in the matters of the agency without benefit or profit to himself. *Caulkins v. Memphis Gaslight Co.*, 85 Tenn. 633. *A fortiori*, the agent who, with notice of the fraud, aids the fraudulent vendee in putting the property beyond the reach of its true owners, ought to be liable for the value of the property thus wrongfully diverted. *Hoffman v. Carou*, 20 Wend. 22, 22 Wend. 285; *Mechem*, Ag. § 915. This case does not fall within the principle which ruled the cases of *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 719; *Bradley v. Fuller*, 118 Mass. 239; *Tasker v. Moss*, 82 Ind. 62, and *Blair v. Smith*, 114 Ind. 114.

These cases hold that a creditor who has no interest in nor lien upon the property of his debtor cannot maintain an action at law against a person who has accepted a conveyance of the debtor's property for the purpose of defrauding his creditor, after such fraudulent grantee has conveyed the property to another at the instance and for the benefit of the debtor, without retaining any portion of it, or receiving any benefit from it. In such cases it is held that the injury complained of is too remote, indefinite, and contingent. The property belonged to the debtor, and the creditor had no special property or interest in nor claim on the property fraudulently conveyed which could be injuriously affected or destroyed by the act of the fraudulent grantee. The most that the creditor can claim in such a case is that he intended to attach or levy on the property, and that the wrongful act of the fraudulent vendee has prevented him from executing his intention. This is an injury so remote, uncertain, and contingent, that it affords no ground for relief in an action at law. In the case at bar

the property had been obtained by fraud from the creditors who are prosecuting this bill, and Gore, with knowledge of that fact, accepted it, and for his own profit sold the goods at auction, thus placing them beyond reclamation. Here the creditors in equity and good conscience remained the owners of the property, which he wrongfully sold and converted. While the bill is filed by a single creditor, the suit is brought and prosecuted for the benefit of all the creditors whose property was obtained by fraud; and in this property thus obtained the creditors have such special title and interest in common as to enable them to charge every person as trustee who has wrongfully dealt with it with knowledge of the fraud. Gore must, therefore, account for the goods received by him from Davis on account of the New England Shoe Company, which were sold by him as auctioneer.

Peabody invokes for his protection the claim that he received the warehouse receipts covering from \$35,000 to \$40,000 worth of goods in good faith to secure a loan of \$20,000 made by him to the New England Shoe Company. The evidence shows that Peabody was a man of large and varied business experience. At different times in his life he had been engaged in dealings in bucket shops, in buying boots and shoes, in purchasing jewelry from failing concerns and at bankrupt sales, while at and for some time before the transactions in question he was a capitalist engaged in loaning money. He had been acquainted with Davis for twenty years. He had visited the basement store of the New England Shoe Company, and did not know of its having any other. He testifies that at one time he had loaned Davis \$5,000, but previously, in an interview sought by him with the receiver of the New England Shoe Company, he denied that he had ever previously loaned Davis any money. He arrived in Chicago on the 10th day of December, 1889, and went immediately to his office, where he found Davis awaiting him. Davis had visited Peabody's office a number of times within a few days preceding his return, and in conversation with his confidential clerk and bookkeeper had expressed anxiety to see Peabody. Davis at once told Peabody that he wanted to borrow some money, and he exhibited the nine warehouse receipts on which he asked a loan of \$20,000. After a little conversation, Peabody asked his bookkeeper if he had that amount to spare, and, on being informed that he had, he took the receipts, and with his bookkeeper went to the warehouse, and inspected the cases of goods, and returned to his office. The goods were in the original cases, and the names and marks had all been recently scraped off from the cases. The evidence shows that the scraping was fresh, and plainly apparent, and must have been observed by any one giving the least attention. In about five minutes after his return to his office, Davis called again, and the loan was at once agreed on. The bookkeeper wrote the check for \$20,000, payable to the order of the shoe company. Davis took the check, and gave the shoe company's note for ninety

days at 7 per cent, pledging the receipts as security, and indorsing the note as guarantor. The note authorized its holder to sell the receipts before its maturity if, in his opinion, the securities had depreciated, and to apply the proceeds to the payment of the note and expenses. Peabody was present at the bank when Davis drew \$20,000 in currency on the check. When Davis applied for the loan he told Peabody that he wanted it to avail himself of a large discount which some of his creditors had offered him if he would cash their claims. Peabody told the receiver that when Davis was asking for the loan he stated that some of his creditors were pressing him. Before making the loan he made no inquiry concerning the business or condition of the shoe company. He asked Davis how he happened to put his goods in a warehouse, and claims that Davis told him that he had engaged a large store on State street, and had been disappointed in getting it, and so had put them in the warehouse. The foregoing facts, with others disclosed in the statement of the case, raise a strong suspicion against the bona fides of the transaction between Davis and Peabody. His statement to the receiver that he had never loaned Davis money on any former occasion is proved to have been untrue by his own admission under oath. A false statement is always suggestive of fraud. He knew that Davis was being pressed by his creditors, and was urgent to secure money by pledging goods, which he knew were not paid for. The large quantity of goods, the place of their deposit, the defacing of all marks from the original packages, the pretense of Davis that he had engaged a large storeroom, which he had failed to secure, the transfer of nearly \$40,000 worth of goods on such terms as precluded their redemption, and the failure to make any inquiry are a few of the circumstances, calculated to create a strong doubt of the integrity of the transaction between Davis and Peabody. "They threw on Peabody the duty of making a full explanation, and the burden of proof to sustain it." *Clements v. Moore*, 73 U. S. 6 Wall. 299, 815, 18 L. ed. 786, 789; *Piddock v. Brown*, 3 P. Wms. 289; *Wharton v. May*, 5 Ves. Jr. 49; *Zook v. Simonson*, 72 Ind. 83. He has wholly failed to produce any evidence to relieve the transaction of the strong doubts of its integrity which surround it. The title of his pledgor was fraudulent and voidable, and, if Peabody is to be permitted to defeat the prior rights of the parties defrauded by Davis, it can only be done when on the whole evidence it is made to appear that he was a bona fide purchaser for value. If, on the whole case, strong doubts of the integrity of the transaction exist, the prior rights of Davis' creditors will prevail.

The evidence makes a case which fully satisfies us that the proceeds arising from the sale of the goods pledged by Davis must, so far as necessary, be applied to the payment of the appellant's claims. It is urged that the exigencies of business in great commercial centers justify less inquiry into the title and ownership of personal property offered for pledge or sale than would be ex-

acted elsewhere. If good faith and honest dealings are to be maintained, if business is not to degenerate into robbery, the courts must with unflinching hand strip the mask of hypocrisy from the face of fraud, whether practiced in city or hamlet. The transactions of great commercial centers furnish abundant facilities for the practice of fraud, and courts ought to scrutinize them with a jealous solicitude to defeat the wrong, and to vindicate the right.

The bill fails to allege that the plaintiff had prosecuted its claim to judgment, and had issued an execution thereon, and had the same returned *nulla bona*. For this reason the bill of complaint is insufficient within the doctrine of *Scott v. Neely*, 140 U. S. 108, 35 L. ed. 358, and *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804.

It is therefore adjudged that the decrees herein be reversed, but at the costs of the appellant, and that the cause be remanded to the court below, with leave to the complainant to amend its bill of complaint within thirty days after the judgment herein shall be certified to the court below; and, if the complainant shall fail to amend its bill of complaint within the time herein allowed, the same shall be dismissed without prejudice.

Bunn, District Judge, dissenting:

I am unable to concur in the conclusions reached by a majority of the court in this case. I think the evidence hardly more than sufficient to raise a suspicion of fraud as against the appellees, without proving its existence, and that the decree of the circuit court should be affirmed.

A petition for rehearing was subsequently filed in response to which on March 9, 1894, **Baker, District Judge**, on behalf of the court delivered the following opinion:

The appellees have filed petitions for a rehearing, which they have supported by elaborate briefs. We have given their petitions and briefs attentive consideration, and find no error pointed out which would justify the court in granting them a rehearing. The grounds upon which our decision is rested are fully stated in the opinion heretofore filed, to which we still adhere, and no good purpose will be subserved by adding anything to what is there stated. The petitions of the appellees are therefore overruled. The appellant has filed a petition for a rehearing and a modification of the opinion of the court by striking out of the same the following:

"The bill fails to allege that the plaintiff had prosecuted its claim to judgment, and had issued an execution thereon, and had the same returned *nulla bona*. For this reason the bill is insufficient within the doctrine of *Scott v. Neely*, 140 U. S. 108, 35 L. ed. 358, and *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804.

The appellant further asks that the order of the court be modified to read as follows:

"That the decrees herein entered respectively on the 28th day of April, 1892, dismissing the bill of complaint as to the defendants Gore, Prouty, and Heimerdinger, and on the 9th day of May, 1892, dismissing the said bill as to Hiram B. Peabody be reversed at the costs of said appellees, and that said cause be remanded to the court below for further proceedings not inconsistent with this opinion, and with leave to complainant to amend its bill as it may be advised within thirty days after the judgment herein shall be certified to said court."

Counsel for the appellant insist that the suit is brought under Ill. Rev. Stat. chap. 32, § 25, and that under this section it is unnecessary to the maintenance of the suit that the claim should have been reduced into judgment and an execution issued thereon and returned *nulla bona*. This section provides that: "If any corporation, or its authorized agents shall do, or refrain from doing any act which shall subject it to forfeiture of its charter or corporated powers, or shall allow any execution or decree of any court of record, for a payment of money after demand made by the officer to be returned on property found, or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who are stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suits; . . . and courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, etc."

It is firmly settled that under this section it is not necessary to the maintenance of a suit in equity in the courts of the state that the claim of the creditor should have been reduced into judgment, and an execution issued thereon and returned *nulla bona*. A suit in equity may be maintained in a court of the state by a simple contract creditor, who holds neither a general nor a specific lien against a corporation which is insolvent and has ceased to do business, leaving debts unpaid, for the purpose of winding up its affairs. *St. Louis & S. Coal & Min. Co. v. Edwards*, 103 Ill. 472; *St. Louis & S. Coal & Min. Co. v. Sandoeal Coal & Min. Co.* 111 Ill. 32, 116 Ill. 170; *Aling v. Wenzel*, 183 Ill. 264; *Hunt v. La Grand Roller Skating Rink*, 143 Ill. 118; *Mellen v. Moline Malleable Iron Works*, 181 U. S. 352, 33 L. ed. 178. As a general rule, where a new right is created by the statute of a state, the federal courts will take cognizance of it, and will enforce it according to their methods of procedure. Whether it will be enforced at law or in equity depends upon its character. When it is remedial in its nature and essentially of an equitable character, it will be enforced on the equity side of the court. *Gormley v. Clark*, 134 U. S. 838, 33 L. ed. 909; *Davis v. Gray*, 83 U. S. 16 Wall. 221, 21 L. ed. 453; *Re Broderick's Will*, 88 U. S. 21 Wall. 508, 22 L. ed. 599; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010.

But every new right of an equitable nature created by the statute of the state is not necessarily enforceable in the federal courts upon the same facts and under the same circumstances as in the courts of the state. If the new right is one not within the recognized

equitable jurisdiction of the federal courts, it cannot be enforced by such courts in equity although the statute of the state has declared that the new right shall be enforced in equity. The jurisdiction of the federal courts as courts of equity cannot be enlarged by state legislation. New equitable rights which fall within their accustomed jurisdiction can alone be enforced by the federal courts in equity. The case of *Hollins v. Brierfield Coal & Iron Co.* 150 U. S. 371, 37 L. ed. 1113, is decisive of this question. The court there says: "The plaintiffs were simple contract creditors of the company. Their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims, and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarkation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation, (*Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804), nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. *National Tube Works Co. v. Ballou*, 146 U. S. 517, 36 L. ed. 1070; *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577.

It is further contended by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that, while the latter has absolute dominion over his own property, an insolvent corporation is a mere trustee, holding its property for the benefit of its creditors and stockholders, and that a federal court of equity, may entertain jurisdiction to wind up its affairs in a suit brought by a simple contract creditor. This contention is declared in the above-cited cases to be at war with the notions which were derived from the English law with regard to the nature of corporate bodies.

"A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law it is as distinct a being as an individual is, and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them. When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors, and a court of equity, at the instance of the proper parties, will then make those funds trust funds which, under other circumstances, are as much the absolute property of the corporation as any man's property is his." *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 160, 36 L. ed. 106, 111.

Under the settled law applicable to the federal courts, a simple contract creditor is not a proper party to invoke the aid of a court of equity to make the corporate funds trust funds, and to wind up the affairs of an insolvent corporation, unless the ordinary jurisdiction of the court has been enlarged by legislative authority. The jurisdiction of the court below had not been so enlarged and it cannot be supported by an appeal to the state legislation in question. For these reasons the petition of the appellant for a rehearing is overruled. It was determined by the court, and so announced, that, as the appellant had committed the first material error, the cause would be reversed at its cost. By mistake or oversight, the order as entered adjudged the costs against the appellees. The order of reversal heretofore entered will be so far modified as to adjudge the costs against the appellant and in all other respects it will stand approved.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William H. PETTINGELL, by Amos Pettingell, His Next Friend, *App't.*

v.
City of CHELSEA.

(.....Mass.....)

A city is not liable to a lineman on its fire signal system for negligence in respect to the condition of a pole which breaks and injures him.

(May 18, 1894.)

NOTE.—The rule as to exemption of a city from liability for negligence has an interesting application in the above case. That a city is not liable for negligent acts of firemen, see note to *Dodge v. Granger* (R. L.) 15 L. R. A. 781.
34 L. R. A.

A PPEAL by plaintiff from a judgment of the Superior Court for Suffolk County sustaining a demurrer to the complaint in a proceeding brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Plaintiff, at the time of his injury, was working for defendant as a lineman on its fire alarm signal system, and claimed that his injuries were caused by the defective and insufficient condition of a pole to which the wires of the system were attached.

Further facts appear in the opinion.

Mr. M. F. Allen, for appellant:

There are three lines of cases to be considered in determining the liability of cities and towns as bearing upon the case at bar.

The first are where cities and towns are held

liable for negligence on the ground that they derive some profit from the system or undertaking on the part of the city or town, the management, construction, or maintenance of which has contributed to the injury complained of, as—

Oliver v. Worcester, 103 Mass. 489, 8 Am. Rep. 485; *Murphy v. Lowell*, 124 Mass. 564, and cases cited; *Hand v. Brookline*, 126 Mass. 824.

Second, where the negligence resulting from the injury complained of was the act of public officers over whom the corporation had no control, as in—

Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 389; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570; *Hafford v. New Bedford*, 16 Gray, 297.

Third, where the act, if done by a public officer, might give immunity to the city from an injury resulting from negligence, renders the city liable if done by an agent or servant, as in the cases of—

Deane v. Randolph, 133 Mass. 475; *Waldron v. Haverhill*, 143 Mass. 582; *Sullivan v. Houghton*, 135 Mass. 273.

Upon the principle governing the decision in *Waldron v. Haverhill*, 143 Mass. 582, I place the right claimed in the first count of the amended declaration.

The right to maintain the second count of the amended declaration is predicated upon the Act of 1887, chapter 270, upon the ground that the defendant is an employer within the meaning and provisions of that Act.

Because towns and cities in this Commonwealth have the power to manage and control their own prudential affairs, to construct highways and bridges, and to employ in the construction thereof both labor and material.

Hill v. Boston, 122 Mass. 844, 23 Am. Rep. 332; *McCormick v. Boston*, 120 Mass. 499; *Bay State Brick Co. v. Foster*, 115 Mass. 431.

Mr. D. E. Gould, for appellee:

In the absence of express statute, municipal corporations are not liable for actions for injuries occasioned by negligence in using or keeping in repair their fire department. The fire department is more a servant of the citizen than it is of the city. The city is constituted merely the governing power to give efficiency.

Hafford v. New Bedford, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Tainter v. Worcester*, 123 Mass. 811, 25 Am. Rep. 90; *Hayes v. Oshkosh*, 88 Wis. 314, 14 Am. Rep. 760; *Jewett v. New Haven*, 88 Conn. 368, 9 Am. Rep. 332.

The Employers' Liability Act, Statute of 1887, chapter 270, fixes the rights and liabilities of persons occupying the relation of master and servant; it does not create the relation or impose duties and liabilities on municipal corporations in the performance of their public duties from which they receive no compensation or benefit.

Ryalls v. Mechanics Mills, 5 L. R. A. 667, 150 Mass. 190; *Dickie v. Boston & A. R. Co.*, 131 Mass. 517.

24 L. R. A.

Field, Ch. J., delivered the opinion of the court:

This is an appeal from an order of the superior court sustaining a demurrer to the plaintiff's declaration, and directing judgment for the defendant. The declaration contains two counts; the first at common law, and the second under Stat. 1887, chap. 270. The demurrer is general, but the point is not taken that the second count contains no allegation that notice of the time, place, and cause of injury was given to the defendant. We assume that Stat. 1887, chap. 270, may apply to cities and towns. See *Connolly v. Waltham*, 156 Mass. 368; *Conroy v. Clinton*, 158 Mass. 318. But the statute in terms only gives to an employé who has received personal injury from the causes described in the first three clauses of the first section, or to his legal representatives in case the injury results in death, "the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer nor engaged in its work." The question, then, is whether a city is responsible in damages to any person who, in the exercise of due care, is injured by the breaking of a pole to which was attached the wires of the fire-signal system of the city, if the pole broke because it was "negligently constructed, cared for, maintained, and placed" in its position. The special authority of the city of Chelsea to establish a fire department is found in Stat. 1831, chap. 200, § 16. In *Hafford v. New Bedford*, 16 Gray, 297, it was held that the city was not liable for the negligence of the members of a fire department established by the city council pursuant to an act of the legislature. In that case the alleged negligence consisted in the members of the fire department carelessly driving a hose carriage against the plaintiff in a public highway during an alarm of fire. In *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196, the plaintiff was injured by the bursting of hose connected with a fire engine, which was alleged to have been defective, and to have been negligently used at a fire by members of the fire department. It was held that the city was not liable. In the opinion it is said that: "In the absence of express statute therefor, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town house or public way."

See *Tainter v. Worcester*, 123 Mass. 811, 25 Am. Rep. 90. The present case, we think, comes within the general doctrine declared in *Hill v. Boston*, 122 Mass. 844, 23 Am. Rep. 332, viz.: "That no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage."

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

UNITED STATES of America, *Appl.*,v.
E. C. KNIGHT CO. *et al.*

(60 Fed. Rep. 984.)

A control of the business of refining and selling sugar in the United States does not involve a monopoly or restraint of foreign or interstate commerce, under the Act of Congress of July 2, 1890, as this Act does not include the regulation of manufactures or productive industries of any sort, even if their product is a subject of commerce.

(March 26, 1894.)

APPPEAL by complainant from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania in favor of defendants in a proceeding brought to have certain contracts declared void and canceled which had been made by the American Sugar Refining Company with the other defendants for the alleged purpose of monopolizing or restraining interstate and foreign commerce in contravention of a United States statute on that subject. *Affirmed.*

The facts sufficiently appear in the opinion.

Argued before *Acheson* and *Dallas*, *Circuit Judges*, and *Green*, *District Judge*.

Messrs. Ellery P. Ingham, Samuel F. Phillips, and Robert Keston Asst. U. S. Atty., for appellant.

Messrs. John G. Johnson, John E. Parsons, and Richard C. McMurtrie, for appellees:

All restraints of trade and all monopolizations are not illegal. It is well settled that restraints of trade within certain limits of object, time, and place are legal. "Restraint of trade" has a well-defined meaning, viz., unreasonable interference with contracting, or combining, parties, or with third persons, in their power to trade.

In this case nothing was done which bound the vendors not to manufacture; nor was there any attempt to interfere with other persons in building new manufactories or manufactory. The contract was simply one for the purchase and sale of stock. It was a sale by a person who, as an incident to his ownership, had a right to dispose of what belonged to him. It was a purchase by a corporation which, by the law of New Jersey, had a right to acquire either refineries, or shares of stock of refineries.

See *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Butchers Union S. H. & L. S. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 755, 28 L. ed. 690.

The Act of 1890 has been before the United States courts in several cases. In three of

these the acts alleged to be illegal have been restrained.

United States v. Jellico Mountain Coke & Coal Co. 12 L. R. A. 753, 46 Fed. Rep. 432; *Blindell v. Lagan*, 54 Fed. Rep. 40; *United States v. Workmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994.

In seven cases in which relief was refused under the act, the element of direct and unreasonable restraint of interstate commerce was absent, although in some cases all the elements which are relied upon in the present as ground of relief existed.

United States v. Greenhut, 50 Fed. Rep. 460; *Re Corning*, 51 Fed. Rep. 205; *Re Terrell*, 51 Fed. Rep. 213; *Re Greene*, 52 Fed. Rep. 104; *United States v. Nelson*, 52 Fed. Rep. 646; *United States v. Trans. Missouri Freight Assn.* 53 Fed. Rep. 440; *Dueber Watch Case Mfg. Co. v. Howard Watch & Clock Co.* 55 Fed. Rep. 851; *United States v. Trans. Missouri Freight Assn. ante*, 78, 58 Fed. Rep. 58.

Contracts, combinations, or conspiracies to restrain the manufacture of goods in any state, or to affect the price of the same before they enter into trade or commerce, though they may, by virtue of diminished manufacture, or enhanced price, indirectly affect trade or commerce, are not within the statute.

The congress of the United States has no jurisdiction over articles which are manufactured.

A purchase of the shares of stock of a manufacturing corporation of Pennsylvania, though it may result in an interference with manufacturing, is not one which restrains trade, or commerce, or is within the regulating power of congress.

Veazie v. Moor, 55 U. S. 14 How. 568, 574, 14 L. ed. 545, 547; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846, 2 Inters. Com. Rep. 232; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Re Greene, supra*.

No case has been made out entitling complainant to equitable relief by way of an injunction, even though the statute has been offended against.

By the constitution of the United States no person can be convicted of crime without trial by jury.

A misdemeanor, such as that defined by the Act of 1890, was held in *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, to be within the meaning of "crime" as used in the constitution.

The courts of the United States cannot have conferred upon them by congress equity jurisdiction to restrain a crime or misdemeanor.

Gee v. Pritchard, 2 Swanst. 440; *Re Sawyer*, 124 U. S. 300, 31 L. ed. 402; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 1 L. ed. 412; *Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 296; *Cope v. District Fair Assn.* 99 Ill. 489, 89 Am. Rep. 80.

NOTE.—The above decision excludes from the operation of act of congress respecting conspiracies against interstate commerce a very large class of combinations or trusts which are at least indirectly connected with such commerce as the source of supply. The decision is therefore of much importance.

For other conspiracies to create monopolies prohibited by state law, see *People v. Sheldon* (N. Y.) 23 L. R. A. 221; *Queen Ins. Co. v. State* (Tex.) 22 L. R. A. 483; *State v. Phipps* (Kan.) 18 L. R. A. 657.

Spelling, Extraordinary Relief, § 24; *Carlton v. Rugg*, 5 L. R. A. 193, 149 Mass. 550.

When the injury complained of is not, *per se*, a nuisance, or may or may not become so, according to circumstances, and when it is uncertain, indefinite, or contingent, or productive of only possible injury, equity will not interfere.

High. Inj. § 742.

If equity interferes in the present case it will be to enforce a doubtful legal right. This is a jurisdiction that chancellors have always abhorred.

See *Matthews v. Associated Press of New York*, 136 N. Y. 383; *Badische & A. Und Soda Fabrik v. Schott*, [1892] 3 Ch. 447; *Mogul S. S. Co. v. McGregor*, [1892] A. C. 25.

Dallas, Circuit Judge, delivered the opinion of the court:

There are three assignments upon this record. The first two aver, in general terms, that the court below erred in dismissing the bill of complaint, and in not granting the relief thereby prayed. The third, alone specifies the alleged error with particularity, and is in these words: "That the court erred in holding that the facts in this case do not show a contract, combination, or conspiracy to restrain or monopolize trade or commerce among the several states or with foreign nations." This assignment correctly presents the only question which the case involves.

The bill filed on behalf of the United States is founded wholly upon the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." Proceedings, such as have been instituted and pursued in this instance, "to prevent and restrain violations of this Act," are authorized and directed by its fourth section; and these defendants are charged with violation of its first two sections, which are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

These sections relate, respectively, to restraint of trade and to monopoly, but, as to both, with respect only to "trade or commerce among the several states, or with foreign nations;" and upon the application of

this restrictive language of the law to the facts of this case we base our judgment. The learned judge who heard the cause in the circuit court states, in the opinion filed by him: "The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock \$25,000,000; that this assent was subsequently obtained, and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold, that the contract of sale in each instance left the seller free to establish other refineries, and continue the business, if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent of the sugar refined and sold in the United States is refined in other refineries than those

controlled by the American Sugar Refining Co.; that some additional sugar is produced in Louisiana, and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence, or more perfect control, over the business of refining and selling sugar in this country."

This statement of the facts is quoted at length merely for the purpose of showing the general nature of the case; the only essential fact—and of that there is no doubt—being that the questioned conduct of the defendants does not, according to our view of the law, concern interstate or foreign commerce. There is no evidence whatever that the defendants have directly monopolized, or have attempted, combined, or conspired to directly monopolize, any part of the trade or commerce among the several states or with foreign nations; or that they have contracted, combined, or conspired in direct restraint of such trade or commerce. The utmost that can be said—and this, for the present purpose, may be assumed—is that they have acquired control of the business of refining and selling sugar in the United States. But does this involve monopoly, or restraint of, foreign or interstate commerce? We are clearly of opinion that it does not. The particular language of the act which is now under consideration was manifestly derived from the

clause of the constitution by which congress is empowered to "regulate commerce with foreign nations and among the several states;" and the authorities are distinctly to the effect that this grant of power does not include the regulation of manufactures or productive industries of any sort, even where their product is made, or is intended or contemplated to be made, the subject of commerce beyond the territory of the state where the manufactory or other producing industry is situated or operated. Manufacture and commerce are two distinct and very different things. The latter does not include the former. Buying and selling are elements of commerce, but something more is required to constitute commerce, which, "strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

Enough has been said to indicate the ground upon which our conclusion in this case has been reached, and we do not deem it necessary to say more, inasmuch as the subject has very recently been considered and passed upon in the *Re Greene*, 52 Fed. 104, by Judge Jackson (now one of the justices of the supreme court), in whose opinion the earlier cases are sufficiently referred to.

The decree of the Circuit Court is affirmed.

Affirmed 156 U. S. 1, 89 L. ed. 325.

ARIZONA SUPREME COURT.

George FIFIELD, *Appt.*,

v.

COMMON COUNCIL OF THE CITY
OF PHOENIX.

(.....Aris.....)

A city is not liable for the explosion of fireworks in a street, under a permit granted by a city officer under an ordinance prohibiting such display without such permit, especially where the charter denies liability for malfeasance, misfeasance, or neglect of duty of any officer or other authorities of the city.

(March 8, 1894.)

A PPEAL by plaintiff from a judgment of the District Court for Maricopa County in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by the explosion of fireworks in city streets under permission which had been illegally granted by the municipal authorities. *Affirmed.*

The facts are stated in the opinion.

Messrs. Kibbey & Israel, for appellant:

The defendant is liable for the injuries sustained by the appellant, because by expressly granting a permit or license to individuals to

do the things in the public streets, which in themselves constituted a nuisance and were essentially dangerous, and from which the injuries complained of naturally resulted, it became a participant and an active agency in the acts that produced the injuries complained of.

As the primary use of a city street is for the passing and repassing of the public throughout its entire width, a city is liable for permitting such an obstruction of a street, by any individual, as constitutes a nuisance.

2 Beach, Pub. Corp. § 1511, p. 1463.

Our Penal Code, section 600, defines a public nuisance to be anything which unlawfully obstructs the free passage or use in the customary manner of any public park, square or street.

Penal Code, Rev. Stat. 1887, § 600.

Is not the use of a street as a place for discharging explosives a use not contemplated, and is it not an obstruction to the free passage of the street in the customary manner?

Any noise, whether of musical instruments, the human voice, discharge of guns is a nuisance, and the discharge of fireworks are regarded as *prima facie* nuisances.

Wood, Nuisance, § 632; and see § 17.

The firing of fireworks in a frequented public street is *prima facie*, at least a nuisance, and therefore unauthorized.

Cohen v. New York, 4 L. R. A. 406, 118 N. Y. 532; *Irvine v. Wood*, 51 N. Y. 224, 10 A.

NOTE.—As to liability of injuries caused by the discharge of fireworks, see note to Scanlon v. Wedger (Mass.) 16 L. R. A. 335.
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Rep. 608; *Speir v. Brooklyn*, 21 L. R. A. 641, 189 N. Y. 6; *Jenne v. Sutton*, 48 N. J. L. 257; *Conklin v. Thompson*, 29 Barb. 218.

Cities are liable for licensing in the streets anything which is calculated to frighten horses that are ordinarily well behaved.

See 9 Am. & Eng. Encyclop. Law, p. 386, par. 6.

A city is liable for negligently permitting objects to be and remain in the streets, calculated to frighten horses.

See the authorities cited in the *note*, p. 387 of 9 Am. & Eng. Encyclop. Law.

Mr. L. H. Chalmers for appellee.

Hawkins, J., delivered the opinion of the court:

This was an action by appellant to recover damages for personal injuries sustained by him. He based his claim for relief upon the facts that the appellee is a municipal corporation created by an act of the legislative assembly of the territory, approved February 25, 1881, and an Act of March 11, 1886, amendatory thereof; that the corporation, in 1889, ordained, among other things, that it should be unlawful for any person within certain city limits, to make any bonfire, discharge any firecrackers, skyrockets, or any fireworks whatever, etc., without first having obtained permission therefor from the city marshal (this ordinance was in effect at the time of appellant's injuries); that on the 15th day of February, 1893, the city, by and through its members, its mayor, and its marshal, unlawfully and negligently granted to certain Chinese permission to set off, discharge, and explode fireworks upon certain streets of said city, within the fire limits; that appellant, a hack driver, on that day, while in the proper pursuit of his business, was driving along the streets of said city; that, while so driving along a street within said fire limits, the Chinese, acting under the permit so granted them, fired off and exploded a large quantity of fireworks, firecrackers, and bombs, whereupon appellant's horses (they being gentle and well broken) became frightened and unmanageable, and threw appellant to the ground, all without fault upon his part, and he was thereby very seriously injured, sustaining a very serious fracture of the leg, and otherwise bruised. The court below sustained a general demurrer to the complaint on this state of facts, and appellant asks that the ruling be reversed.

Section 7 of article 19 of the charter of the city of Phoenix provides, as follows: "Sec. 7. That said corporation shall not be liable to any one, for any loss or injury to person or property growing out of or caused by the malfeasance, misfeasance, or neglect of duty of any officer or other authorities of said city or for any injury or damages happening to such person or property on account of the condition of any ranja, sewer, cesspool, street, sidewalk or public ground therein, but this does not exonerate any officer of said city or any other person from such liability when such casualty or accident is caused by willful neglect of duty enforced upon such officer or person by law or by the gross negligence or willful misconduct of any such officer or person in any other respect." It seems to us that any fair construc-

tion of this section inhibits such form of action against the city. Appellant, in his reply brief, disclaims any negligence on the part of the city marshal in granting the permit, but says it became the negligent act of the city itself, and such city was an agency in the committing of the injury. We are unable to agree to this line of argument. It could not do more than to undertake the evasion of the plain letter of the city charter. Under this charter, if the city officer performs an act which is authorized by an ordinance, it would not, on his part, be negligence. Then, how could it become negligence on the part of the city itself? Plymouth, Ind., had an ordinance prohibiting the firing of gunpowder, or any other substance, except on occasions of public rejoicing, when the mayor granted permission to fire guns, cannons, and other things in which gunpowder was used. On the 4th of July, 1885, the mayor granted permission to fire gunpowder in an arvil on a lot in said city; and when it was fired it blew gravel and stones against one Wheeler's plate-glass windows, and broke them. The supreme court of Indiana, in *Wheeler v. Plymouth*, 116 Ind. 153, in passing upon the question of the liability of the city, says: "A city which has an ordinance prohibiting the firing of gunpowder, but allowing the mayor to license such firing on certain occasions, is not liable for the damage occasioned by the negligence of the licensees, there being nothing to show that the authorized act was necessarily dangerous." It is also decided in the same case that "there is no actionable breach of corporate duty in failing to enact a proper ordinance, or in failing to enforce one that has been enacted; and consequently this action cannot be maintained upon the theory that there was a proper ordinance, nor upon the theory that the ordinance was not enforced." Under this theory, it seems clear that the action at bar could not be maintained if the ordinance was not enforced. Then, upon what system of reasoning could it be maintained because it was suspended for a day? For failing in governmental action, municipal corporations are responsible only to their corporators, or the power creating them. *Cooley, Torts*, 620. It shows no ground of action when one complains that he has suffered damages because the operation of an ordinance which prevents the explosion of fireworks within the city has been temporarily suspended. *Ibid.*

Lincoln v. Boston, 148 Mass. 578, 3 L. R. A. 257, was also a case where the mayor permitted the firing of cannon upon the commons under an ordinance forbidding it unless such permission was given, and the plaintiff's horse took fright and ran away on a neighboring street. This license to fire cannon was held to be an act of municipal government, and the person doing the firing was not the city's agent, so as to make the city liable. The firing of the Chinese bombs, in the case at bar, was not the act of the city; nor did the city have any agency in said act. A licensee does not thereby become the agent of a municipal corporation. *Ibid.*; *Fowle v. Alexandria*, 28 U. S. 3 Pet. 398, 7 L. ed. 719, *Chief Justice Marshall*, in *Fowle v. Alexandria*, says: "That corporations are bound by their contracts is admitted. That

money corporations, or those carrying on business for themselves, are liable for torts, is well settled. But that a legislative corporation, established as a part of the government of the country, is liable for loss sustained by a non-feasance—by an omission of the corporate body to observe a law of its own, in which no penalty is provided—is a principle for which we can find no precedent." *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787, is a well-considered case, and is very similar to the case at bar. The plaintiff, a minor child, while walking upon one of defendant's streets, was seriously gored by a cow which was running at large in the streets of said city. She sued the corporation for damages alleged to be sustained by reason of this misfortune. It will be noticed, by reference to the facts in this case, that the allegations of the declaration are quite similar to the complaint in the case before us. In 1878 the city had an ordinance against cattle running at large. This ordinance was suspended at the time of the injury to the child. Mr. Justice Crawford says: "The adoption of an ordinance in reference to allowing cattle to run at large in a city is one which is wholly legislative, and therefore discretionary. It is not liable in damages for neglecting, omitting, or refusing to notice the subject, or having noticed it, and adopted an ordinance concerning it, then to repeal or suspend it." The same reasoning would undoubtedly apply to an ordinance against the firing of bombs, etc. In the Georgia case, it was argued that, so long as a city fails to legislate, it is not liable, but, when it does, then its liability for damages accrues. The court was unable to appreciate this difference, but cited the case of *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451, as a case directly in point. An ordinance prohibiting the use of fireworks was passed, remained in force some years, was then suspended from the 25th day of December to January 1st, inclusive. During this time, by the firing off of squibs, firecrackers, and Roman candles, plaintiff's house was burned, for which he sued the city. Held, that it was within the discretion of the authorities to determine, from time to time, what ordinances were proper, and that the corporation was not liable. Also, see *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451. If the ordinance in question had been repealed on the day before the accident to appellant, it seems clear that there could be no liability against the city. Then, upon what system of reasoning could he recover simply because the ordinance was suspended on the day of the accident?

Appellant, in his brief, relies upon the cases of *Cohen v. New York*, 113 N. Y. 532, 4 L. R. A. 406; *Speir v. Brooklyn*, 139 N. Y. 6, 21 L. R. A. 641. In *Cohen v. New York*, the facts were that the city, by a permit, allowed a grocer to keep a wagon in front of his store, when not in use. On a certain morning, Cohen

was walking along the street, in front of the grocer's store. At the same time a wagon loaded with ice was passing in one direction, and one loaded with coal was passing in the other. The grocer's wagon, without any horse attached, was standing in front of his store. The thills were tied up in a perpendicular position with a string. The length of the wagon was parallel with the course of the street. The ice wagon, probably in attempting to avoid the coal wagon, caught against the wheel of the grocer's wagon, turned it around, and loosened the thills, so that they fell, and struck Cohen on the head, injuring him so that he died the next day. The city was held liable. The court held that the permission was not authorized by law, and that the owner of the wagon acquired no right by virtue of the license to store his wagon in the street, and in doing so he was clearly guilty of maintaining a nuisance. The defendant was also guilty because it assumed to authorize the erection and continuance of a nuisance. The legal power to obstruct the street by grant of a license had been withheld by the legislature from the city. Nevertheless, it did grant such a permit, and took a compensation on account of it. In thus doing, the city became a partner in the erection and continuance of such nuisance. *Speir v. Brooklyn*, *supra*, was a case where fireworks were allowed by the mayor, under an ordinance, at the junction of two narrow streets in the city of Brooklyn, and plaintiff's property was destroyed, and the city was held liable; the court having held that the circumstances of that particular case made the same a public nuisance, and the plaintiff recovered under that theory. Such displays, the court seemed to think, should be under the supervision of the municipal authorities, and it was probably entirely proper for the court to rule as it did in this particular case. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injuries to persons or property. The action in the case at bar is not upon the theory that the city was guilty of unlawfully erecting and maintaining a nuisance. A city is liable for maintaining a nuisance, unless expressly authorized by law to do so. It was on this theory a recovery was had in the New York cases. It may have been an error of judgment in the officers of the city in granting the permit or suspending the ordinance on the particular street on the day alleged, but cities are not responsible for errors of judgment of their officers in the enforcing of their laws.

We must conclude that, both from the reading of the charter of the city, and the weight of authority, the chief justice was correct in sustaining the demurrer, and the judgment is affirmed.

Rouse and Sloan, JJ., concur.

WISCONSIN SUPREME COURT.

Emma STAPLES, *Resp't.*,
v.
Eugene W. STAPLES, *Appt.*

(.....Wm.....)

1. Contempt proceedings will lie to compel payment of installments of

NOTE.—Contempt proceedings to compel payment of alimony.

- I. Doctrine of contempt.
- II. Constitutionality of contempt.
- III. When contempt proceedings may be resorted to.
- IV. Evidence in support of.
- V. Necessity of service of order.
- VI. Necessity of demand of payment.
- VII. Necessity of notice of application.
- VIII. Right of defendant to be heard.
- IX. Excuses for nonpayment.
- Inability to pay.
- X. Commitment refused.
- XI. Application for relief.
- XII. Power of court to inquire into.
- XIII. State statutes and decisions thereunder.
- XIV. English decisions.

I. Doctrine of contempt.

Contempt is defined by Justice Swift to be "a disobedience to the court by acting in opposition to the authority, justice, and dignity thereof, and commonly consists in a party's doing otherwise than he is entitled to do, or not doing what he is commanded or required by the process, order, or decree of the court, in all which cases the party disobeying is liable to be attached and committed for contempt." 2 Swift, Dig. 858; Lyon v. Lyon, 21 Conn. 185.

In *Re Wilson*, 75 Cal. 580, the court considered the distinction between a civil and a criminal contempt, the former consisting generally in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party; the latter consisting of acts of disrespect to the court, such as disorderly or violent conduct, in its presence or immediate vicinity, or in the doing of a forbidden act, resistance to process, etc., and held that the contempt proceedings in divorce came within the former.

The duty and obligation of the husband is to provide maintenance for the wife and is not merely contractual, and their disregard and breach partake largely of the nature of a contempt, and equity will enforce their observance by attachment of the person of the husband. *Murray v. Murray*, 84 Ala. 363.

Yet this duty is an imperfect obligation which is not technically a debt; he does not owe any specific amount of money, but he owes a duty which may be enforced by the order of the court compelling him to pay the money. *Ex parte Perkins*, 18 Cal. 60.

The attachment of this species of contempt, the disobedience of an order to pay money, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. *Buck v. Buck*, 60 Ill. 105; *Crook v. People*, 18 Ill. 535.

In *State v. Dent*, 29 Kan. 415, however, the court held that such proceedings were in the nature of criminal prosecutions.

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alimony ordered to be paid in the future by a final judgment of divorce; where an execution cannot be issued, since there is no provision of law for collecting such judgment.

2. Inability to pay installments of alimony, brought about by the party himself with intention to avoid payment, will not prevent his refusal to pay from being contemptuous and punishable as a contempt of court.

Without the ability to compel the obedience to its mandates—whether the order be to surrender writings in the possession of a party, to execute deeds of conveyance, to pay money, or to perform any other act, the court is competent to require it to be done—many of its most important and usual functions would be paralyzed. *Pain v. Pain*, 80 N. C. 322.

The non-performance of a decree being adjudged a contempt, the power to attach for the contempt cannot be questioned. *Wightman v. Wightman*, 45 Ill. 167.

The court has power to commit as for contempt. *Blake v. People*, 80 Ill. 11.

The remedy for a failure to comply with the order of the court is by attachment. *Waldron v. Waldron*, 55 Pa. 231.

The proper method of enforcing an order for alimony is by attachment made for contempt, and not by way of *ieri factus*. *Goss v. Goss*, 29 Ga. 109.

In *Andrews v. Andrews*, 60 Ill. 609, it was sought to reverse the decree, the defendant bringing the record into court by writ of error, questioning the power of the court to award an attachment on nonpayment of the amounts awarded, and of counsel's fees, the court held that there was no doubt of the power of the court to award an attachment for noncompliance with an order for the payment of alimony.

The power to award the process is inherent in the court, essential to the exercise of its jurisdiction and a maintenance of its authority. *Pain v. Pain*, *supra*.

If the defendant remains contemptuous, defying the court, his estate, real and personal, may be sequestered as a means of enforcing performance of a decree. *Wightman v. Wightman*, *supra*.

The order in contempt committing the defendant, need not show that the payment was not enforceable by sequestration or under the security. *Ryer v. Ryer*, 67 How. Pr. 369.

In order to punish a party for contempt in a civil proceeding, the contempt must be such as to defeat, impair, impede, or prejudice a right or remedy of the party affected by it, and such fact must be ascertained and adjudged by the court directing the punishment to be imposed. *Sandford v. Sandford*, 40 Hun. 540.

The process of contempt to enforce civil remedies, being one of those extreme resorts which would not be justified, if there was any other adequate remedy, the payment of money can only be enforced by attachment "where by law, execution cannot be awarded for the collection of such sum." *Haines v. Haines*, 35 Mich. 128.

In *Re Fanning*, 40 Minn. 4, the petitioner applied to be relieved from an order for the payment of temporary alimony, by way of habeas corpus and certiorari, the proceedings in divorce having been dismissed. The court held that the contempt had a double aspect, being in the nature of a remedy to enforce payment of the alimony, and also punitive or merely in punishment of the offense of contempt, the first being for the benefit of the party only, the second in order to assert the au-

(May 1, 1894.)

APPEAL by defendant from an order of the Circuit Court for Juneau County directing the imprisonment of defendant for contempt, for failure to comply with a decree directing him to pay alimony to the plaintiff. *Affirmed.*

thority of the court; and that so far as it was private it failed with the dismissal of the suit, but that so far as the fine was concerned the judgment did not affect it, and that therefore the petitioner was not entitled to discharge until he paid the fine.

It has been held that it ought never to be resorted to, except as penal process founded on the unwillingness of the party to obey. *Carlton v. Carlton*, 44 Ga. 216.

And that the order must be for the performance of some specific act other than the mere payment of money, and in such case he may be punished by the court as for contempt by final imprisonment under the General Statutes of 1886, chap. 172, § 27. *Coughlin v. Ehler*, 39 Mo. 285.

In *Lewis v. Lewis*, 80 Ga. 706, the decree was a final one, and the court held that the direction of the payment of alimony by a husband to a wife was a duty the husband owed, not only to the wife, but to the public, to comply with the order, and that if he failed the court would compel him to make such payment by an order of attachment, directing his imprisonment in case of his failure to comply with the order.

The power of granting alimony belongs to the superior court, as an incident of its jurisdiction over divorces, and not to the judge, and cannot be exercised by him in vacation. *Goss v. Goss*, 29 Ga. 109.

In *Dwelly v. Dwelly*, 45 Me. 377, a motion to dismiss exceptions and render judgment on a verdict because the libelee failed to comply with an order of the court directing the payment of costs of the wife's attorneys, under section 5 of chapter 60 of the Revised Statutes, it was held that the court sitting *in banc*, had no jurisdiction over the question and the proper course was to proceed before the judge *ad nisi prius*, where the party would be proceeded against as for contempt, and disregarding the decree of the court.

In *Lockridge v. Lockridge*, 3 Dana, 23, 28 Am. Dec. 52, it is said to be the more approved and provident decree, to require a bond with approved security for such annuity as shall be fixed by the court, payable in prescribed installments, reserving the power to compel payment from time to time by attachment, sequestration or otherwise, and unless the husband should refuse to give such security, a decree for partition of his estate would be, not only unnecessary, but incongruous, unusual, and injurious.

Where it appeared that the husband had conveyed his property, in anticipation of the divorce proceedings, and for the purpose of preventing alimony being obtained, the court held that the proceedings of themselves were not sufficient to show contempt. *Stuart v. Stuart*, 123 Mass. 370.

In *Coughlin v. Ehler*, 39 Mo. 285, it was held that an order for the payment of alimony was simply an order for the payment of money, and imprisonment for debt being abolished in that state, a commitment to prison as for contempt was without authority of the law.

It has been held that the remedy by execution must be exhausted upon all demands for the recovery of money, whether they be recovered in legal or equitable actions, before a creditor's suit could be instituted. *Miller v. Miller*, 7 Hun. 208.

The petition framed for the commitment of the defendant, for contempt, is not defective by reason of its not alleging that he is able to make the pay-

Statement by Winslow, J.:

March 25, 1892, plaintiff obtained a judgment of divorce *a vinculo* against the defendant. By the judgment the plaintiff was awarded the custody of an infant child, and the title of certain real estate of the defendant's was transferred to the plaintiff; and defendant

ment, it is enough to show a refusal to obey the order. *Andrew v. Andrew*, 62 Vt. 485.

In *Mann v. Mann*, 7 W. N. C. 507, where the wife as defendant sought to enforce the order by attachment. It was contended that the rule was restricted to cases where the wife was a plaintiff, and that where the husband was plaintiff the result of noncompliance was a stay of proceedings; the court granted the rule absolute, holding that this way would be very adequate where the wife was the respondent, the court stating that it would be difficult to see why, if a wife was entitled to this rule against a husband, respondent, her case was not all the stronger where she was unwillingly before the court.

An attorney has no lien upon the alimony awarded to the wife by a final judgment rendered in her favor in an action for separation, such as would enable him to collect his costs by a proceeding to punish for contempt in the non-payment of alimony. *Weill v. Weill*, 10 N. Y. Supp. 637.

II. Constitutionality of contempt.

Attachment is not in the nature of an imprisonment for debt, within the prohibition of the constitution. *Murray v. Murray*, 18 Ala. 383.

Such a case is not a debt within the meaning of the constitution. *Pain v. Pain*, 80 N. C. 322.

The power to commit for contempt is not contrary to the clause of the Georgia Constitution of 1868, prohibiting imprisonment for debt. *Carlton v. Carlton*, 44 Ga. 216.

Such a course is legal where the defendant has refused to obey the order and his whole conduct indicates clearly that nothing but the stern order of the chancellor to commit him on his disobedience will bring him to the performance of what is his clear duty in the premises. *Ibid.*

It is not the intention of the constitution to take from courts the power to punish for contempt, without giving to the party charged a jury trial. It is not designed to virtually take from every court a power so essential to its efficiency and very existence, and no less necessary for the safety and benefit of the public, the protection of every citizen in his life, liberty and property. *Ex parte Grace*, 12 Iowa, 206, 79 Am. Dec. 529.

The power is preservative and inherent in every court, and extends to the enforcement of every order which it may make in the legitimate exercise of its authority. *Ibid.*

The court has power to order such attachment, and it is not contrary to the fifteenth section of article eight of the Constitution of Illinois, prohibiting imprisonment for debt. *Wightman v. Wightman*, 45 Ill. 137.

But it has been held that imprisonment for non-compliance with such an order, unless willful, or unless upon a refusal, upon a proper demand made to deliver up his estate in satisfaction of the decree, is within the inhibition of the constitution against imprisonment for debt. *Blake v. People*, 80 Ill. 11.

It must appear that he has the pecuniary ability to enable him to comply with the decree, and that his disobedience is willful. *Ibid.*

In *Steller v. Steller*, 25 Mich. 156, where an appeal was taken from the order committing defendant upon the ground of the constitutional provision prohibiting imprisonment for debt, the court held that with imprisonment for debt forbidden, a

was adjudged to pay plaintiff, as alimony, \$150 annually, in equal quarterly installments, also the sum of \$33, temporary alimony, which had been ordered *pendente lite*, but had not been paid. The defendant paid none of the sums, and in September, 1893, upon certain affidavits, a motion was made

that defendant be punished for contempt in not paying said sums, the whole amount then due being \$357. The affidavits showed due demand, and the defendant's refusal to pay; also, that he stated, in foul and abusive language, that he should never pay anything on the judgment; that defendant is a strong,

party could not be imprisoned for non-compliance of such an order except on the ground of contempt of the authority of the court, that there must be something of wrong beyond the mere failure to pay money, and the party, before he can be convicted and punished, must have an opportunity to be heard in his own explanation,

III. When contempt proceedings may be resorted to.

The process for contempt, although not frequently resorted to, is a proper and salutary mode of proceeding where the exigency of the case requires it, it being one of the established and customary modes of enforcing decrees of courts of equity, and a practice to which the superior court should conform in cases where the defendant's disobedience of the decree is palpable, willful and utterly inexcusable, and constitutes, beyond a doubt, contempt. *Lyon v. Lyon*, 21 Conn. 185.

The authority is based upon the ground that the refusal is willful disobedience, and where a party is guilty of willful disobedience or obstinacy to an order of the court or judge, the court or judge is empowered to punish for contempt, and to sentence him to imprisonment until the specified sum and costs are paid, such decision being in the nature of a sentence and final judgment. *State v. Dent*, 29 Kan. 416.

Such a course is appropriate. *Russell v. Russell*, 60 Me. 336; *Strobridge v. Strobridge*, 21 Hun, 38. To the same effect, *Wright v. Wright*, 74 Wis. 433; *Blake v. Blake*, 80 Ill. 523; *Murray v. Murray*, 34 Ala. 363; *Ex parte Perkins*, 18 Cal. 60.

Such disobedience being contumacious the petitioner is not limited to *scire facias*. *Slade v. Slade*, 106 Mass. 499.

The same was the ruling of the court in contempt proceedings to compel payment of alimony installments for the support of children. *Hand v. Hand*, 25 Ohio L. J. 214.

The willful disobedience of a lawful order is itself criminal, much more so than the non-payment of costs adjudged against a prisoner in a criminal action, and for which he may be imprisoned. *Pain v. Pain*, 80 N. C. 322; *State v. Cannady*, 79 N. C. 539.

To such a case the old adage, "when a bird can sing and will not sing, he must be made to sing," applies. *Lewis v. Lewis*, 80 Ga. 706.

Such proceedings will be upheld where it is shown that the failure of the defendant to comply with the order has been through his own action, as in cases of fraud. *Haines v. Haines*, 85 Mich. 123.

There must be a contempt of the court's authority. *Steller v. Steller*, 25 Mich. 159.

Something of wrong beyond the mere failure to pay money must exist. *Ibid*.

The court must be satisfied that there is good ground for the attachment. It must appear that the defendant has the money to comply with the decree, and that he fails to comply with it. *Lewis v. Lewis*, *supra*.

The imprisonment must be clearly for the contempt of the process of the court, and be of one who is able and unwilling to obey the order, the imprisonment being conditional and in the discretion of the judge. *Carlton v. Carlton*, 44 Ga. 216.

The order adjudging the non-performance of the decree for payment of alimony, being a lawful order, the court is allowed the usual means to enforce the order by issuing an attachment there-
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for, and committing the defendant, on failure to purge himself of the contempt. *Wightman v. Wightman*, 45 Ill. 167.

The power extends to the use of the process likely to be effectual in all cases, and it is not necessary to exhaust other possible remedies in order to become entitled to that remedy. *Andrew v. Andrew*, 63 Vt. 436.

In *Andrew v. Andrew*, *supra*, where the petitioner was decreed alimony upon the obtaining of a divorce, the payment of which, upon demand, was refused, and was sought to be enforced by an order for the punishment of the defendant for contempt, it was held that the county court had power to punish, by way of imprisonment for contempt, the failure and refusal of the defendant to pay permanent alimony, there being nothing unusual or extraordinary in this mode of enforcing the payment. *Curtis v. Gordon*, 62 Vt. 340, to the same effect.

If the proceeding is instituted by the wife, she may have costs taxed *dies ad diem* and alimony awarded by the court, and if the husband has the means of payment, an order will be enforced by attachment. *Ormsby v. Ormsby*, 1 Phila. 573.

In proceedings for divorce and alimony *pendente lite*, the husband cannot escape unless he be destitute of all ability, and in such case if he be the libellant, the court will not require him to pay but will suspend the suit until provision is made for the wife. *Ibid*.

So where the husband refused to comply with the order of the court, in divorce proceedings made abortive by the wife's death, the court enforced such order, in a summary way by attachment and imprisonment. *Ballard v. Caperton*, 3 Met. (Ky.) 412.

In *O'Callaghan v. O'Callaghan*, 60 Ill. 533, it was held that such an order would issue for the refusal of the defendant even though the decree made the same a lien upon his real estate.

Where the position was taken that the payment of costs and alimony could not be enforced by proceedings for contempt, it was held that the attachment could not be vacated upon that ground as it was a proceeding for "disobedience of the lawful mandate of the court," and that the provisions of the statute prohibiting imprisonment for non-payment of costs did not apply. *Park v. Park*, 30 N. Y. 136.

Where the libelee made payments for a short time and then refused, and notice being issued to him he attempted to purge himself by showing pecuniary inability, the court finding him of sufficient ability, adjudging him in contempt and committing him until he complied with the order, it was held such course was the proper one. *Russell v. Russell*, 60 Me. 336.

So where demand was made and the defendant was willing to take the chances and made an unwarranted statement to his attorney, it was held that there was no abuse of discretion; in committing him for contempt. *Rahl v. Rahl*, 14 N. Y. Week. Dig. 560.

It is for the court to determine that it would be useless to order sequestration or security, and where it so determines, the husband may be committed without notice, if he neglects to pay the alimony which he is ordered to pay. *Isaacs v. Isaacs*, 61 How. Fr. 399, 10 Daly, 306.

Where the defendant appeared to have acted by

able-bodied man, and runs a large farm, keeping a large stock of cattle and horses, but claims that he is doing it all for his mother. The defendant filed an affidavit showing that he had no property, real or personal, but that he was in debt, and could borrow no money. He did not deny that he

was an able-bodied man, nor that he was running a farm, nor did he deny that he had stated he would never pay anything on the judgment. Upon these affidavits the circuit court made an order reciting that defendant had in no way controverted the fact of his ability, as an able-bodied man, to earn and

the advice of his counsel he was allowed to remedy the evil by complying within a reasonable time with the order of the court, and to give the security required by the order, or, in default, be committed. *Grimm v. Grimm*, 1 E. D. Smith, 190, where an injunction had been issued by the court, restraining the defendant from parting with his property until proper security was given.

The plaintiff is not estopped by reason of a provision in the decree authorizing an execution to be issued, the proceeding being for disobedience of an order of the court and to compel the defendant to furnish the security required by the decree, chapter 390 of the Laws of 1847 having no application to such a case. *Park v. Park*, 80 N. Y. 155.

The provision that execution may issue, does not interfere with the order that security may be furnished, and therefore an attachment may be issued to compel the giving of the same. *Ibid.*

Where the order directing the payment of the wife's counsel's fees, provided that the allowance might be included in a final judgment and enforced by execution, the court held that such provision enforcing the payment by execution being improperly contained in the order, the right to proceed by way of contempt for non-compliance of the order still existed. *Mercer v. Mercer*, 78 Hun, 192.

In *Groves's App.* 68 Pa. 143, it was held that attachment was the proper method of enforcing the order of the court for the payment of the wife's expenses and support *pendente lite*, as such execution could not issue upon such an order, which was not a lien upon the defendant's property, nor an equitable decree for the payment of money.

Where the circuit court required the husband's bond with surety, it was held that the husband's refusal to give such bond was punishable in the same manner as any other contempt. *Wright v. Wright*, 74 Wis. 439.

In the above case, the original judgment did not provide for the security, but the court stated that such judgment might be revised or altered by the court upon application. *Ibid.*

From this decision *Justice Orton* dissented, holding that before the defendant could be convicted, under the section of the revised statutes, it was necessary for the court to adjudge that it was "yet in the power of the defendant to perform" the order under section 3491 of the Revised Statutes, that such a fact is a condition precedent to such a judgment, which was void without it. *Ibid.*

Where an attachment was issued for alleged contempt of an order requiring the payment of alimony, and security therefor, which it was sought to vacate, but the court adjudged the defendant in contempt, and ordered the payment of a fine and security to be given, and further committed him until he complied with the order, it was held that the court had jurisdiction over the matter. *Park v. Park*, 80 N. Y. 155.

In *Waters v. Waters*, 49 Mo. 385, it was held that the allowance might be enforced by attachment or by execution, or, when the husband was plaintiff, the court might make its payment a condition to the further prosecution of the suit.

IV. Evidence in support of.

As a foundation for contempt proceedings, it must appear from the defendant's examination, or its equivalent, his admission, that at the time of 24 L. R. A.

the service of the order he had in his possession, or under his control, some specified property or sum of money, the application of which could have been lawfully directed towards the payment of the judgment. *Tinker v. Crooks*, 22 Hun, 579.

It must be shown that he has refused payment, and that his refusal or neglect is calculated to, or will actually defeat, impair, or prejudice the rights of the party in whose favor alimony and counsel's fees have been ordered, and the order of the court must show these facts. *Whitney v. Whitney*, 23 Jones & S. 335.

Such a question is one of fact, and when not passed upon below, cannot be reported for the determination of the full court. *Stuart v. Stuart*, 123 Mass. 370.

A conveyance and transfer by a respondent, the grantees being his son-in-law and daughter, was held competent evidence upon the question, whether he had in his possession or control the means of obeying the order of the court, and was consequently sufficient to hold him in contempt for disobedience to the order. *Ibid.*

V. Necessity of service of order.

Before a defendant can be committed for contempt, in the non-payment of alimony, there must be a previous order of the court directing its payment by him. *Gerard v. Gerard*, 2 Barb. Ch. 73, 5 L. ed. 561.

The order of the court, for the payment of alimony, must be served upon the husband before he can be committed for contempt. *Johnson v. San Francisco City & County Super. Ct.* 63 Cal. 578; *Sandford v. Sandford*, 40 Hun, 540.

Until service of the order, a party is not in contempt for a failure to comply with its directions. *Sandford v. Sandford*, *supra*.

Where, however, the petitioner for a writ of habeas corpus alleged that he had no written notice of the order of the court, served upon him, but did not deny the fact that he had notice of the order being made, he being present in court at the time, and it was shown that a demand of payment had been made and refused, it was held there was sufficient notice to warrant his being committed for contempt. *Ex parte Cottrell*, 59 Cal. 417.

Where the defendant, served with a copy of order to pay temporary alimony, by a certain date, failed to make the payment and was arrested on attachment for contempt, and it was contended on his behalf that he should have been brought before the court and interrogated, and an opportunity afforded him to purge himself of contempt, the court held that such step was not necessary, as after a party had been once brought into court; the presumption being that he was present and cognizant of every step taken in the case until it was terminated, unless considerable time elapsed without taking any step. *Petrie v. People*, 40 Ill. 384.

Where a party has entered his appearance, filed his demurrer, and resisted the motion for alimony, and is fully aware of the order and its requisites, and of the fact that he is in default and subject to attachment, it must be presumed that he is fully aware of the motion for attachment, and there is no reason to say that the court erred in having him arrested and detained for non-compliance of the order. *Ibid.*

accumulate money, and finding that he was guilty of contempt in refusing to pay the amounts due under the judgment, and ordering that he be committed to jail until he should pay said sum of \$257 and costs, unless sooner discharged by the court. From this order, defendant appealed.

The above case was followed in *O'Callaghan v. O'Callaghan*, 69 Ill. 552.

Where the defendant absented himself from the state, thereby rendering personal service impossible, service being effected upon his attorney, the court held that disobedience of the order was punishable as contempt. *Fairchild v. Fairchild* (N. J.) April 3, 1888.

The rule for an attachment for the non-compliance of an order for the payment of alimony will be refused where the order has been served upon the defendant out of the jurisdiction. *Russell v. Russell*, 15 Phila. 168.

It is not sufficient to support an attachment. *Ibid.*

The delivery of a copy of the order to the husband in another state is not sufficient service. *Johnson v. San Francisco City & County Super. Ct.* 63 Cal. 578.

Before a person can be brought into contempt for not complying with an order of the court, such order must be served upon him, and the mere delivery to a person in another state of a certified copy of an order made by a court in that state would not be a service upon him within the meaning of the Code of Civil Procedure, §§ 101A, 101B. *Ibid.*

See also *infra*, head XIII.

VI. Necessity of demand of payment.

There must be a personal demand before the defendant will be committed for contempt under § 7200, of the Michigan statutes, Howell's edition. *Edison v. Edison*, 56 Mich. 185.

In *Brown v. Brown*, 23 Mich. 247, the affidavit showed no demand, and it did not appear that the order for alimony had been served by a person having authority to receive the money. The court stopped the proceedings, holding that a demand and refusal must be shown.

Where, however, the husband had informed the wife of his intention not to pay, it was held that his statement did away with the necessity of a previous demand, prior to the commencement of contempt proceedings. *Potts v. Potts*, 68 Mich. 492.

See also under state statutes, *infra*, XIII.

VII. Necessity of notice of application.

In *Sanchez v. Sanchez*, 21 Fla. 346, the court held that due notice of the wife's application to the court for alimony must be served upon the husband, who must have a reasonable opportunity to oppose, and the record must show such facts; and where it is not shown that the husband has been notified and had such opportunity to oppose, the order made upon such application cannot be enforced by way of attachment as for contempt, and will be void.

Notice may be given to him of the application to punish him for contempt, although his property has not been sequestered, and although he has not been required to give security, provided the court is satisfied that it would have been of no use to make an order of sequestration, or for security. *Isaacs v. Isaacs*, 61 How. Pr. 869, 10 Daly, 306.

The power given under section 2200 of the New York Code of Civil Procedure is discretionary, either to give or not to give the husband notice of the application that he be punished. *Ibid.*

But until the court has so adjudicated, notice must first be given to the defendant. *Ibid.*

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Mr. W. S. Stroud, for appellant:

The courts, either in law or equity, possess no powers except such as are conferred by statute; and that to justify any act or proceeding in a case of divorce, whether it be such as pertains to the grounds or cause of action itself, to the process, pleadings, or practice in

The proceedings were designed in order that notice might be given. *Andrew v. Andrew*, 63 Vt. 495.

See also *infra*, XIII.

VIII. Right of defendant to be heard.

A defendant can only be convicted of contempt by regular and orderly proceedings under an attachment, or an order to show cause, and is entitled to an independent hearing, inasmuch as he may furnish a perfect excuse for not complying with the order. *Tinker v. Crooks*, 22 Hun, 579.

The party must have an opportunity to be heard in his own explanation (*Steller v. Steller*, 25 Mich. 159) the proceedings being designed for this purpose. *Andrew v. Andrew*, 63 Vt. 495.

It is contrary to the first principles of right, to proceed to the punishment of a party upon a mere *ex parte* showing; the party must have an opportunity to present what he has to say in his own justification. *Steller v. Steller*, *supra*.

In the above case it appeared that the party was confined on papers which he was not allowed to answer, though it could not be known that he might not effectually disprove the charges. *Ibid.*

See also *infra*, XIII.

IX. Excuses for non-payment.

Inability to pay.

Inability to comply with the order, unlike the commitment of costs, is an answer to a rule to enforce it, and when made to appear, discharges the obligation. *Pain v. Pain*, 80 N. C. 323.

The attachment is designed to enforce the compliance with the order, and not to punish for being unable to perform it. *Ormsby v. Ormsby*, 1 Phila. 578.

The attachment for non-payment is not of course, but the court must exercise discretion in awarding it. *Ibid.*

In such a proceeding, the debtor may appear, and by proper notice purge himself of the contempt, by showing pecuniary inability, or any other facts which may properly produce a like effect. *Lockridge v. Lockridge*, 3 Dana, 23, 28 Am. Dec. 53.

Where the neglect or refusal is not from mere contumacy, but from the want of means, the result of misfortune not induced by any fraudulent conduct on the defendant's part, the party will be compelled to adopt some other mode than imprisonment, to enforce the decree consistent with the practice of the courts, either by execution or other final process; or by sequestration of the real or personal estate; or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice. *Blake v. People*, 69 Ill. 11; *Newhouse v. Newhouse*, 14 Or. 290, 323; *Ormsby v. Ormsby*, and *Lockridge v. Lockridge*, *supra*; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Carlton v. Carlton*, 44 Ga. 218; *Peel v. Peel*, 50 Iowa, 521; *Allen v. Allen*, 73 Iowa, 502; *Re Wilson*, 75 Cal. 580; *Wood v. Wood*, 61 N. C. 533; *Wright v. Wright*, 74 Wis. 430.

In such a case, it is for the defendant to disclose his financial condition and to account for his earnings and their disposition, if he desires to evade the process of commitment. *Bahl v. Bahl*, 14 N. Y. Week. Dig. 500.

it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and cannot be looked for elsewhere, or otherwise asserted or exercised.

Barker v. Dayton, 28 Wis. 867; *Bacon v. Bacon*, 43 Wis. 202.

The court of chancery having no original

jurisdiction of the subject of divorce, it (referring to power to order suit money) cannot be claimed as one of the common equity powers of the court. It is not a power inherent in the court of chancery but a special statutory power.

Re Gill's Petition, 20 Wis. 686.

The husband must show in defense of such proceedings that his non-compliance with the terms of the order was not a mere willful disobedience on his part. *O'Callaghan v. O'Callaghan*, *supra*.

The proceedings being designed in order to give him notice and an opportunity to be heard before an attachment for contempt is ordered. *Andrew v. Andrew*, 62 Vt. 495.

But unless such plea is well founded, the order will be enforced by attachment. *Ormsby v. Ormsby*, 1 Phila. 578.

The question of the petitioner's ability is one of fact to be determined by the court making the order, upon the evidence. *Ex parte Cottrell*, 50 Cal. 417.

The moment that it appears that there is inability, it is clearly the duty of the judge to discharge the party, since it is only the contempt, the disobedience, upon which the power rests. *Carlton v. Carlton*, 44 Ga. 216.

The husband is not obliged to wait for justice in a prison, and may, by proper proceedings, obtain a modification or change of the order upon these grounds. *Wright v. Wright*, 74 Wis. 489.

Such a defendant may be regarded as a debtor entitled to the benefits conferred by the Insolvent Debtor's Act, chapter 59 of the North Carolina Revised Code. *Wood v. Wood*, 61 N. C. 538.

In *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167, the plaintiff claimed that the process was not in the nature of an execution to enforce performance of a duty, and that she was entitled to it without inquiry as to whether the defendant was able to perform it or not; that the question of his ability could not be inquired into in proceedings afterwards taken for his release. The court, however, held that the question of his inability to pay when not voluntary and for the purpose of evading the order, would be taken into account, and if proved to be correct he would not be committed for contempt.

Where the defendant disclosed real and personal estate, heavily mortgaged or incumbered, and did all he could, offering to surrender his property, he was held entitled to be discharged. *Blake v. People*, 60 Ill. 11.

So, where the order specified a time in which it was to be paid and the money was not deposited at the time, but the husband complied with the order at a subsequent term of court, stating as his reason for not doing so earlier poverty and inability to raise the sum, it was held that he could not be punished by way of contempt, and that a dismissal of the suit was error, there being no neglect or refusal to obey the court's order, such as would entitle the other party to commit for contempt. *Newhouse v. Newhouse*, 14 Or. 290, 292.

In *Allen v. Allen*, 73 Iowa, 502, the defendant failed to pay temporary alimony owing to lack of funds and the plaintiff filed a motion to strike out his answer upon the ground of contempt. The court held, that he was not in contempt and that it was error to strike out his answer.

A similar motion was made in *Peel v. Peel*, 50 Iowa, 321, his offer and answer which were refused and stricken out being restored upon appeal.

In *Re Wilson*, 75 Cal. 580, an application for discharge was made, and the court held that under the sections of the California Code, the applicant, upon proving his inability to pay, might be discharged.

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Where, however, it was shown that the husband would have been able to comply, but that he disabled himself from doing so by a second marriage, his disability being voluntary and intentionally created, and an act prohibited by the judgment and in defiance of its terms, it was held that he would not be relieved from imprisonment upon that ground. *Ryer v. Ryer*, 67 How. Pr. 369.

X. Commitment refused.

Where, however, alimony is made a lien upon the amount by the decree in divorce, the court will not proceed by way of attachment for contempt, to enforce the payment of attorney's fees. *Andrew v. Andrews*, 60 Ill. 608.

Where the original judgment of the court can be enforced by execution, proceedings by way of contempt will not be allowed. *Gane v. Gane*, 13 Jones & S. 355; *Haines v. Haines*, 35 Mich. 138; *Miller v. Miller*, 7 Hun. 206.

In *Gane v. Gane*, 14 Jones & S. 218, a judgment was obtained against the defendant for the payment of certain sums as alimony, and proceedings taken to enforce the judgment by declaring him in contempt, an order was made directing him to pay the alimony and give security for the future payment, and in default thereof, that an attachment issue punishing him as for a contempt of court. It was held the proceedings by way of contempt could not be taken.

Where the wife applied for alimony, which was allowed, and on the trial the jury negatived her charges and refused the decree in divorce, it was held in a subsequent proceeding by her to recover arrears of alimony, that such order ought to be rescinded and nullified as such arrears could not be collected or enforced. *O'Haley v. O'Haley*, 31 Tex. 502.

So in *Coughlin v. Ehlert*, 39 Mo. 235, such proceedings were refused. Imprisonment for debt being abolished in that state, and execution being allowed.

They were denied to an attorney for the collection of his fees in *Weill v. Weill*, 10 N. Y. Supp. 627. See also *infra*, XIII, for decisions under state statutes.

XI. Application for relief.

Where the defendant refuses to obey an order of the court, is in contempt and liable to punishment, the court has power to refuse to hear him. *Walker v. Walker*, 62 N. Y. 260.

Where the defendant, committed for nonpayment of alimony *pendente lite*, contended that he was entitled to the benefit of the act abolishing imprisonment for debt, the court held that its terms were confined to the ordinary proceeding in a court of law, and did not embrace such a case and refused to discharge the prisoner. *Wood v. Wood*, 61 N. C. 538.

The imprisonment of such a defendant is not as an indignity offered to the court, but is in the nature of an execution for debt, in which the body is taken under *capias ad satisfaciendum*, and therefore cannot be discharged until he pays the debt, or proceeds in a proper manner to take the benefit of the insolvent debtor's act. *Ibid*.

Where the defendant refused obedience and was committed to jail, but was subsequently brought up on habeas corpus, and complied with the order of the court he was discharged. *Purcell v. Purcell*, 4 Hen. & M. 507.

The power of courts of record to punish contempt is given and limited by the provisions of chapter 150, Rev. Stat.

Rev. Stat. § 8477, subdiv. 8, confers power on the court to punish by imprisonment any party for non-payment of any sum of money ordered by such court to be paid, in cases

where by law execution cannot be awarded for the collection of such sum.

Execution could have been awarded for the collection of the sums due on the judgment in this case.

Rev. Stat. § 2367; *Keyes v. Scanlan*, 68 Wis. 345.

In *Re Bissell*, 40 Mich. 63, the order committing for contempt was regular on its face and recited that the contempt was admitted. The court therefore refused the application for habeas corpus holding that it could not review a committal apparently regular, and that the petitioner must appeal from the order.

Where release was sought upon habeas corpus upon the ground that since his imprisonment the petitioner had filed a petition of insolvency, and obtained a preliminary order declaring him insolvent, the court held the order worked no discharge as when the order of contempt was made and found as a fact, he was able to comply with the order for alimony. *Ex parte Wilson*, 73 Cal. 97.

In *Ex parte Hart*, 94 Cal. 254, the petitioner contended that the decree for alimony was void, as not specifying the period of payment. The court construed the decree as intending the payment to continue during life, or until modified by the court, and held that the court had power to make such order, and within the jurisdiction, the matter could be dealt with in proceedings for contempt.

Where it was contended that the precept committing the defendant to jail for nonpayment of expenses and temporary alimony, was void because it committed the prisoner "to close custody in the jail, without being allowed the liberties thereof" until the order was complied with. It was held under section 3 of chapter 433 of the Laws of 1864, and section 4, chapter 149, of the Revised Statutes of Wisconsin, that the prisoner was entitled to jail liberties. *Re Gill's Petition*, 20 Wis. 686.

But where an appeal was taken from an order committing the prisoner for contempt, in the non-payment of alimony, it was held that the party disobeying the order, committed to prison and restrained for that cause, there was no provision entitling him to the liberties of the jail. *Re Clark*, 20 Hun. 551, affirmed *Clark v. Reilly*, 81 N. Y. 638.

The precept authorizes the confinement of the delinquent to prison, and would not be executed by allowing him to go at large over the entire county, upon a bond binding him not to transcend its limits. *Ibid*.

Such a precept would be practically destroyed, and the summary remedy provided would be deprived of the coercive power intended by the statute. *Ibid*.

If the order has not been complied with by the husband, the mere fact that he has proceeded by way of petition for an alteration of the order, and for reduction of the amount, will not operate so as to stay an attachment by way of contempt for non-compliance with the order. *O'Callaghan v. O'Callaghan*, 69 Ill. 552.

Where no facts were shown, the defendant merely claiming that he had appealed the case to the supreme court, and that the court below had, therefore, no authority, the court held the appeal taken did not affect the merits, nor prevent proceedings being taken in the cause other than those, for enforcing payment of the alimony and expenses, had when the proceedings appealed from were commenced, and that the court had power to make a further order as to the payment of alimony accruing after appeal taken. *Ross v. Griffin*, 53 Mich. 5.

XII. Power of court to inquire into.

In *Lash v. Lash*, 4 N. Y. Law Bull. 20, an application L. R. A.

tion for discontinuance for the nonpayment of counsel's fees was made, and it was held that the court could only discontinue the suit on payment of the amount awarded, and that if it were not paid within a given number of days, a motion might be made to the court to punish the defendant, and the special attention of the court could be drawn to the defendant's conduct when the order for alimony was served upon him.

In *Spencer v. Lawler*, 79 Cal. 215, the petitioner was cited to show cause why he should not be punished for contempt, and after hearing, the court decided that he had contumaciously refused to obey the order, and judged him guilty of contempt, the petitioner giving notice that he would apply for his discharge under the provisions of the code, and the judge refusing to hear the application, the plaintiff sought relief by mandamus. The court held that such refusal so soon after the first examination, was proper, but that if the application had been renewed at any time subsequent to the expiration of ten days referred to by the defendant, the matter would have been inquired into under the sections of the code.

In *Errisman v. Errisman*, 25 Ill. 126, the decree ordered the defendant into custody, until he should enter into a bond conditioned for the payment of alimony, and perpetually enjoined him from disposing of his property. It was held that such decree was improper, and that the husband should have been ordered to secure the alimony by mortgage upon his realty, and that he should have been restrained from selling his real estate until he complied with such order.

XIII. State statutes and decisions thereunder.

In Arkansas, under section 2663 of the Digest of Statutes of that state, ed. 1884, page 581, the court may enforce the payment of its decrees for alimony and counsel's fees, by orders and executions, and proceedings as in case of contempt.

Under section 1143 of the California Code of Civil Procedure, it is provided that "any person confined in jail on an execution, issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified."

The succeeding sections of the chapter provide for an application to the judge upon notice seeking discharge, and give power to the judge to examine the applicant touching his property, effects and ability to pay, and to hear evidence, with power to discharge if satisfied that the prisoner ought to be discharged.

In *Ex parte Cottrell*, 59 Cal. 417, the applicant sought to be discharged from imprisonment, upon the ground that the court exceeded its jurisdiction, in increasing the amount over that decreed to be paid by the judgment in the action, but the court held that under the Code, section 129 of the Civil Code, the court had authority to modify its orders in this respect, from time to time.

To hold that the prisoner, though utterly penniless, must suffer a life imprisonment for debt, because of the particular form in which the imprisonment is imposed, is a gross violation of the plain intent of the code. *Re Wilson*, 73 Cal. 530.

Section 18 of article 1 of the Georgia Constitution of 1868, abolishing imprisonment for debt, does not take away the power of the judge to commit to jail for contempt; section 17 of the same article, implying the contrary, making it the duty of the

The same may be enforced by supplementary proceedings.

Barker v. Dayton, supra.

Proceedings as for contempt for non payment of judgment for alimony are in contravention of Rev. Stat. § 8477, subd. 8.

Lansing v. Lansing, 4 Lans. 377; *Gane v. Gane*, 14 Jones & S. 218, 18 Jones & S. 355;

North v. North, 39 Mich. 67; *Segear v. Segear*, 28 Neb. 306; *People v. Grant*, 41 Hun. 351; *Coughlin v. Ehlert*, 39 Mo. 285; *Haines v. Haines*, 35 Mich. 138; *Miller v. Miller*, 7 Hun, 208; *Jacquín v. Jacquín*, 86 Hun. 378.

Therefore the court had no authority to make the order appealed from.

The fact that it is within the power of the

general assembly to limit the power of the courts to punish for contempt. *Carlton v. Carlton*, 44 Ga. 216.

In divorce cases, the court is authorized to require the husband to pay the wife such sums of money as may enable her to prosecute or defend the suit, and where it is just and equitable, may allow her alimony pending the litigation, and may enforce the payment in any "manner consistent with the rules and practice of the court." Ill. Rev. Stat. ed. 1874, §§ 15, 18, p. 421. *Blake v. People*, 30 Ill. 11.

Section 291 of the Kansas Criminal Code gives a right of appeal, and confers jurisdiction upon the court to examine the order and judgment of the district judge. *State v. Dent*, 20 Kan. 416.

By section 6 of chapter 60 of the Revised Statutes of Maine, the court is authorized, pending a libel, to order the husband to pay the wife a suitable sum for her defense, or to enable her to prosecute her libel for her separate support, etc., "and to enforce obedience by appropriate process."

In *Allen v. Allen*, 100 Mass. 373, it was stated that under section 45 of the General Statutes of Massachusetts, chapter 107, the court might enforce decrees for the allowance of alimony, or allowances in the nature of alimony pending libels, or upon or after final decree of divorce in the same manner as decrees were enforced in equity, and that in all cases where the course of procedure was not specially prescribed, the court might issue process of attachment and of execution, and all other proper and necessary processes.

It has been decided that under the Massachusetts Statutes, chapter 78, *scire facias* was the proper remedy in case of non-payment of installments, and a writ of attachment for contempt was refused. *Morton v. Morton*, 4 Cush. 518.

Section 5709 of the Michigan Compiled Statutes is express, that when the court in contempt proceedings orders the payment of moneys to the injured party, they shall stand "instead of a fine" and therefore if a fine be imposed in addition, it is illegal and the order providing therefor will be reversed or vacated. *Haines v. Haines*, 35 Mich. 138.

Under the Public Acts of Michigan of 1877, Act 44, page 32, in the case of alimony for the support of children, execution is the remedy and the court will not enforce its payment by way of attachment. *North v. North*, 39 Mich. 67.

In *North v. North, supra*, it was held that under section 5689, sub-section 3, of the Compiled Laws, attachment was allowed to enforce the payment of money only when an execution could not be awarded.

Section 26 of the Statutes of Minnesota, ed. 1888, vol. 2, page 546, provides, *inter alia*, that any person or party disobeying such order or direction, may be punished as for contempt, the proceedings therefor being prescribed in chapter 87 of the General Statutes of 1873, respecting the punishment of contempt. The above section has reference to the proceedings for alimony in divorce.

The Missouri act concerning divorce and alimony provides that when a party neglects or refuses to pay alimony as adjudged, the court shall have power "to award an execution for the collection thereof, or to enforce the performance of the judgment or order by sequestration of property, or by such other lawful ways and means as is ac-

ording to the practice of the court. Gen. Stat. 1865, § 6, chap. 114. *Coughlin v. Ehlert*, 39 Mo. 285.

In Nebraska it has been held that section 4a of chapter 25 of the Compiled Statutes, title "Divorce and Alimony," established the character of the order for the payment of alimony, with that of a judgment at law, and limited the enforcement and character to the same means; that it was not in the nature of a tort, and in the absence of fraud by the defendant he could not be subjected to a more summary mode of collection than that of levy and sale of property, as upon other executions, and that the commitment for contempt under section 689 of title 20 of the Civil Code was not a lawful remedy. *Segear v. Segear*, 28 Neb. 306.

Section 4a of the statutes above referred to provides that "all judgments and orders for payment of alimony, or of maintenance in actions of divorce, or maintenance, shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, or other execution or process, as other judgments."

The non-payment of a judgment by a defendant is not such willful disobedience of or resistance willfully offered to the lawful process or order of the court, contemplated by the statute. *Segear v. Segear, supra*.

Upon a failure to comply with the terms of an order for alimony, granted in a limited divorce, he may be punished for contempt under sections 1772, 1773, of the Code of Civil Procedure. *Ryckman v. Ryckman*, 34 Hun. 235; *Mendel v. Mendel*, 25 N. Y. Week. Dig. 314.

The proceedings to be taken for that purpose must be such as are prescribed in title 3 of chapter 17 of the Code. *Mendel v. Mendel, supra*.

By section 1768 of Bliss' New York Code, vol. 2, page 175, where the husband makes default, and payment cannot be enforced by the proceedings prescribed in the foregoing section, or by resorting to the security, the court may, in its discretion, require him to show cause and punish him for his failure, the proceedings being taken as prescribed in title 3, chapter 17 of the Act, and such order may be made without previous sequestration or direction to give security, the court being satisfied that such course would be ineffectual.

Sections 1769, 1772, and 1773, of the New York Code, seem to be to secure the appropriation of personal property, or the rents and profits of real property, or both, by sequestration, if there be any such property, and to authorize the courts to act directly by proceedings to punish for contempt, if any evidence is offered from which it presumptively and satisfactorily appears that payment cannot be enforced by means of sequestration where security has not been given, or by resorting to security if any have been given. *Rahl v. Rahl*, 14 N. Y. Week. Dig. 500, where it was sought to commit the defendant for contempt in not paying alimony and counsel's fees.

Section 1773 of the Code of Civil Procedure provides that where the husband fails to pay, and it appears presumptively that payment cannot be enforced either by sequestration or by a resort to the security which the husband may have given, the husband may be punished for contempt of court.

Section 2206 of the Code authorizes the proceed-

defendant to pay the amount due on the judgment is a condition precedent to the order that he be imprisoned for failure to pay the same.

Wright v. Wright, 74 Wis. 489; *Mahon v. Mahon*, 18 Jones & S. 92; *Whitney v. Whitney*, 26 Jones & S. 885.

Mr. H. W. Barney, for respondent:

ings only when "a right or remedy of a party to a civil action or special proceeding . . . may be defeated, impaired, impeded, or prejudiced thereby." *Mendel v. Mendel*, *supra*.

And by section 2381 of the same, a commitment of a defendant can only be made when it is determined that the accused has committed the offense charged, and that it was "calculated to, or actually did, defeat, impair, impede, and prejudice the rights or remedies of the other party." *Ibid*.

And section 14 is to the same effect, providing for punishment by fine or imprisonment, or either, of a neglect or violation of duty, or other misconduct by which a right or remedy of a party to a civil or special proceeding, pending in the court, may be defeated, impaired, impeded, or prejudiced. *Ibid*.

Section 2266 of the Code authorizes a commitment to prison of a person neglecting to pay a specified sum of money, which the court has required him to pay, and under section 2269 he may be committed without notice; the application for his commitment may be *ex parte* on proof by affidavit of a personal demand and of refusal or neglect to pay. *Isaac v. Isaac*, 61 How. Pr. 369, 10 Day, 806.

The proceedings to punishment must be taken in the manner prescribed in title 3 of chapter 17 of the Code of Civil Procedure, section 2269 of the same chapter and title also requiring an order to show cause to be made and served, or a warrant of attachment to be issued, to bring the party before the court. *Sandford v. Sandford*, 40 Hun, 540.

Where the husband was ordered to pay the costs but upon demand refused, it was held that section 1241 of the Code of Civil Procedure, which enacts that a judgment may be enforced by attachment, when the judgment requires "the payment of money into court, or to an officer of the court," did not apply to the case, the section requiring a payment of money other than costs, given by a final judgment to the party or to his attorney. *Noland v. Noland*, 29 Hun, 690.

The application to punishment must comply with the above provisions if it is made upon a mere notice of motion, it is insufficient. *Sandford v. Sandford*, *supra*.

In *Pritchard v. Pritchard*, 4 Abb. N. C. 298, it was held that under section 1241 of the Code of Civil Procedure, where a counsel's fee, disbursements, and costs were awarded to the plaintiff's attorney, in a final judgment decrees in divorce, the order was enforceable by attachment, particularly where an execution therefore has been returned unsatisfied.

It has been held that the power of the court to imprison the husband for the non-payment of alimony, without first giving him notice of the application for his commitment, where it was not adjudicated that it would be of any avail to make an order of sequestration, or for the giving of security turned upon the construction of the phrase "it appears presumptively" and as used by the codifier in compiling the code, the court holding that the intention was to prohibit the commitment, which existed under the revised statutes, until satisfactory proof was given to the court that the money could not be collected in any other way. *Isaac v. Isaac*, *supra*.

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Subdivision 8, section 8477, Revised Statutes, reads as follows:

"All other cases where attachments, and proceedings, as for contempts, have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party or to protect the rights of any party."

The plaintiff was not estopped from enforcing

In *Lansing v. Lansing*, 4 Lans. 377, it was held that an attachment for the non-payment of costs and alimony was unauthorized under section 226 of the Code, as an execution could be awarded for their collection, and sub-section 3 excepts such cases from punishment by way of contempt, as not being for the non-payment of money.

Where the judgment directed the husband to pay the amount of costs and counsel's fees to the attorneys for the plaintiff, within a given number of days after service of a certified copy of the judgment, it was held that the provisions of section 1778 of the Code of Civil Procedure did not apply to a judgment entered for the recovery of costs in divorce proceedings, and that therefore he could not be committed as for a contempt. *Jacquin v. Jacquin*, 36 Hun, 378.

The direction given for the payment of costs in the judgment, was not a mandate within the signification of subdivision 3 of section 8 of the Code, that having been defined by sub-section 2 of section 8348 of the Code, as not including a fixed sum of money by a final judgment. *Ibid*.

In *Branth v. Branth*, 50 Hun, 623, mem., the court approved and followed *Jacquin v. Jacquin*, *supra*, holding that there was no power to commit for the non-payment of costs and allowances, contained in the final judgment in divorce, and distinguished the case from *Park v. Park*, 80 N. Y. 156, upon the ground that the costs and expenses for which the attachment was issued in that case were the costs and expenses of the proceedings for the attachment.

Where the defendant is arrested and remains imprisoned under the commitment for the full term for which he was imprisoned, under section 111 of the Code of Civil Procedure, he cannot be again imprisoned for the non-payment of other sums of money afterwards becoming due under the judgment; such section providing that "the prisoner shall not be again imprisoned upon a like process issued in the same action, or arrested in any action upon any judgment, under which the same may have been granted." *Winton v. Winton*, 53 Hun, 4.

The language of the section is very general and entirely unrestrained, and its obvious meaning is that no further process shall be issued against a person, in an action for divorce upon which he shall be committed to prison for the non-payment of a sum of money after he has been once imprisoned and lawfully discharged under the preceding provisions of the section. *Ibid*.

The right to an attachment in any case under section 1241 of the Code of Civil Procedure is not imperative but discretionary, and will not be granted to collect costs or alimony in divorce proceedings, when the party is unable to comply with the demand; imprisonment and consequent disgrace should not be put upon a person who is too poor to pay. *Noland v. Noland*, *supra*.

Yet the defendant's answer to the application for his commitment, by way of affidavit, showing his inability to make the payments required from him, was held not to relieve him from the obligation to comply with the directions contained in the judgment, and that his proper course was by way of motion under section 2266 of the Code. *Ryckman v. Ryckman*, 34 Hun, 236.

ing payment of alimony by reason of the provision in the decree authorizing an execution.

Park v. Park, 80 N. Y. 156, 18 Hun, 466.

Judgments for alimony may be enforced by proceedings for contempt.

Ex parte Perkins, 18 Cal. 60; *Ex parte Cottrell*, 59 Cal. 417; *Lyon v. Lyon*, 21 Conn. 185; *Goss v. Goss*, 29 Ga. 109; *Blake v. People*, 80 Ill. 11; *Andrews v. Andrews*, 69 Ill. 609; *Wightman v. Wightman*, 45 Ill. 167; *Russell v. Russell*, 69 Me. 386; *Strobridge v. Strobridge*, 21 Hun, 288; *Fritchard v. Fritchard*, 4 Abb. N. C. 298; *Groves's App.* 68 Pa. 143; *Wright v.*

Wright, 74 Wis. 489; *Re Wilson*, 75 Cal. 580; 2 Bishop, Mar. Div. & Sep. §§ 1091, 1092.

Attachment for contempt is the proper method of enforcing a decree for the payment of alimony.

Wallen v. Wallen, 9 Lanc. L. Rev. 99; *Ex parte Hart*, 94 Cal. 254; *Ex parte Gordan*, 95 Cal. 874.

Willful non-payment of final alimony in installments, awarded for the support of children after divorce, can be punished by proceedings as for a contempt.

Hand v. Hand, 25 Ohio L. J. 314.

The remedy provided under the code was held to be applicable to judgments previously recovered, and was intended to provide a uniform remedy by which rights of that description might be enforced. *Ibid.*

Before a defendant can be relieved under the provisions, an opportunity must be afforded to the plaintiff to controvert the statements made by the defendant, for the purpose of securing his release, and such opportunity is not secured where his affidavit may be interposed as an answer to the application for his punishment. *Ibid.*

To such a proceeding, it has been held that the pecuniary circumstances of the husband showing his inability to pay was no defense to the motion. *Strobridge v. Strobridge*, 21 Hun, 288.

In the above case it was held that section 20 of 2 Rev. Stat. 538, applied to cases in which the husband was actually imprisoned, and did not extend to an application to be relieved from the order, on account of inability to comply therewith, which must be made to the court upon notice to the parties. *Ibid.*

In *Mahon v. Mahon*, 18 Jones & S. 32, an order by default was obtained, the defendant obtaining leave to open the default, and the matter being referred the referee found in favor of the wife; upon motion to compel payment and to commit, the court held that as it was not shown that the offense committed was calculated to, or did, actually defeat, impair, or prejudice the rights or remedies of the plaintiff, the order should not be made under sections 2281, 2283, of the Code of Criminal Procedure.

In *Ford v. Ford*, 10 Abb. Pr. N. S. 74, 41 How. Pr. 160, decided under 2 Rev. Stat. 535, § 4, it was held that the order for the payment of temporary alimony being interlocutory or *ad interim* order, it could not be enforced by execution, that process being allowed only upon final judgments, except for interlocutory costs, and that unless a party could be proceeded against under the statute concerning contempts, there would be no remedy for the collection of the alimony unless the court had power to sequester property of the husband, and that even such latter power did not take away the power of the court to punish for contempt.

By section 3297 of the Tennessee Code, ed. of 1884, page 615, the court may enforce its orders and decrees, by sequestering the rents and profits of the real estates of the husband, if he has any, and his personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the complainant and her children, or by such other lawful ways and means as are usual and according to the course and practice of the court, as to the court shall seem meet and agreeable to equity and good conscience.

In *Barker v. Dayton*, 28 Wis. 387, it was held that supplemental proceedings to compel the payment of a judgment for alimony might be instituted under section 15 of chapter 111 of the Revised Statutes of Wisconsin, which provide that actions to annul

and affirm a marriage, or for a divorce, and all other matters coming within the provisions of that chapter, not otherwise specially prescribed, shall be conducted in the same manner as other actions in courts, and the court shall have power to award issue to, and adjudge costs, and enforce its judgments as in other cases, such supplemental proceedings being considered as statements in the action, and not by way of separation action.

Section 24 of chapter 111 of the Revised Statutes of Wisconsin authorizes the judgment of divorce, or a separate judgment upon divorce to provide for alimony for the wife for the maintenance of herself and children, according to the ability of the husband and the circumstances of the parties; and section 28 of the same chapter authorizes a revision of such judgment, and such new judgment as the court may make. *Campbell v. Campbell*, 37 Wis. 205.

It is an undoubted and general principle of the law of divorce that the courts, either of law or of equity, possess no powers, except such as are conferred by statute, and that to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action, or to the process, pleadings, or practice in it, or to the mode of enforcing the judgment, or decree, authorities therefor must be found in the statute and cannot be looked for elsewhere, or otherwise asserted or exercised. *Bacon v. Bacon*, 43 Wis. 203.

Section 2307 of the Wisconsin Divorce Act, Revised Statute, authorizes the court on adjudging alimony to the wife, to provide that the same may be paid as shall be deemed expedient, or to impose it as a charge upon a specific real estate of the party liable, or to require sufficient security to be given for the payment thereof, according to the judgment, and upon the failure to pay such alimony "the court may enforce the payment thereof by execution or otherwise as in other cases." *Keyes v. Scanlan*, 66 Wis. 345.

Under section 2307 of the Revised Statutes of Wisconsin, where alimony or other allowance is adjudged the wife, the court may provide for the payment of the same, and such sums and at such times as it shall deem expedient, or may require sufficient security to be given therefor; and if the husband is unable to give the bond, and such fact is proved to the satisfaction of the court, he will not be committed to prison for contempt. *Wright v. Wright*, 74 Wis. 489.

XIV. English Decisions.

An application for an attachment against a husband for the non-payment of alimony and costs should be made in one motion. *Watts v. Watts*, 4 Swab. & T. 274.

Under the fifty-second section of the English Divorce Act, 20 & 21 Vict. chap. 25, all decrees and orders in any suit, proceeding, or petition, instituted under the authority of the act, are enforceable and put in execution as judgments, orders, and decrees of the high court of chancery. *Ex parte Holden*, 18 C. B. N. S. 641, 39 L. J. C. P. 111, 9 Jur. N. S. 940 7 L. T. N. S. 791.

It is not necessary to exhaust other possible remedies to become entitled to the contempt proceeding.

Andrew v. Andrew, 62 Vt. 495; *Curtis v. Gordon*, Id. 840; *Potts v. Potts*, 68 Mich. 493.

Alimony is a mere personal duty of the husband, which courts will control and enforce, from time to time, in their discretion.

Campbell v. Campbell, 37 Wis. 206.

Winslow, J., delivered the opinion of the court:

The broad ground is taken by the appellant that the court has no power to enforce,

by contempt proceedings, payment of permanent alimony ordered to be paid by a final judgment of divorce. His premises are: First, a judgment for alimony may be enforced by execution. Rev. Stat., § 2867. Second, contempt proceedings for the non-payment of money are only authorized where execution cannot be awarded. Id. § 3477, subdiv. 8. Hence, in the present case, the judgment for alimony being capable of enforcement by execution, contempt proceedings will not lie.

Were the judgment here a judgment for a gross sum, payable at once, it might un-

Where an order was made for the payment of the wife's costs, in a suit for judicial separation, and a demand made therefor by a party, signed by the petitioner's attorney who produced a receipt for the same, the court held the demand sufficient to ground proceedings for attachment. *Thomas v. Thomas*, 2 Swab. & T. 64, 2 L. T. N. S. 390, 8 Week. Rep. 478.

A personal demand for the payment of a sum of money within a specified time is unnecessary where the order for payment has been personally served, and an attachment will issue thereon. *Nicholls v. Nicholls*, 2 Swab. & T. 637, 31 L. J. Mat. 115, 7 L. T. N. S. 221.

The original order for the payment of costs must be served by showing the same, before the court will grant an attachment, and where such order has been filed in the registry, the court will direct it to be delivered out for that purpose. *Davies v. Davies*, 2 Swab. & T. 437, 31 L. J. Mat. 104, 6 L. T. N. S. 163, 10 Week. Rep. 447.

A copy of the order must be served, and a copy annexed to the affidavit of service, before the court will grant an attachment for the non-payment of costs pursuant to the order. *Busby v. Busby*, 3 Swab. & T. 383, 30 L. J. Mat. 172, 5 L. T. N. S. 137.

In *Parr v. Parr*, 4 Swab. & T. 229, it was held that it was competent to a party to object on a motion for attachment for non-compliance with an order of the court, to the sufficiency of the service of the order on him.

The court will not grant an attachment for the non-payment of costs, unless the original order for payment has been served upon the party liable by showing the same to him. *Parr v. Parr*, 32 L. J. Mat. 90, 11 Week. Rep. 550, 4 Swab. & T. 229.

In *Hamerton v. Hamerton*, 1 Hag. Eccl. Rep. 23, it was held that where no sufficient cause was shown for neglect to comply with an order, personally served upon the party, he may be pronounced contumacious, but otherwise, if he has virtually obeyed, or is willing to obey the order.

If the court is satisfied of the husband's inability, through poverty, to comply with the order of the court for the payment of the wife's costs in a matrimonial suit against the husband, an attachment will not be granted for disobedience to such an order, but in such a case the court will allow an execution to be issued for the arrears of alimony *pendente lite*. *Ward v. Ward*, 1 Swab. & T. 494, 29 L. J. Mat. 17.

In *Hepworth v. Hepworth*, 2 Swab. & T. 414, 31 L. J. Mat. 18, 5 L. T. N. S. 365, 10 Week. Rep. 195, the husband disobeyed an order to pay into court, or give security for the wife's costs of the hearing, and alleged as the grounds of so doing, his inability to raise the money or security. The court ordered an attachment but allowed it to remain in the registry for a week.

In *Alexander v. Alexander*, 2 Swab. & T. 385, where an order was made for the restitution of conjugal rights upon the wife's petition, it was held that the husband was bound to make the first step,

by inviting his wife home, and was liable to attachment for neglect of such duty.

And the court will not withhold the enforcement of its order, by reason that the party obtaining such order is in contempt, and is a resident out of the country for the purpose of evading the process of the court. *Greenhill v. Greenhill*, 1 Curt. Eccl. Rep. 462, where a sentence of separation had been pronounced in favor of the wife and alimony had been allotted.

In *Bremner v. Bremner*, 8 Swab. & T. 373, 33 L. J. Mat. 202, 10 L. T. N. S. 99, 13 Week. Rep. 444, a balance was due from the husband for alimony and costs, with an agreement between the parties that it should be paid by installments, and that an attachment should be granted, but was to remain in the registry until after default. It was held that the court had power to enforce an attachment after the suit had been dismissed.

In *Dickens v. Dickens*, 2 Swab. & T. 521, the husband was in custody under an attachment for non-compliance with an order for the payment of costs and it was sought to recover a second attachment against him. The court directed a writ of habeas corpus to issue, and upon the husband's appearing he was charged under the second attachment.

Where the husband was committed for the non-payment of tax costs, and about eight months afterwards moved to set aside the attachment, upon the ground that the amount of costs was indorsed on the writ, the *allocatur* and order for payment having been served upon him, the court held his application too late. *Pearson v. Pearson*, 3 Swab. & T. 546, 31 L. J. Mat. 102, 8 Jur. N. S. 153, 5 L. T. N. S. 772, 10 Week. Rep. 410.

In *Holland v. Holland*, 4 Swab. & T. 73, the court refused to grant an attachment against the husband for the non-payment of certain costs incurred on behalf of the wife in her suit for judicial separation, where, on the husband's uncontradicted answer, it appeared that he had been compelled to separate from her for several months, in consequence of her drunkenness and violence, and had not the present means of complying with the order. 34 L. J. Mat. 65, 13 Week. Rep. 505.

In *Shine v. Shine* [1893] Prob. 239, the husband, an undischarged bankrupt, was in receipt of a weekly salary, not under the control of the trustee in bankruptcy, and an order of the court was served upon him to pay into court, or give security for a certain sum to cover the wife's costs of the hearing, which he neglected to obey for nearly two years. The court held that although he was an undischarged bankrupt, yet he was liable to an attachment and ordered accordingly.

In *De Loessy v. De Loessy*, 15 Prob. Div. 115, the decree was made absolute for a divorce on the wife's petition, and as part of the final order, the husband was directed to pay a permanent maintenance to the wife. It was held that there was no power to grant an attachment against the husband for the non-payment of arrears due under the order.

E. W.

doubtedly be docketed as a money judgment, and execution might issue to enforce it. *Keyes v. Scanlan*, 63 Wis. 845. In that case the argument would be strong that contempt proceedings could not be resorted to, and the position would not be without authority. *Lansing v. Lansing*, 4 Lans. 377. This decision, however, has been seriously questioned in New York. *Strobridge v. Strobridge*, 21 Hun, 288. But conceding the correctness of the doctrine, it cannot apply to the present case. Execution can be issued only on a judgment which has been docketed. Rev. Stat., §§ 2968, 2969. It does not appear in the present case that any judgment has been docketed for any of the installments of alimony. In fact, there seems to be no provision of law for such docketing. A judgment is to be docketed at the time of filing the judgment roll. Id. § 2899. The remarks of the court in *Park v. Park*, 18 Hun, 466, upon this point, are quite pertinent. It is there said: "It is not explained, however, in that case [referring to *Lansing v. Lansing*, *supra*], how a judgment for final alimony is to be docketed,—whether or not a new docket is to be made every time the annual or semi-annual alimony becomes payable. And as a judgment is made a lien only for ten years from the filing of the roll and docketing, it is not clear how, after ten years from the judgment, the amounts of the alimony are to be docketed so as to be a lien on land. And docketing is necessary before the issue of execution. Besides, after the lapse of five years from the entry of judgment, execution is to issue only by leave of the court, granted on notice. How this provision is to apply to alimony is not explained in that decision." This reasoning was concurred in by the court of appeals in the same case. *Park v. Park*, 80 N. Y. 156. Our conclusion is that contempt proceedings will lie to compel pay-

ment of installments of alimony ordered to be paid in the future by a final judgment of divorce. It is true that the remedy is severe and harsh. Imprisonment certainly should not be ordered when it appears that the default is the result of honest inability to pay, on account of business misfortunes, or lack of health or earning ability, or other circumstances which are not the fault of defendant. But where the inability is willfully brought about by defendant himself, with intent to avoid payment, the refusal to pay becomes contumacious, and the inability so resulting will not purge the defendant of contempt. The present case seems clearly one of contumacious refusal to pay. It stands admitted that the defendant, in abusive language, has refused to pay, and declared his intention never to pay, any part of the judgment, notwithstanding he is a strong, able-bodied man, and engaged in an occupation which must, in the natural course of things, bring him considerable returns. He has defied the order of the court, and, in effect, declared his intention to continue such defiance, whatever his financial condition may be. We think that, in such a case, imprisonment for contempt may be inflicted. The question of whether or not the act is contumacious is one which the trial court has far better opportunity to determine than this court. We regard the order of the trial court in this case as practically a decision that the act of the defendant is contumacious, and the record leads our minds to the same conclusion. It was argued that the imprisonment should be limited to six months, under Rev. Stat. § 3492. It is sufficient to say that the order is plainly made under Id. § 3479, and that it is justified under the terms of that section.

Order affirmed.

Newman, J., took no part.

NEBRASKA SUPREME COURT.

Rose KIRKWOOD, *Pff. in Err.*,

FIRST NATIONAL BANK of Hastings.

(.....Neb.....)

*1. Where an action is begun in the district court by a petition seeking legal relief, there being an answer praying for equitable relief, and a trial by jury being waived, an objection to a judgment granting equitable relief upon the ground that the action was at law is not well founded. The district courts are court of general legal and equitable jurisdiction. No forms of action are recognized, and the courts has power to administer either legal or equitable relief according as the pleadings warrant and the proof requires.

*Headnotes by IRVING, C.

NOTE.—Considerable difference of doctrine exists in respect to the question when a certificate of deposit becomes overdue, as to which, see note to *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City* (Neb.) 15 L. R. A. 388.

For right of action on last negotiable paper, see *Butler v. Joyce* (D. C.) 16 L. R. A. 206, and note. 24 L. R. A.

2. Where an instrument negotiable by delivery is lost before maturity, a bond of indemnity should be required as a condition for recovery thereon; but where it is clearly shown that the instrument was payable to order, and not indorsed, or that it was lost after maturity, no indemnity should generally be required.

3. A certificate of deposit, in the usual form, issued by a bank, and made payable to order or bearer, is negotiable, and a bona fide purchaser thereof for value, before maturity without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper.

4. The negotiability of such a certificate is destroyed neither by a stipulation that it is payable on return of the certificate properly indorsed, nor by a provision that it is payable in current funds, nor by a provision that it shall bear interest if left six months, but no interest after six months.

5. A certificate of deposit as follows: "This certifies that A. B. has deposited in this bank \$3,000, payable to order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With

interest at 6% if left six months. No interest after six months."—is overdue, so as to charge purchasers with notice of equities, after the expiration of six months, and not until then.

6. In actions tried by the court, there must be a general finding and, if requested by one of the parties, a special finding; and if this finding be vague, uncertain, or indefinite, it will not support a judgment, when attacked directly.

7. Accordingly, where there is no general finding, and no special finding upon the issues upon which the form of the judgment depends, the judgment must be reversed.

(May 2, 1894.)

ERROR to the District Court for Adams County to review a judgment in favor of defendant in an action brought to recover the amount due upon a certificate of deposit which had been issued by defendant and lost by the plaintiff. *Modified.*

The facts are stated in the commissioner's opinion.

Messrs. L. W. Billingsley and R. J. Greene, for plaintiff in error:

To be negotiable the bill must be for money, certain in amount and payable "absolutely and at all events."

Averett v. Booker, 15 Gratt. 163, 78 Am. Dec. 203; *Cook v. Batterlee*, 6 Cow. 108, 16 Am. Dec. 432; *Grimison v. Russell*, 14 Neb. 523, 45 Am. Rep. 126.

There is not such a certainty as to the amount as there should be in a negotiable instrument.

"Interest and exchange" render a note non-negotiable, and the words "counsel fees and expenses" have the same effect.

First Nat. Bank of New Windsor v. Bynum, 84 N. C. 24, 87 Am. Rep. 604; *Lamb v. Story*, 45 Mich. 498; *Altman v. Bittershofer*, 68 Mich. 287; *Hegeler v. Comstock*, 8 L. R. A. 393, 1 S. Dak. 133; 1 Dan. Neg. Inst. § 47, p. 83; *Grimison v. Russell*, *supra*; *Bank of Carroll v. Taylor*, 67 Iowa, 572; *Merchants Nat. Bank of Chicago v. Chicago R. Equipment Co.* 25 Fed. Rep. 909; *Hall v. Toby*, 110 Pa. 318; *McComas v. Haas*, 107 Ind. 572; *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 432; *Edwards v. Rumsey*, 30 Minn. 91; *Smith v. Marland*, 59 Iowa, 545; *Miller v. Poage*, 56 Iowa, 96, 41 Am. Rep. 82; *Third Nat. Bank of Syracuse v. Armstrong*, 25 Minn. 530; *Palmer v. Ward*, 6 Gray, 340.

There is no certainty as to the medium of payment, which must be money.

Dan. Neg. Inst. § 55, p. 42; *National State Bank of Lafayette v. Ringel*, 51 Ind. 898; *Clarity, Bills of Exchange*, 182; *Edwards, Bills & Notes*, 134; *Story, Prom. Notes*, §§ 17, 18; *Cook v. Batterlee*, *supra*; *Johnson v. Henderson*, 76 N. C. 229; *McCormick v. Trotter*, 10 Serg. & R. 94; *Wharton v. Morris*, 1 U. S. 1 Dall. 124, 1 L. ed. 65; *Simpson v. Moulden*, 8 Coldw. 429; *Little v. Phiniz Bank*, 2 Hill, 425; *Cornwell v. Pumphrey*, 9 Ind. 135; *Platt v. Sauk County Bank*, 17 Wis. 227; *Collins v. Lincoln*, 11 Vt. 268; *Farwell v. Kennett*, 7 Mo. 595; *Klauber v. Biggerstaff*, 47 Wis. 556, 33 Am. Rep. 778.

A diligent search through the adjudicated cases fails to unearth a single case in which an instrument payable "in current funds" has

been held to be negotiable. An instrument payable "in current funds" is non-negotiable.

Lindsey v. McClelland, 18 Wis. 481, 86 Am. Dec. 786; *Easton v. Hyde*, 13 Minn. 90; *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244; *Rindskoff v. Barrett*, 11 Iowa, 172; *Patterson v. Pointedexter*, 6 Watts & S. 227, 40 Am. Dec. 554; *Irvine v. Lowry*, 39 U. S. 14 Pet. 298, 10 L. ed. 462; *Fry v. Rousseau*, 8 McLean, 106; *Simpson v. Moulden*, *supra*; *Hasbrook v. Palmer*, 2 McLean, 10; *Warren v. Brown*, 64 N. C. 881; *Mason v. Noonan*, 7 Wis. 609; *Ford v. Mitchell*, 15 Wis. 805; *Haddock v. Woods*, 46 Iowa, 433; *Kirkpatrick v. McCullough*, 8 Humph. 171; *Whiteman v. Childress*, 6 Humph. 303; *Wright v. Hart*, 44 Pa. 454; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. 496, 78 Am. Dec. 890.

Negotiable instruments if lost cannot be recovered on at law; the remedy is in equity.

Mowery v. Mast, 14 Neb. 512; *Fells Point Sav. Inst. of Baltimore v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *Edwards v. McKee*, 1 Mo. 123, 18 Am. Dec. 474; *McClusky v. Gerhauser*, 2 Nev. 47, 90 Am. Dec. 512; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609; *Thayer v. King*, 15 Ohio 242, 45 Am. Dec. 571; *Randolph, Com. Paper*, 1694, 1697.

Upon a lost, non-negotiable instrument, or upon a lost, after due, undorsed, negotiable instrument, the action is at law.

Thayer v. King, *supra*; *Citizens Nat. Bank of Cincinnati v. Brown*, 45 Ohio St. 59; *Mowery v. Mast*, *supra*; *Chaudron v. Hunt*, 3 Stew. (Ala.) 81, 20 Am. Dec. 60; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Lazell v. Lazell*, 12 Vt. 443, 36 Am. Dec. 352.

In an action on a lost negotiable instrument, lost after due, not indorsed when lost, indemnity cannot be required.

Randolph, Com. Paper, 1694; 2 *Parsons, Notes & Bills*, 813; *Dan. Neg. Inst.* § 1481; 2 *Greenl. Ev.* 156; *Story, Prom. Notes*, 451; *Mowery v. Mast*, and *Citizens Nat. Bank of Cincinnati v. Brown*, *supra*; *Allen v. Reilly*, 16 Nev. 452; *Wofford v. Holmes County Board of Police*, 44 Miss. 579; *Thayer v. King*, 15 Ohio 242, 45 Am. Dec. 571; *Pintard v. Tackington*, 10 Johns. 104; *Rowley v. Ball*, 3 Cow. 303, 15 Am. Dec. 266; *Rogers v. Miller*, 5 Ill. 333; *Depew v. Wheelan*, 6 Blackf. 485; *Lazell v. Lazell*, 12 Vt. 443, 36 Am. Dec. 352; *Moore v. Hall*, 42 Me. 450, 66 Am. Dec. 297; *McNair v. Gilbert*, 3 Wend. 344; *Aborn v. Bosworth*, 1 R. I. 401.

Courts of equity cannot compel indemnity. This is an action at law.

Randolph, Com. Paper, § 1697; 2 *Dan. Neg. Inst.* 1478; *Story, Prom. Notes*, § 450; *Rowley v. Ball*, 3 Cow. 303; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609; *Elliott v. Woodward*, 18 Ind. 183; *Sloo v. Roberts*, 7 Ind. 123; *Mowery v. Mast*, *supra*; *Pierson v. Hutchinson* 2 Campb. 211; *Ex parte Greenway*, 6 Ves. Jr. 812; *Lamson v. Pfaff*, 1 Handy (Ohio) 449.

Messrs. Tibbets, Morey & Ferris for defendant in error:

Certificates of deposit have all the characteristics of negotiability which pertain to promissory notes in general.

Miller v. Austen, 54 U. S. 18 How. 218, 14 L. ed. 119; *Carey v. McDougald*, 7 Ga. 84; *Drake v. Markle*, 21 Ind. 433, 38 Am. Dec.

358; *National State Bank of Lafayette v. Ringel*, 51 Ind. 398; *Frank v. Wesola*, 64 N. Y. 155; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176; *Hove v. Hartness*, 11 Ohio St. 449, 78 Am. Dec. 812.

A general principle applicable to negotiable instruments is that the party to such an instrument when he is called upon to pay it has the right to insist that it shall be produced and delivered up to him.

1 Wait, Act. & Def. p. 165.

The instrument was negotiable by indorsement, and when negotiable in form should be considered negotiable in law.

Miller v. Austin, *supra*.

The negotiable character of a certificate of deposit is not affected by the fact that a demand is necessary before an action can be maintained thereon, nor is it changed by a provision therein by which it is made payable in current bank notes.

* *Pardee v. Fish*, *supra*; *Shamokin Bank v. Zadok Street*, 16 Ohio St. 1; *Bull v. First Nat. Bank of Kasson*, 128 U. S. 112, 81 L. ed. 100.

A check drawn for "current funds" entitles the holder to demand coin or its equivalent.

Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am. Dec. 234; *Marc v. Kupfer*, 34 Ill. 287; *Lacy v. Holbrook*, 4 Ala. 90.

The payment in "current funds" does not destroy the negotiability of the instrument.

Mr. J. B. Cesana, also for defendant in error.

Irvine, C., filed the following opinion.

A brief statement of the pleadings is necessary to a consideration of this case. The plaintiff in error was the plaintiff in the district court. In her petition she avers that on December 4, 1890, she deposited with the defendant bank \$3,000, for which the defendant issued to her a certificate of deposit; that on or about June 6, 1891, she lost the certificate, and at once gave notice of loss to the defendant; that she had not, at the time of the loss, or at any other time, indorsed the certificate, or in any other way negotiated or hypothecated the same. The prayer was for a judgment for the amount of the certificate, with interest. The defendant, by its answer, admits the deposit, and the issuance of a certificate in words and figures as follows: "First National Bank. Hastings, Nebraska, Dec. 4, 1890, 28,906. This certifies that Miss Rose Kirkwood has deposited in this bank three thousand dollars (\$3,000.00), payable to the order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at 6 per cent if left six months. No interest after six months. C. B. Hutton, for Cashier. Certificate of deposit." The defendant further alleged that, when the plaintiff demanded payment, she failed to produce the certificate, claiming that she had lost it; that the defendant was at all times ready and willing to pay the certificate, upon its production, or, if lost, to pay it upon the execution and delivery of a sufficient indemnifying bond. The defendant then denied each and every allegation in the petition not specifically admitted or modified, and prayed that the plaintiff be ordered to execute and

deliver an indemnity bond to secure it against any loss by reason of said certificate. There was a trial upon these pleadings, a jury being expressly waived, and the following finding and judgment was entered: "This cause comes finally on to be heard upon the petition of the plaintiff, the answer of the defendant, and the evidence, and the same is submitted to the court. Upon consideration, the court finds that there is due to the plaintiff from the defendant, upon the cause of action set out in her said petition, the sum of \$3,090. It is therefore considered and adjudged by the court that the plaintiff have and recover of and from the said defendant the said sum of \$3,090, and that each party to this action pay half of the costs herein. It is also considered and ordered by the court that the defendant pay the said sum of \$3,090 to the clerk of this court, to be paid over to said plaintiff upon the filing by plaintiff with the clerk of this court of a good and sufficient bond of indemnity, with approved sureties, to be approved by said clerk; indemnifying the said defendant against any and all liability which may hereafter arise, and might subject the said defendant to the payment of the said certificate of deposit, as set out in said petition, and heretofore lost by said plaintiff." The plaintiff brings the cause here, assigning several errors; all, however, going to the authority of the court to make an order requiring a bond of indemnity. There is no bill of exceptions, and the case can be reviewed only upon the petition, answer, and judgment.

There is a great deal of argument in the briefs to the effect that the action was begun as one at law; that an action at law can only be maintained upon a lost instrument when it is nonnegotiable, or, if negotiable, when lost after maturity, or unindorsed, and that in any event, in an action at law, no indemnity can be required. These distinctions have been recognized in England, and generally in those of the United States where the courts of law and equity are distinct. But counsel lose sight of the fact that our district courts are courts of general law and equity jurisdiction; that the code abolishes formal distinctions between law and equity, and that, where a cause of action, either at law or in equity, is stated in a petition, the district court may administer relief according to the nature of the case, without regard to forms of action. Had the old practice prevailed, upon the tender of proper issues, if the court had found that indemnity was proper, the plaintiff could have obtained no relief, if she began at law. Had she begun in equity, she would have obtained the appropriate relief according to the pleadings and the proof. Under our practice, she alleging a state of facts entitling her to relief at law, and the defendant, by answer, setting up facts entitling it to equitable relief, the question is not one of jurisdiction, but of proof; and the court had jurisdiction to enter either an absolute judgment, or one conditioned upon the execution of an indemnity bond, according as the proof might justify.

The rule as to whether or not indemnity should be required in an action upon a lost

instrument has been practically settled in this state. In *Mowery v. Mast*, 14 Neb. 510, it was held that where a negotiable instrument is lost after it becomes due, a recovery may be had in a court of law. This was a case where the suit had been begun originally before a justice of the peace, and his jurisdiction depended upon that question. It was there said: "Where a negotiable instrument, in such form that the legal title will pass to the holder by delivery, is lost before it becomes due, there is good reason for requiring a bond of indemnity from the person who has lost the instrument, if he bring an action on such lost instrument to recover the amount due thereon. In such case the action should be brought in a court of equity which, may impose suitable conditions upon the plaintiff before he will be permitted to recover. But where it is clearly shown that an instrument is lost after it has become due, and an action is brought thereon by the actual owner, no indemnity would seem to be necessary. The instrument will stand on the same ground as though it was nonnegotiable, and a recovery thereon by the actual owner will be a complete bar to an action by a party who has received the instrument after it has become due." In *Means v. Kendall*, 35 Neb. 698, it was held that where a negotiable note is lost before it is due the court will require indemnity, but, where lost after due, no bond will ordinarily be required. It does not appear in that case whether or not the note was negotiable by delivery only; but from the language of the first case cited, and upon general principles, as settled by the weight of authority (Dan. Neg. Inst. § 1481), indemnity will not be required where the instrument is payable to order, and clearly shown not to have been indorsed, even if lost before maturity, because in that event the maker would be subjected to no liability.

Applying the rules to this case, no indemnity should be required, unless the instrument was negotiable. So far as the character of the instrument is concerned, as being a certificate of deposit, and for the present disregarding its particular phraseology, this court has said that: "The established doctrine is that a certificate of deposit, in the usual form, issued by a bank, and made payable to order or bearer, is negotiable; and a bona fide purchaser thereof for value, before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper." *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City*, 84 Neb. 71, 15 L. R. A. 386. Was there anything upon this certificate to take it out of the general rule, and render it non-negotiable? It is argued that the provision that it should be payable "on return of this certificate properly indorsed" destroys its negotiability. That, however, was the language of the certificate in *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City*, *supra*, and these certificates were there treated as negotiable paper. It has indeed, been frequently said that the stipulation for the return of the certificate adds nothing to the instrument. It is merely the expression

of a rule which applies to all negotiable paper, and an action may be maintained without a previous presentment. This question was thoroughly considered in the case last cited. As to the requirement that it should be properly indorsed, it would seem that an indorsement by the payee would not be necessary. A "proper" indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no indorsement would be proper, or at least necessary. If presented by another, "proper indorsement," to show his title, would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument.

It is next said that the amount of payment is uncertain, and the instrument, for that reason nonnegotiable. This argument is predicated chiefly upon the provision that the certificate is payable "in current funds." We are aware that many courts have held that such a clause does not require payment in money, and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, or cases decided upon the authority of that class, without regard to changed conditions. With regard to existing conditions, we think the Supreme Court of the United States has declared the law correctly in *Bull v. First Nat. Bank of Kasson*, 123 U. S. 105, 81 L. ed. 97, as follows: "Within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes, and the term 'current funds' has been used to designate in fact any of these; all being current, and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words." This also is the doctrine of the court of appeals of New York. *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176. And the supreme court of Illinois has held that a check so drawn entitles the holder to demand coin, or its equivalent. *Galena Ins. Co. v. Kupfer*, 28 Ill. 382, 81 Am. Dec. 284. We are satisfied with the reasoning of these cases, as against the contrary authorities, and therefore hold that a provision for payment in current funds is, in effect, for payment in money, and that such an instrument, if having no other requisites, is negotiable.

It is also contended that the negotiability of the instrument was destroyed by uncertainty of amount, arising from the provision that it should draw interest at 6 per cent, if left six months, but no interest after six months. In *Lamb v. Story*, 45 Mich. 488, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached, pro-

viding that, if paid within one year, there should be no interest; and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker*, 112 Mo. 338, the provision was: "Without interest thereon, if paid at maturity. If not paid at maturity, to bear interest from date." It was held that that provision did not destroy the negotiability of the note; the note, on its face, showing what should be paid at any particular time, and being therefore certain in its terms. The circuit court of appeals for the sixth circuit has recently held that a provision for interest after maturity, and attorney's fees, did not render a bill nonnegotiable, saying: "It is intended to be a circulating medium until maturity. For this purpose, every purchaser must know exactly what will be, or ought to be, paid on it at maturity. It only has currency upon the hypothesis that it is to be paid at that time. If the sum then to be paid is fixed and certain, we do not see why that is not sufficient." *Farmers Nat. Bank of Valparaiso, Ind. v. Sutton Mfg. Co.* 52 Fed. Rep. 191, 17 L. R. A. 595, 6 U. S. App. 312. We think the same reasoning applies here. Every purchaser has, upon the face of the note, evidence of the exact amount to be paid. If he takes it within six months, he knows that the amount to be paid, if presented within that period, is the face of the certificate, without interest; that if presented at the end of six months, or at any subsequent time, the amount is the face of the certificate, with interest for six months at the rate of 6 per cent. Nothing could be more certain or more absolute. When did the certificate become due, so as to charge a purchaser with notice of equities? There could be no doubt that, if the certificate had provided simply for payment upon presentment properly indorsed, it would be, in effect, a promissory note payable on demand, and would be overdue, so as to charge a purchaser with notice, at the latest, after the lapse of a reasonable time for presentment. *Dan. Neg. Inst.* 788. But the terms of this instrument are different. It was to draw interest if left six months, but in no event to draw interest after six months. In *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City*, *supra*, an instrument payable upon the return of the certificate properly indorsed, bearing across its face the language, "This certificate payable three months after date, with 6% interest per annum for the time specified," was held to be payable three months after date. There the language was absolute, and the construction given was undoubtedly correct. We should here follow the rule adopted in that case, and so construe the certificate as to give effect to every part. It would seem that the result would be to reach an analogy to instruments payable "on or before" a certain date, which are due at the expiration of the time so fixed, and not before. *Mattison v. Marks*, 81 Mich. 421, 18 Am. Rep. 197; *Dan. Neg. Inst.* § 43. Surely, a purchaser reading this certificate within six months from its date, observing that, if presented before

the expiration of six months, it would draw no interest, but if presented at the end of that period would bear interest, would be justified in presuming that it had not been presented. Equally certain it is that seeing it after the expiration of six months, and observing by its terms that it could draw no interest thenceforth forever, he would be put upon inquiry to ascertain why it had not been presented when interest ceased. We think the instrument should be treated, so far as ascertaining the rights of purchasers, as one payable on or before six months after date, or, if not, that then, from the peculiar nature of the contract, six months after date should be treated as the reasonable time within which it should be presented, and a purchaser taking it within that period should be considered as a purchaser before maturity. Adopting, then, the conclusions we have outlined, this was a negotiable instrument, which a bona fide purchaser for value, within six months from its date, would be entitled to enforce against the defendant.

Recurring now to the judgment, it will be seen that the only finding upon the issues was "that there is due to the plaintiff from the defendant, upon the cause of action set out in her said petition, the sum of \$3,090. Does this finding support the judgment rendered? In several cases the general doctrine has been announced that a finding need be no more specific than the verdict of a jury upon the same pleadings. Upon this rule, it has been held that where a justice of the peace rendered judgment, saying "it was found by this court that the plaintiff have and recover" a certain sum, it was sufficient, but the issue in that case was practically the general issue upon a claim and counterclaim. *Ranadell v. Putnam*, 15 Neb. 643. In *Rhodes v. Thomas*, 81 Neb. 848, a justice rendered a judgment as follows: "Court convenes, and defense proceeds with examination of witnesses, after which case is argued by parties, and submitted to the court, with the following finding: Oct. 17, 1888, after hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the sum of \$69.15." This was held equivalent to a general finding, but the case rested largely upon the liberality with which records of a justice of the peace should be construed. In several cases, similar judgments have been sustained, as against collateral attacks, upon the ground that, while they might be voidable, they were not void. *Black v. Cabon*, 24 Neb. 248, is an example of this class of cases. Upon the other hand, it has been several times held that in actions tried by the court there must be a general finding, and, when requested by one of the parties, a special finding, and if this finding be vague, uncertain, or indefinite, it will not sustain a judgment, when attacked directly. *Sprick v. Washington County*, 8 Neb. 253; *Smith v. Silvis*, 8 Neb. 164; *Crossley v. Steele*, 13 Neb. 219; *Foster v. Devinney*, 28 Neb. 416. Had the issue in this case been simply as to the amount of recovery, or had it been such that a finding of an amount due plaintiff from the defendant would logically cover the essential issues,

we might treat it as sufficient to determine the case and authorize a judgment; but the most that can be claimed for the finding is that it determined the amount of the certificate, and that it determined that the plaintiff remained the owner thereof. The determination of these issues was not sufficient to adjudicate the case. The plaintiff avers that she lost the certificate on or about the 6th of June, which would be after maturity, as we have construed the certificate. She also avers that she had never indorsed it. A determination of either of these facts in her favor would entitle her to an absolute judgment against the defendant, without a requirement for indemnity. The defendant, by its general denial, put both facts in issue. If it were shown that she lost the certificate before it was due, and that before its loss she had indorsed it, so that it became payable to bearer, then payment could not be required, except upon the giving of indemnity. We have not the evidence before us, and the court did not find upon either of these issues. Upon their determination the character of the judgment must depend.

There is therefore no finding sufficient to sustain that portion of the judgment requiring indemnity. That portion of the judgment is reversed, and the cause remanded for a new trial upon the issues relating to the defendant's claim for indemnity. Judgment accordingly.

Leuva YEAZEL, Admx., etc., of Abraham Yeazel, *Pf. in Err.*,
v.

Herman EINSPAHK.

(.....Neb.....)

- *1. A purchaser of real estate at a sale thereof on execution acquires thereby, prior to confirmation, only the lien which the execution debtor had on such land.
2. Under our law governing sales of real property on execution, the title of a purchaser thereat depends upon a final confirmation of the sale made; and until this is had, and a conveyance of the real estate is executed and delivered, in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not divested.
3. Where real estate is sold on ordinary execution, the sale confirmed, and a conveyance made and delivered to the purchaser, the title he thereby acquires relates back, and such purchaser obtains the same title to the real estate the execution debtor had at the time the judgment under which the land was sold became a lien thereon, except as affected by subsequent tax liens.
4. But this doctrine of relation back applies only to the title. It has no necessary reference to the quantum of the estate which the execution debtor owned at the time the judgment became a lien.

*Headnotes by RAGAN, C.

NOTE.—As to the nature of the interest of a purchaser at execution sale, see note to Robertson v. Vanleave (Ind.) 15 L. R. A. 68.

24 L. R. A.

5. The owner of real estate that has been sold on execution retains the legal title thereto, and is entitled to the possession, rents, profits, and usufruct of such real estate, until a final confirmation of the sale is made.

6. A judgment debtor harvested a crop of wild grass from land after it had been sold on execution against him, but before the confirmation of the sale. In an action of replevin brought by the purchaser of the real estate at the execution sale for the grass,—held that, as the grass was severed from the realty before the confirmation of the sale, the title to the grass did not pass to the purchaser of the land.

(May 2, 1894.)

ERROR to the District Court for Hall County to review a judgment in favor of defendants in an action brought to recover damages for the alleged wrongful removal of grass from land which had been sold at execution sale. *Affirmed.*

The facts are stated in the opinion.

Messrs. Batty, Caste & Dungan for plaintiff in error.

Messrs. Capps, McCreary & Stevens, for defendants in error:

Under our law governing sales of real property on execution the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose direction it was made, and until this is done the rights of the debtor are not certainly divested.

State Bank of Nebraska v. Green, 10 Neb. 185.

The mortgagor is not liable for rents or profits while he is in possession of the mortgaged premises, and his grantee will take his title, and be protected to the same extent as the mortgagor.

Renard v. Brown, 7 Neb. 449.

A mortgagor would not be required to account for the rents and profits.

Higginbottom v. Benson, 24 Neb. 463.

Purchasers at execution sales are neither entitled to the possession of the property nor to participate in the rents and profits thereof, until their title has become absolute, by the failure of the persons interested to redeem within the time prescribed by law.

Rorer, Jud. Sales, p. 887; *Cassilly v. Rhodes*, 13 Ohio, 96; *Houts v. Showalter*, 10 Ohio St. 128.

It is true that for the purpose of perfecting his title to the real estate—that which he bought—the confirmation relates back to the sale, and no other person can in the meantime obtain any rights that will affect the title; but it cannot be held to relate back for the purpose of giving the purchaser the right of possession and the right to the rents and profits.

Beggs v. Thompson, 2 Ohio, 96, 15 Am. Dec. 539.

Ragan, C., filed the following opinion:

On the 9th day of April, 1890, Herman O. Einspahr was the owner of a tract of land in Hall county, Neb. On that date there was filed in the office of the clerk of the district court a transcript of a judgment in favor of Abraham Yeazel, and against said

Einspahr. Execution was duly issued on this judgment, and the land levied upon and sold by the sheriff on the 7th day of June, 1890; Yeazel becoming the purchaser. This sale was duly confirmed on July 31, 1890, and on or about that date the sheriff executed to Yeazel a conveyance for the real estate. At the time of the levy upon this land, and at the time of its sale, there was growing thereon a crop of wild grass. After the sale of the land, but before the confirmation, Einspahr cut this grass, removed it from the land, and sold it to one M. F. White. After Yeazel had procured his conveyance from the sheriff, he brought this action in replevin against Einspahr and White to recover the possession of the wild grass or hay which Einspahr had taken from the land, as above stated. There was a verdict and judgment in the court below for White and Einspahr, and Yeazel brings this suit here on error. All the material evidence in the case is undisputed, and is embraced in the foregoing statement of facts, and the question is as to the correctness of the verdict and judgment upon that evidence. Counsel for the plaintiff contend:

1. That the wild grass growing upon the land at the time of the execution sale was real estate. For the purposes of this opinion, we concede the contention to be correct. We do not decide, however, that growing wild grass is always real estate, nor do we decide that it is personal property. A decision of that point is not necessary here, and we do not decide it.

2. That Yeazel, by his purchase of the land on the 7th of June, 1890, at the execution sale, acquired on that date the legal title to the land, and that, as the wild grass was then growing on the real estate, Yeazel acquired the title to that. We do not agree with this contention. A purchaser of real estate at an execution sale in this state, solely by the purchase, does not acquire the title of the execution debtor to the land purchased. Such a purchaser acquires simply the lien which the execution creditor had on said land at the time. By section 497a of the Code of Civil Procedure it is provided that the owner of any real estate against which a decree of foreclosure has been rendered, or upon which an execution has been levied to satisfy a judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be finally confirmed. Section 498 provides for the examination and confirmation of such sale by the court. Section 499 provides that, upon the confirmation of a sale made of real estate sold on execution, the sheriff or other officer who made such sale shall make to the purchaser of such real estate as good and sufficient a deed of conveyance for the property or land sold as the person against whom such writ of execution was issued could have made of the same at the time the land became liable to the judgment, or at any time thereafter. And section 500 provides, among other things, that the deed so made shall vest in the purchaser as good and perfect an estate in the premises as was vested in the execution debtor at or after

the time when the land became liable for the satisfaction of the judgment.

In *State Bank of Nebraska v. Green*, 10 Neb. 180, Lake, J., speaking for this court, said: "Under our law governing sales of real property on execution, the title of the purchaser depends entirely upon the sale being finally confirmed, and until this is done the rights of the execution debtor are not certainly divested." And in *Lamb v. Sherman*, 19 Neb. 681, Maxwell, Ch. J., speaking for this court, on that subject said: "A purchaser at execution sale of real estate upon the payment of the purchase money and confirmation of the sale becomes the equitable owner of the property, and in a proper case may compel the issuing of a sheriff's deed to himself."

In *Freeman on Executions*, § 838, that author, in commenting upon the titles of the purchaser and the judgment debtor before the latter's right to redeem has passed, remarks: "It is certain that, prior to the execution of the sheriff's deed, the purchaser has no title in the lands purchased. He cannot recover possession, nor can he, unless expressly authorized by statute, maintain an action for rents and profits. Frequently his interest is spoken of as that of a mere lienholder. 'The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this, that it is more specific, and may continue after that of the judgment has expired, and that the lien is much nearer a complete enforcement than that of the judgment, the single act of the execution and delivery of the sheriff's deed being required.' But the interest of the purchaser is certainly something more than a lien. It seems more like an inchoate title than like a lien, and it is generally, for the purposes both of voluntary and involuntary transfer, treated like real estate. And, while the purchaser has something more than a mere lien, the judgment debtor, until after the expiration of the time to redeem, has an interest different from, and superior to, a mere right or equity of redemption. He is the holder of the legal title, and must in all respects be treated as the owner of the land, even after he has lost his right of redemption, unless a deed has been executed in pursuance of the sale." In *Ourtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 400, it was held that "the purchaser of real property at a judicial sale made under execution acquires only a lien for the amount of the purchase money and interest, which may ripen into a perfect title at the expiration of the time allowed for redemption." This case was cited and adhered to in *Boeringham v. Braden*, 58 Iowa, 188.

The statute of Wisconsin on the subject of the sale and confirmation of real estate on execution in force in 1882 were substantially the same as ours; and under those statutes the supreme court of Wisconsin, in *Allen v. Elderkin*, 63 Wis. 627, said: "Under section 3169, Rev. Stat. the title to land sold on the foreclosure of a mortgage does not vest in the purchaser until the confirmation of the sale; and until then the mortgagor, or those claiming under him, have the right of possession,

and may cut and remove all crops which are in condition to be cut and removed in the usual course of good farming." Taylor, J., delivering the opinion of the court, remarked: "The only question in this case is whether the title to the mortgaged property vests in the purchaser at a mortgage sale upon the day of sale and the execution of the deed to the purchaser, or upon the confirmation of the sale by the court. If the title vests on the sale and execution of the deed, then the circuit court properly directed a verdict for the plaintiff; but if it does not vest until after confirmation of the sale, then the court should have directed a verdict for the defendant. . . . The law in this state is plain and unequivocal, and, under it, it is clear that the title of the mortgagor or his assigns is not divested, and vested in the purchaser at a sale upon the foreclosure of a mortgage given by him, until such sale is confirmed."

In view of these authorities, it seems clear that the legal title of Einspahr to the land sold was not divested, nor did Yeazel acquire the legal title to such real estate, until the delivery to him of the sheriff's conveyance made in pursuance of the order of confirmation of the sale. Yeazel acquired an equitable title to the real estate when the sale was confirmed, but the legal title did not pass to him until he received his sheriff's deed.

8. But counsel for the plaintiff in error insist that the legal title finally acquired by Yeazel to the land he purchased related back to the date the sale was made. This is conceded. Indeed, the title which Yeazel finally acquired related back to the date and the hour that the judgment to satisfy which the land was sold became a lien upon the real estate; and the conveyance made by the sheriff to Yeazel vested in him the same title, and as good a title, to the real estate, as Einspahr himself possessed at the time when the judgment became a lien, except as to subsequent tax liens. But counsel confuse the title to the real estate with the *quantum* of the estate. This doctrine of relation has reference only to the title which the execution debtor had to the real estate at the time the judgment became a lien, but it has no necessary reference to the *quantum*, whether more or less, of estate which the execution debtor owned at the time the judgment became a lien. The contention of counsel that, because the title which Yeazel finally acquired related back and vested in him the same title which Einspahr had when the judgment became a lien, therefore, as the wild grass was growing on the land at the time the land was sold, Yeazel is owner of such grass,—will be found upon investigation to be untenable. The judgment became a lien upon this real estate from the date of its filing in the clerk's office, and might have so continued for a period of five years. Thus it will be seen that it is in the power of a judgment creditor to maintain a lien against the real estate of his debtor for that period

of time without any effort to sell the land. Again, after the sale was made and reported to the court, there was no obligation upon the part of Yeazel to have this sale immediately confirmed. Had he chosen to do so, he probably could have postponed a confirmation for a number of years. Now, if counsel is correct, all the wild grass grown upon this land from the time that the judgment became a lien thereon, although the land might not be sold for a number of years to satisfy such judgment, would become the property of the purchaser of the real estate at the sale finally made. It cannot be doubted, we think, that if, after this judgment became a lien upon the land, or after the land had been sold on execution, Einspahr had built a house, or executed some other permanent fixture upon the real estate, such fixture would have passed to the purchaser of the land along with the title he acquired thereto by the sheriff's deed. Yet if the rule as to the doctrine of relation which counsel contend for should be applied, the purchaser at execution sale, should he finally acquire the title to the real estate by the sheriff's conveyance, would not be entitled to the fixtures placed thereon by the execution debtor after the judgment became a lien or after the sale of the premises. It is not disputed by the learned counsel for the plaintiff in error that Einspahr might have removed a crop of corn or oats from this land at any time before the sale was confirmed, if such crops had been ripe and fit for harvesting; but he claims that this rule does not apply to a crop of wild grass. It is not contended but this grass was ripe for cutting and stacking. It is not contended that the harvesting of this grass by Einspahr was done for the purpose of depreciating the value of the land. Suppose that this land had been planted to fruit trees, and that the fruit had matured between the time of the sale of the land and the confirmation of the sale; can it be contended that Einspahr would not have had the right to gather the fruit and appropriate it to his own use? Suppose that this land had been covered by a sheet of water, and the water had been frozen, then no doubt the ice, while it remained unbroken, would have been real estate. Can it be said that Einspahr might not have cut such ice and sold it between the time of the sale of the real estate and the confirmation of such sale? We think that Einspahr was the owner of the legal title to this land until the sale was confirmed; that he was entitled to the possession of it, to the use of it, to the rents and profits thereof; that he was entitled to harvest all fruit and crops thereon, whether the fruits of industry or of nature, that were in a proper condition for harvesting at any time before the confirmation of the sale, and entitled to appropriate to his own use such crops or fruits.

The judgment of the District Court is affirmed.

Harrison, J., took no part in the decision.

LOUISIANA SUPREME COURT.

STATE of Louisiana, App't.,

v.

OLYMPIC CLUB.

(46 La. Ann. —.)

*1. A criminal statute denouncing what is commonly called prize fighting to be a misdemeanor, or punishable by fine or imprisonment, coupled with a proviso that the provisions of the act shall not apply to exhibitions and glove contests between human beings, which may take place within the room of regularly chartered athletic clubs, presents a question of fact to be determined by the court or jury as to whether any given contest or series of contests come within the designation of the statute as a prize fight or within the scope and meaning of the proviso as a glove contest.

2. As the state of Louisiana is in court seeking the forfeiture of the defendant's charter on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own legislature which, in terms, authorizes just such contests as the witnesses describe the club contests to have been, this court will be excused for declining to disturb a finding of a jury in favor of the defendant on a question of fact.

3. Conceding such contests to be violative of good morals and of a sound public policy, the remedy comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief.

(April 23, 1894.)

APPEAL by complainant from a judgment of the Civil District Court for the Parish of Orleans in favor of defendant in a proceeding for the revocation of defendant's charter upon the ground that it was transcending its powers in maintaining exhibitions of prize fights. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. H. McCaleb, Jr., and Benjamin Rice Forman, with Mr. Milton J. Cunningham, Atty. Gen., for the State:

A corporation may be dissolved by the forfeiture of its charter, when it abuses its privileges, or refuses to accomplish the conditions on which such privileges were granted.

Civil Code, art. 447.

When there is proven a clear abuse of its privileges (a) by gambling, by betting on a prize fight, (b) carrying on and conducting a prize fight, (c) paying men large sums of money to commit assault and battery on each other, (d) and do each other great bodily harm, (e) commit an affray, (f) keep a grogshop without a license; and doing such things not contemplated by Act 113, 1883, or by the charter, then the charter should be forfeited.

Morawetz, Priv. Corp. § 649-654; Beach,

*Headnotes by WATKINS, J.

NOTE.—Upon the question of prize fighting as a crime, see note to *Seville v. State* (Ohio) 15 L. R. A. 516.

The final decision in *STATE v. OLYMPIC CLUB*, to the effect that expert evidence was inadmissible in line with a ruling in the above case of *Seville v. State*, 15 L. R. A. 516, 49 Ohio St. 117. 24 L. R. A.

Corp. §§ 54, 58; State v. Fagan, 22 La. Ann. 545; La. Const. arts. 235, 237; *People v. North River Sugar Ref. Co.* 9 L. R. A. 38, 121 N. Y. 582; *Terrett v. Taylor*, 18 U. S. 9 Cranch, 51, 8 L. ed. 658; 4 Am. & Eng. Encyclop. Law, pp. 802-806, No. 8; *Com. v. Union F. & Marine Ins. Co. in Newburyport*, 5 Mass. 230, 4 Am. Dec. 50; *State v. Bacon Club of Newsho*, 44 Mo. App. 86; *State v. Standard Oil Co.* 15 L. R. A. 145, 49 Ohio St. 187.

No corporation can engage in any business other than authorized by its charter. Const. art. 237. The clubs authorized by Act 113 of 1-83, including athletic clubs, are non-trading corporations and have no right to engage in any other business for profit.

Aiding and abetting prize fights is misfeasance.

Reg. v. Brown, Car. & M. 814; *Reg. v. Orton*, 14 Cox, C. C. 226; *Reg. v. Perkins*, 4 Car. & P. 537; *Reg. v. Young*, 10 Cox, C. C. 371. *Res v. Willingham*, 2 Car. & P. 234; *Reg. v. Orton*, 89 L. T. N. S. 293; *Reg. v. Coney*, L. R. 8 Q. B. Div. 584; *Sullivan v. State*, 67 Miss. 353; *Com. v. Barrett*, 108 Mass. 303; *Com. v. Welsh*, 7 Gray, 324; *Beutler v. Clark*, Ball. N. P. 16; *Bell v. Hansley*, 48 N. C. 131; *Stout v. Wren*, 8 N. C. 420; *Adams v. Waggoner*, 33 Ind. 534, 5 Am. Rep. 230; *State Bank v. State*, 1 Blackf. 267, 2 Am. Dec. 234; *People v. Women's Inst. Dispensary & Hospital Soc. of New York*, 7 Lans. 304; *Morawetz, Priv. Corp.* 1024; *Danville & W. L. Pl. Road Co. v. State*, 16 Ind. 456.

What constitutes prize fights is a question of law to be determined by the court, from the facts proved to have taken place and not from the opinion of witnesses.

Seville v. State, 15 L. R. A. 516, 49 Ohio St. 117; *People v. Taylor*, 21 L. R. A. 287, 96 Mich. 576.

And it is a term in common use and so simple as to need no definition.

Dictionaries of Worcester, Webster, Stormonth, Century Co.; *Com. v. Welsh*, *supra*; *Com. v. Barrett*, 108 Mass. 303; *People v. Kent*, 1 Dougl. (Mich.) 42; *Rice v. People*, 15 Mich. 9; *Durand v. People*, 47 Mich. 833; *Lohman v. State*, 81 Ind. 15; *State v. Smith*, 30 La. Ann. 846; *State v. Gaster*, 45 La. Ann. 636; *Sedgw. Stat. & Const. L.* 279, 287, 335.

Whether prize fights or not the seventeen pugilistic fights, for large rewards, carried on and conducted by the club, were assaults and batteries and affrays and preceded by illegal aleatory contracts, in violation of the public policy of the state, declared in the Constitution, articles 172, 234, 235, and Rev. Stat. §§ 796, 699.

Because the contestants wore light gloves it matters not. The contests were fought "to a finish" for a prize before a large crowd and were not exhibitions of scientific boxing or sparring for points.

Seville v. State and *People v. Taylor*, *supra*; *Reg. v. Orton*, 14 Cox, C. C. 226.

Consent of all the persons engaged does not make it any the less an offense against the state.

2 Greenl. Ev. § 85; 1 Am. & Eng. Ency.

elop. Law, § 22, pp. 785, 807; *Reg. v. Coney*, L. R. 8 Q. B. Div. 534; Bishop, Crim. L. § 85; *Com. v. Colberg*, 119 Mass. 350, 30 Am. Rep. 323; *Logan v. Austin*, 1 Stew. (Ala.) 476.

The proviso of Act 25 of 1890 should be strictly construed so as to conform with the legislative intent. It does not destroy the enacting and antecedent clauses, nor is it a grant to perform a prohibited act.

State v. Fernandez, 89 La. Ann. 539; Const. arts. 46, 235; *United States v. Dickson*, 40 U. S. 15 Pet. 141, 10 L. ed. 689; *Eppe v. Eppe*, 17 Ill. App. 196.

On rehearing.

The proviso of Act 25 of 1890, the prize fighting law, does not make prize fighting lawful in athletic clubs when they are declared unlawful elsewhere. This would be a forced construction and would read into the law an intention not therein expressed.

State v. King, 12 La. Ann. 593.

Prize fighting is none the less prize fighting because conducted under the Marquis of Queensbury rules and because gloves are used.

Century Dictionary, *verbo*: Prize fighting.

Messrs. Henry P. Dart, Charles H. Luzenberg and Frank Zengel, for appellee:

Statute No. 25 of 1890 does not define the crime of prize fighting with such distinctness as to enable the court to establish what is or is not prize fighting under the laws of Louisiana.

Reference made to any other system or code of laws to obtain a definition of a crime in this state is prohibited by the Constitution of 1879 and by well-settled decisions.

State v. Gaster, 45 La. Ann. 636; *State v. Smith*, 80 La. Ann. 346.

The proviso of the statute exempting from its provisions "glove contests and exhibitions between human beings in the rooms of regularly chartered athletic clubs," is intended to promote boxing and sparring contests, and such contests are not prize fights within the prescription of the statute, nor can they be found to be prize fights under this examination, more especially when it is established by the evidence that they were contests with gloves accompanied by no disorder, by no unlawful assemblages, and held under strict police surveillance, and within the rooms of a regularly chartered athletic club.

The state cannot maintain this action because she has proceeded against the defendant for a state license, based on its receipts from the contests now complained of.

State v. Taylor, 28 La. Ann. 462; *State v. Ober*, 84 La. Ann. 359; *Concordia School Directors v. Hernandez*, 81 La. Ann. 158.

The forfeiture of a charter will not be lightly decreed when a full and complete remedy exists to prevent the infraction of the law complained of, and the policy of the court should be to maintain the charter of a corporation which exists for other useful and legal purposes when the objectionable features may be prohibited by injunction.

Watkins, J., delivered the opinion of the court:

The plaintiff's suit is for the revocation and

forfeiture of the defendant's charter, on the ground and for the reason that it has committed acts *ultra vires*, and transgressed the powers granted by its charter and conferred upon it by law, in that the corporation, through its officers and agents, has fostered, encouraged, and maintained exhibitions of what is "commonly called prize fighting" in violation of the constitution and laws of this state. Accompanying the foregoing averments is a prayer for an injunction restraining and prohibiting the corporation, its officers and agents, from maintaining, fostering, and encouraging such exhibitions, and also enjoining and prohibiting the defendant from selling or disposing of its property *pendente lite*. The prayer is concluded by demand for the appointment of a receiver to take charge of its assets and property, and to liquidate and wind up its affairs. In the petition are set forth the various objects and purposes of the defendant organization as they are enumerated in its charter and the amendment thereto,—such as the establishment and maintenance of rooms for literary purposes; for the collection of valuable works of art, books, maps, charts, statuary, coins, etc.; for the promotion of social intercourse, enjoyment, comfort, harmony, refinement of manners, and intellectual improvement; to encourage physical culture and development of athletic exercises, such as boxing, wrestling, fencing, and exhibitions of athletic sport; to organize one or more military companies; to promote and maintain a natatorium, gymnasium, athletic grounds, rowing clubs, bowling alleys, and such other features as may be found necessary to fulfill the purposes for which this corporation is formed. Then follows the averment that "the acts of the incorporation were a fraud upon the laws of the state, the vague and indefinite language employed to express the objects and purposes of the club being purposely used to cloak, cover up, and conceal the real objects for which said corporation was organized," as set out *supra*. As adjudvatory of the foregoing allegation the further averment is made that the defendant is accustomed to offer large prizes or rewards to noted pugilists of other states and countries; and its arena has been the scene of prize fights that were participated in by them, intending to fight until one of the contestants should give in from sheer exhaustion or injuries received; that the fights were witnessed by large assemblies of persons, there unlawfully congregated for the purpose of encouraging same, who were compelled to pay entrance fees for admission to said exhibitions. It is then further averred that such unlawful assemblies and acts, which were public nuisances, were instigated and maintained by the club; that "these disgraceful exhibitions have attracted to this city a large number of noted thugs, confidence men, and criminal characters from other cities and states, thereby endangering the public peace, and menacing the security of life and property;" that these exhibitions are and have been an "incentive to gambling, and large sums of money have been bet, wagered, and staked on the result thereof;" and that the

defendant "has been offering and paying large sums of money to noted pugilists, and has caused and encouraged them thereby to commit assault and battery upon each other;" and that "said prize fights set evil examples to the young, discourage honest industry by disproportionately rewarding sanguinary exhibitions of brute force,—all of which are public nuisances." It is then alleged that a large number of said exhibitions have taken place at the club house of the defendant, by the direction, and under the sanction and authority, of its officers and agents, and that "the said exhibitions of what are commonly called prize fights" have taken place on the dates and between the participants named in the accompanying list, to wit:

FIGHTERS.	Date.	Prize.	Prize Am't rec'd by winner.	Am't rec'd by loser.
Thos. Ward.				
1 Kid Wilson.	—, 1890	\$ 400	\$ 800	\$ 100
Jim Carroll.				
2 Andy Bowen.	Sept. 14, 1890	3,000	2,500	800
Bob Fitzsimmons.				
3 Jack Dempsey.	Jan. 14, 1891	10,000	9,000	1,000
Cal McCarthy.				
4 Tom Warren.	Sept. 22, 1891	1,500	1,000	500
J. Griffin.				
5 J. Larkin.	Nov. 19, 1891	2,500	2,000	500
Billy Myer.				
6 Jim Carroll.	Dec. 23, 1891	5,000	4,500	500
Cal McCarthy.				
7 Tom Callaghan.	Jan. 27, 1892	2,000	1,500	500
Bob Fitzsimmons.				
8 Pat Maher.	Mar. 2, 1892	10,000	9,000	1,000
Jas. McAuliff.				
9 Billy Myer.	Sept. 5, 1892	10,000	9,000	1,000
Geo. Dixon, a negro.				
10 J. Skelly.	Sept. 6, 1892	7,500	7,500	—
Jas. Corbett.				
11 Jno. Sullivan.	Sept. 7, 1892	25,000	25,000	—
Billy McMillan.				
12 Billy Hinds.	Mar. 2, 1893	800	600	200
N. Smith.				
13 J. Goddard.	Mar. 31, 1893	10,000	8,500	1,500
Andy Bowen.				
14 J. Burke.	April 6, 1893	2,500	1,250	1,250
Andy Bowen, mulatto.				
15 J. Everhardt.	May 31, 1893	2,000	2,000	—
J. Van Heest.				
16 W. Napier.	Sept. 20, 1893	2,000	1,700	300
J. Gorman.				
17 J. Levy.	Oct. 17, 1893	1,000	700	300
		\$95,200	\$93,050	\$2,150

The petition further and finally alleges that in conjunction with said exhibitions or prize fights the defendant, on occasions on which same occur, operates and conducts a bar room and retail liquor establishment upon its premises, without paying a license to the state, as required by law.

The defendant moved to dissolve the injunction, on several grounds, to wit: (1) That the injunction was not justified by the facts and allegations contained in the petition. (2) That the writ was improvidently issued, and without cause. (3) That the petition sets forth no cause for or right to an injunction. (4) The allegations on which the injunction was demanded are untrue. (5) That the plaintiff is estopped by her conduct and allegations in the suit of same title as

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the instant one for the recovery of a license. Contemporaneously therewith the defendant filed exceptions to the suit, of no cause of action, prescription of one year, and estoppel laid on aforesaid record. All of said exceptions were cumulated with the merits, and tried together, the defendant having in the mean while filed an answer, alleging that it was "and is a solvent and existing corporation, lawfully established, and is in the legal and actual possession of all its property, rights, and privileges, and has in no manner abandoned the same, or incurred any liability to forfeiture thereof." The case was tried by a jury, who returned a verdict in favor of the defendant, and plaintiff has appealed.

A fair summary of the charges made by the plaintiff, upon the proof of which the forfeiture of defendant's charter and the perpetuation of her injunction depend, is as follows, to wit: First. That the corporation had committed acts *ultra vires*, and transcended the powers conferred upon it by its charter and the law, by encouraging and maintaining exhibitions of what is commonly called prize fighting," in violation of the constitution and the law. Second. That the defendant is accustomed to offer large prizes or rewards to noted pugilists, and its arena has been the scene of prize fights that have been participated in by them, intending to fight until one of the contestants should give in from sheer exhaustion or injuries received and which were witnessed by large assemblies of people, unlawfully congregated for the purpose of encouraging same, which assemblies and acts constituted public nuisances, and same were instigated and maintained by the defendant. Third. That these exhibitions have attracted a large number of noted thugs, confidence men, and criminal characters from other cities and states, thus endangering the public peace. Fourth. That these exhibitions are, and have been, an incentive to gambling, and large sums of money have been wagered and staked on the result thereof; and the defendant has been offering and paying large sums of money to noted pugilists, thus causing them to commit assault and battery. Fifth. That in conjunction with said exhibitions or prize fights the defendant operates a bar room and retail liquor establishment upon its premises, without paying a license to the state. The gravamen of the suit is found in the first specification, and is to the effect that the defendant committed acts *ultra vires* of its charter, by encouraging and maintaining, on its premises, and within its club room, "exhibitions of what is commonly called prize fighting, in violation of the constitution and law," thus making its acts of incorporation a fraud on the law. The remaining four specifications relate to the collateral incidents and surrounding circumstances illustrative of the exhibitions, as an aggravation of the charge complained of.

The solution of the question propounded by this action depends—First, upon a correct and proper interpretation of the phrase "exhibitions that are commonly called prize fights;" and, second, upon a just interpreta-

tion of the laws which are alleged to have been thereby violated. As pointing the issue thus formulated, we make the subjoined extract from the plaintiff's brief, viz.: "The questions at issue may be stated thus: Were these pugilistic fights for prizes, held in the arena of the Olympic Club, within the legitimate objects and purposes of the charter, or were they such abuses of its franchises as would justify a perpetual injunction, and a decree of forfeiture of the charter, and the appointment of a receiver to sell its property and distribute its proceeds among creditors and stockholders? Were they not 'what are commonly called prize fights' and did not each fight constitute the crime or offense of assault and battery and breach of the peace, and were they not in violation of the law and public policy of the state? Or were they lawful exhibitions of skill in boxing, permissible under the law, or, as the defendant is pleased to call them, 'glove contests,' whatever precisely that may mean?" The provisions of Act No. 25 of 1890 are referred to and relied upon as having been violated by the defendant, and same are distinctly invoked and quoted by the plaintiff's counsel as the basis of this proceeding. That act is couched in the following terms, to wit: "Act No. 25, 1890. Defining the crime of prize fighting, and to provide for the punishment thereof in and out of the state of Louisiana. Section 1. Be it enacted by the general assembly of the state of Louisiana, that any person who shall send, or cause to be sent, publish or otherwise make known a challenge to fight what is commonly called a prize fight, or who shall accept any such challenge, or who shall engage in such fight, or act as trainer for any such, contemplating a participation in such fight, and any such person who shall act as aider or abettor, backer, umpire, second, surgeon or assistant at such fight, or in preparation for such fight, shall upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months and be fined not more than five hundred dollars." Section two is omitted, as unimportant. But to this section is appended the following proviso, to wit: "Provided this act shall not apply to exhibitions and glove-contests, between human beings, which may take place within the rooms of regularly chartered athletic clubs." Previous to the promulgation of this act, on the 25th of June, 1890, an ordinance was adopted by the city council of New Orleans, of the following tenor and purpose, to wit: "Be it ordained by the city council of the city of New Orleans, that Ordinance No. 1194 be, and the same is hereby, amended so as to read as follows: That exhibitions and glove contests between human beings for the development of muscular strength be and the same are hereby permitted to take place within the rooms of all regularly chartered athletic clubs in the city of New Orleans, provided that at the time when said exhibitions and glove contests shall take place the sale or giving of spirituous liquors in said club rooms is hereby prohibited; and provided further, that all such exhibitions and

glove contests shall be under the supervision of the police authorities of the city of New Orleans; and provided further, that a glove weighing not less than five ounces shall be used in such exhibitions or contests; but under no circumstances shall this ordinance be construed as permitting any sparring contests in such club or clubs on Sunday. Provided further, that for each exhibition the parties shall be required to donate fifty dollars for fund of public charities of New Orleans; and that a good and solvent bond of five hundred dollars cash shall be given, to be forfeited in case of any violation of said ordinance, the proceeds of said forfeited bond to go to the said fund of public charities." The foregoing ordinance bears the number 4386, O. S., and was adopted by the city council on March 5, 1890. It was with direct reference to this ordinance and the act of the general assembly that the defendant procured an amendment to its original charter, whereby, on the 16th of May, 1891, it was reincorporated as a stock company, the objects and purposes of the corporation being therein enumerated as set out in plaintiff's petition. *Vide* article 2 of amended charter. From the city ordinance it appears, "that exhibitions and glove contests between human beings, for the development of muscular strength," were "permitted to take place within rooms of regularly chartered athletic clubs in the city of New Orleans," coupled, however, with the proviso "that all such exhibitions and glove contests shall be under the supervision of the police authorities," and with the further proviso "that a glove weighing not less than five ounces shall be used in such exhibitions or contests." The denunciation of the legislature was addressed to "what is commonly called a prize fight," and declares that any one who shall send or accept a challenge to make such a fight shall be deemed guilty of a misdemeanor, and punished accordingly; but it was careful to insert the proviso that it should not apply to exhibitions and glove contests which may take place in regularly chartered athletic clubs.

Having reproduced the allegations of the petition, the averments of the answer, the purport of the argument, the provisions of the city ordinance, and of the statute of the general assembly, and the provisions of the defendant's charter, the conclusion is plain that our decision must turn upon the distinction that is taken in the statute and ordinance between a glove contest and what is commonly called a prize fight, for upon this distinction depends the criminality *vel non* of the contests which took place between the combatants. And it is equally clear that, unless these combatants are proven guilty of the acts denounced in the statute as misdemeanors, the defendant cannot be treated as *particeps criminis*, and its charter revoked, and like contests enjoined. This brings us to the consideration of the evidence that was adduced *pro et con* in the lower court, and the various rulings of the judge *a quo* with reference to admissibility of testimony, and, as a preliminary to this examination, it is well to incorporate one of the contracts under

which the club contests occurred as the best means of illustrating its character, and the following is selected as a sample, to wit:

"Olympic Club. Articles of Agreement between Stanton Abbott and Andrew Bowen. We, the undersigned, Stanton Abbott, of London, England, and Andrew Bowen, of New Orleans, La., do hereby agree to engage in a glove contest to a finish before the Olympic Club of New Orleans, La., on November 15th, 1893, at nine o'clock P. M., sharp, for a purse of two thousand five hundred dollars, the winner to receive two thousand dollars and the loser five hundred dollars of said purse; said Bowen and Abbott to receive each three hundred dollars for expenses as soon as forfeit of \$500.00 is deposited with the Olympic Club. The contest to be with five-ounce gloves, and according to Marquis of Queensbury rules. The club is to select the referee and official time keeper, each of us reserving the right to appoint a time keeper to represent us, said time keeper to be subject to the approval of the club. The referee shall have the power to stop and decide the contest when so directed by the seconds and the contest committee. Should either of us commit a deliberate foul, thereby injuring the other's chances of winning, the one so doing shall lose all interest in the aforesaid purse. We each hereby agree to weigh 133 lbs. at the ring side at 9 o'clock P. M., on day of said contest. To guarantee the faithful performance of the above obligations, we each hereby agree to deposit the sum of five hundred dollars in the hands of the Olympic Club. Should either of us fail to appear at the proper time and place, the one so doing shall forfeit his deposit to the club. [Signed] A. Bowen. Stanton Abbott. Jno. W. Lyons. Witnesses: Thos. C. Anderson. Alb. Spitzfaden. Teddy Wilson. Date, Sept. 25, 1893."

During the progress of the trial question was made with regard to the admissibility of testimony on the part of the defendant as tending to show a difference between a prize fight and a glove contest. The judge *a quo* ruled in favor of the defendant, and admitted the evidence, and the plaintiff reserved a bill of exceptions. After the evidence had gone to the jury, the same question was presented again, in certain requested instructions to the jury that were presented by the plaintiff's counsel, and refused by the court. To be accurate, we will incorporate the pertinent portions of the charge requested, which is as follows, viz.: "The plaintiff requests the judge to charge the jury as follows: (1) The statute of this state, which applies to both persons and corporations, prohibits prize fighting, and makes it a penal offense; and also provides that this statute shall not apply to exhibitions and glove contests between human beings which may take place within the rooms of regularly chartered athletic clubs. All parts of this statute, as well as every other law, must be so construed as to harmonize with each other, and I charge you, gentlemen of the jury, that the term 'prize fighting' does not require any definition; it is a simple term, defined in all the dictionaries to be fighting for a prize or reward; and

if the jury believe from the evidence that the defendant corporation held one or more fights within its arena, under the auspices of its officers and managers, in which the fighters were offered or promised a prize or reward to be paid to the victor, or either of them, such a fight is a prize fight, within the meaning of the law, and is unlawful, whether the combatants wore gloves or not. It matters not what the rules of the fight were, or how they were clothed, or whether any portions of their bodies were covered or uncovered. If they fought to a finish for a prize or reward, to be given to the successful combatant, it is a prize fight, within the meaning of the law, and the verdict must be for the plaintiff." The legislature cannot be presumed, in prohibiting prize fighting, to have enabled any one to escape the prohibitory or penal clauses of the statute by putting on and wearing a pair of gloves, and thereby evading the penalty prescribed by the law for its infraction. But, to our thinking, the foregoing requested special charge was modified, and the admissibility of such evidence (partially, at least) conceded, by the third and fourth requested special charges, which are as follows, viz.: "(3) I charge you, gentlemen of the jury, that if from the evidence you find that the defendant in this case contracted or agreed with certain noted pugilists, residing here or coming here from other states or countries, to engage in a fight for a prize or reward, in the arena of their club, and at such contests the fights were carried on to a finish, and the reward previously promised was subsequently paid to the successful combatant, then this was a prize fight, and your verdict should be for the plaintiff. If it were a mere exhibition of skill in sparring with gloves, not calculated to do great bodily injury, it was a glove contest, within the provision of the law; but, if the jury believe from the evidence that the parties who have engaged in these contests within the arena of the defendant intended to fight until one gave in from exhaustion or injuries received, it was a breach of the law, and a prize fight, whether the combatants fought with gloves or not. (4) Gentlemen of the jury, you are to decide this case from the evidence adduced on the witness stand as to what actually occurred at the time the several contests or fights referred to in the petition, and testified to by witnesses, took place, and not by your preconceived opinions, or the opinions of any other person, as to whether these contests were prize fights or not. In other words, you are to decide this case upon the facts proven by the testimony of the witnesses on the stand, and the law as given to you by the court, and not in accordance with your preconceived opinions, or according to the opinions of any one else." Taken collectively, we understand the objection of plaintiff's counsel to be that it was permissible for witnesses to state the facts and incidents which actually occurred, as coming within the range of their personal knowledge and observation; but that it was not permissible for them to give their opinions, based upon that knowledge and information, same being a conclusion of law, and not a matter for determination by expert

testimony. To the judge's declination to give the jury this special charge no bill of exceptions was retained on behalf of the plaintiff, and the state is to be considered as having abandoned it, and acquiesced in the charge that was given by the judge, and which is as follows, viz.: "There is only one question for the jury to decide, and that is as to the character of the exhibitions given at the Olympic Club. . . . The burden of proof is on the plaintiff to make out its case. The defendant is charged here with having violated the terms and conditions of its charter by having given, under its auspices, what are commonly called prize fights. The defendant resists that charge on the ground of a proviso in the law which permits glove contests. There is, then, but one question before you: Does the evidence disclose that these exhibitions were prize fights, or not, or does the evidence disclose that they were glove contests or not? Now, the rule of interpretation of words is that they must be received according to their significance in common use. I am not an expert, and can give you no opinion as to the significance of these words. You must determine for yourselves whether, in common parlance, these exhibitions were prize fights or glove contests. There is no other law in this case." No objection was made to this charge, and no bill of exceptions was retained by the plaintiff to it. When the counsel for the state presented the aforesaid special charges the judge declined to give the jury any other charge than the one above quoted, stating, however, "that this is not a criminal prosecution, but that it is a civil prosecution, for the forfeiture of defendant's charter," reading to the jury Act 25 of 1890. The acquiescence of the plaintiff in the judge's estimate of this controversy is plainly indicated by the paragraph we clipped from its brief at page 10, which we reproduce in this connection for the purpose of emphasizing the correctness of the judge's conclusions: "Were they not what are commonly called prize fights? And did not each fight constitute the crime or offense of assault and battery, and a breach of the peace? And were they not in violation of the law and public policy of the state? Or were they lawful exhibitions of skill in boxing, permissible under the law; or, as the defendant is pleased to call them, glove contests, whatever, precisely, that may mean?" On the face of the statute against prize fighting (Act 25 of 1890) the denunciation of the law is against "any person who shall send, or cause to be sent, publish, or otherwise make known, a challenge to fight what is commonly called a prize fight," not a prize fight *eo nomine*. And that denunciation is coupled with the proviso "that this act shall not apply to exhibitions and glove contests between human beings which may take place within the rooms of regularly chartered athletic clubs." That is the only statute governing such contests or exhibitions to which we have been referred, or of which we are aware; and it is controlling, and conclusively affirms the correctness of the view entertained by the district judge.

Accepting this as the correct theory of this case, it is manifest that the judge ruled correctly in admitting the evidence objected to, and in refusing to give the special charge requested by plaintiff's counsel; for it cannot be readily perceived on what theory expert testimony should have been excluded when the main question for the jury to determine was the proper significance of "what is commonly called a prize fight," as contradistinguished from a "glove contest." Addressing ourselves to the definition of these terms, we are to ascertain the distinction between them in common parlance; that is to say, to ascertain their true significance in the vernacular of the prize ring and athletic club, where such exhibitions are given. Taking the contract between Bowen and Abbott as a sample of the articles of agreement between the contestants before the Olympic Club, we find that it declares they "do hereby agree to engage in a glove contest," and that it further stipulates that "the contest [is] to be with five-ounce gloves," and "according to Marquis of Queensbury rules." It also provides that, if either party shall "commit a deliberate foul, thereby injuring the other's chances of winning, the one so doing shall lose all interest in the aforesaid purse." City Ordinance No. 4386 provides "that exhibitions and glove contests between human beings, for the development of muscular strength be and the same are hereby permitted to take place within the rooms of all regularly chartered athletic clubs in the city of New Orleans." That ordinance provides further that in such contests "a glove weighing not less than five ounces shall be used." We have extracted from the little volume entitled "Billy Edwards' Art of Boxing and Manual Training," which was introduced and filed in evidence by the attorney general on the part of the plaintiff, as immediately bearing on the contracts of the Olympic Club contestants, the Marquis of Queensbury rules. The extract is from page 109, and is as follows, to wit: "The Marquis of Queensbury rules for the English challenge cups (open to gentlemen amateurs). . . . Rule 4. There are to be three judges appointed by the committee. Rule 5. That the boxing is to take place in a 24 foot ring. Rule 6. That no wrestling, roughing, or hugging the ropes [is to] be allowed. Rule 7. That each heat consist of three rounds, with one minute interval between each; the duration of each round to be at the discretion of the judges, but not to exceed five minutes. Rule 8. Any competitor not coming up to time shall be deemed to have lost. Rule 9. That no shoes or boots with spikes or sprigs be allowed. . . . Contests for Endurance. Rule 1. To be a fair stand-up boxing match in a 24-foot ring, or as near that size as practicable. Rule 2. No wrestling or hugging allowed. The rounds to be of three minutes duration, and one minute time. Rule 3. If either man fall, through weakness or otherwise, he must get up unassisted, ten seconds to be allowed him to do so, the other man to retire meanwhile to his corner; and when the fallen man is on his legs the round is to be resumed, and continued until the three minutes have expired;

and, if one man fails to come to the scratch in the ten seconds allowed, it shall be in the power of the referee to give his award in favor of the other man. Rule 4. A man hanging on the ropes in a helpless state, with his toes off the ground, shall be considered down. . . . Rule 6. The gloves [are] to be fair-sized boxing gloves of the best quality, and new. . . . Rule 8. A man on one knee is considered down, and, if struck, is entitled to the stakes." As contradistinguished from the foregoing, we refer to the Manual of Billy Edwards, at page 108 *et seq.*, containing the London prize ring rules, from which we find the only distinguishing features to be: (1) That the contests are made without gloves or other covering for the hands; (2) that the fighting boots of the contestants are provided with three metal spikes, which are one eighth of an inch broad, and extend three eighths of an inch from the sole, one to be placed on each side of the boot, near the toe, and the other at the heel; (3) that wrestling, roughing, and hugging are not forbidden,—all the prohibitions being attempts to inflict injury by gouging, tearing the flesh with the finger nails, and hitting. Contests under the London prize ring rules are usually out doors, in open public view.

With these rules kept in view, the evidence will disclose whether the Olympic contests were glove contests or prize fights, as the major part of the witnesses were connoisseurs in matters of this sort, if not experts, scientifically speaking. The plaintiff only introduced four witnesses,—gentlemen who had witnessed some of these contests as reporters of the newspapers,—whose testimony was chiefly directed to the consequences of them, rather than to the *modus operandi* of their management. But, on this subject, the evidence of the defendant is full, and therefrom we find the following summary of facts, and extracts from the testimony of witnesses. During the examination of one of the most prominent of the witnesses the following occurred, viz.: "Q. Have you ever seen any of the contests at the Olympic Club, which are sometimes called glove contests, and which the state now calls prize fights? A. I have seen several of them. Q. Can you mention any of the names of the contestants? A. I saw the Sullivan-Corbett contest; I saw the Fitzsimmons-Maher contest; and I saw the contest between Bowen and Myer, of Illinois. Q. Did you see the McCarthy-Warren contest? A. Yes; I saw that fight. Q. Take the Corbett-Sullivan fight, and describe what you saw at that fight. A. Well, I saw the gentlemen come into the ring, and take respective corners assigned to them, and prepare themselves for the contest. They prepared themselves by divesting themselves of their clothing, except [their] trunks and shoes, and covering their hands with gloves. Then, after the other preliminary arrangements were made, under the rules and regulations governing the contest, time was called, and they were then engaged in their boxing contest. They appeared in the center of the ring, and commenced the boxing exercise,—boxing against each other the best

way they could, in order to strike one another, and to get what advantage they could, under the rules and regulations of the contest, by striking, parrying blows, dodging, or retreating; doing all they could in that way, *to save themselves from injury, and to administer injury to the opposite party, in a sporting and friendly manner, under the rules and regulations for that character of contest.* (Our italics). I saw them through the contest, which consisted of twenty-one rounds of three minutes each. They were required to remain contesting each round for three minutes. After each round they were given one minute's rest, during which they were refreshed by their respective attendants, after which the contest was resumed for another three minutes: and so on until one or the other either surrendered, or was rendered incapable to the call of the contest. Q. Do you know anything of what is commonly called boxing? A. Yes, sir. Q. Have you any skill in it, yourself? A. Not a great deal. I have boxed some in former years. Q. Do you feel competent to define the physical act that these men committed? A. I will say, then, . . . that what I saw is what I would call boxing, to determine the superior excellence, science, and endurance of the parties to the contest. They were governed by certain rules and regulations which had been prescribed. And each contestant is compelled to conform to those rules and regulations, and while doing so they use all the skill and strength in their possession, each endeavoring to strike the other, using all tactics in their possession, in order to defend themselves from the blows of each other. And they do this, as I said before, by retreating, by dodging, and by parrying the blows. It is very seldom that either one of them gets a square, direct hard blow, because the blow is either parried, or dodged, or they retreat, or they close in to each other, and lock arms, in order to protect themselves from the force of the blow. That is the case in the exercise of boxing,—whether it is for fun, for a prize, or otherwise, it is the same character of exercise. Q. You used the word 'skill.' What do you mean by that? A. I mean that skill or science or expertness of the parties to defend themselves each from the blows of the other, and at the same time to strike the other. It is an exercise that is capable of being carried to a very high degree of skill and science, both in the manner of striking, and in the manner of defending, retreating, and dodging; all of which make up the whole exercise. It is a contest for physical supremacy, physical superiority, endurance, skill, and strength. Q. It is also called 'the manly art of self-defense,' is it not? A. Yes; the manly art of self-defense. That is a comprehensive term applied to the art of boxing. . . . Q. Did you ever see a prize fight, commonly so called? A. Yes, sir. Q. Which one did you see? A. I saw the Sullivan-Ryan fight. That is the only prize fight that I ever saw. Q. Is there any difference between that contest and the contests you have seen in the Olympic Club? A. I can state the facts, and what was done at the contest between Sullivan and Ryan.

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They entered a ring similar to that of the other contests we have been speaking of, but they were differently prepared. They had naked fists, and they continued the contest in a more severe manner, and continued the exercise until one or the other had fallen or was knocked down. Then they were allowed to wrestle, and they were allowed to fall upon one another, when they did [fall]. They were allowed to take advantage in their efforts to strike or injure each other that they were not allowed to do in the other contests of which we have been speaking. Then, as soon as the round had been completed by either one of them falling, they then retired to their respective corners, but only for a half-minute's rest, when time was called.

Q. By the Court: That was in case of the Sullivan and Ryan contest? A. Yes, sir. They only had a half a minute's rest after each round, and a round continued up to the point when either of them fell, either of his own volition or from the effect of a blow, a slap, or a wrestle. The contest continued in that way until one of them had gained sufficient superiority over the other to justify the other's seconds to throw up the sponge. That contest, I think, lasted seven rounds, when the seconds of Ryan threw up the sponge; that is, simply surrendered the contest, and admitted that Mr. Sullivan was the superior pugilist.

Q. Were the contestants arrayed as they were in the contest before the Olympic Club? A. No. The shoes were heavier, and they were allowed to have spikes in their shoes, and their hands were not gloved.

Q. Did the Sullivan-Ryan contest that you speak of take place in the open air? A. Yes. It took place in the open air.

Q. Were any of the contestants injured in any of these contests which you witnessed at the Olympic Club? A. In some cases they received slight injuries.

Q. Whereabouts? A. In the Maher-Fitzsimmons fight Maher received a slight injury by the bruising of his lip, and perhaps a little to the nose; sufficient to cause some little flow of blood. It is claimed, quite a considerable of a flow of blood. I saw some blood, but I saw no serious injury.

Q. You saw no serious injury to any one? A. I have never seen any one of the contestants seriously injured.

Q. Have you witnessed those contests from beginning to end? A. Yes. I have witnessed all the principal contests we have had here, from beginning to end. We have selected the testimony of this particular witness, because of his being a typical representative of the conservative element of this community, the president of a college, and a man apparently possessed of accurate and careful information on the subject, as furnishing the most concise *exposé* of the Olympic Club contests, as he seems to have witnessed the greater number of them, and closely observed them from a scientific standpoint.

The next witness to whose evidence our attention has been attracted is a prominent city official, who states that he has seen nearly all of the contests at the Olympic Club, and specially mentions the Sullivan-Corbett contest. He says that he witnessed the Sullivan-

Ryan fight at Mississippi City, Miss., and Sullivan-Kilrain fight at Richburg, Miss., and says they were prize fights. "Q. Now, will you kindly tell me what, if any, difference there was between that prize fight between Sullivan and Kilrain and the contests which you saw at the Olympic Club? A. Well, the rules for sparring contests are not observed in the London prize ring rules. For instance, in a glove contest, the rules require that when the contestants come together and clinch, they must separate, and, if they do not, the referee separates them by force. But you cannot do that under the London prize ring rules. Under the London prize ring rules the contestants can clinch and stand and thump and punish until one or the other goes down. That is not tolerated in a glove contest. Then, under the London prize ring rules, they are not limited as to the time they shall have for each round. In a glove contest they are. Then, under the London prize ring rules, they wear spiked shoes, and in those contests they are not allowed to use them. Under the London prize ring rules they fight with the bare knuckles, while in these contests they must wear gloves weighing not less than five ounces," etc.

The next witness whose testimony has attracted our notice is a prominent lawyer, who furnishes a like description of the Olympic contests as the first witness did. He says these contests were conducted with a high degree of skill; the participants exhibiting a great deal of skill. The men who participated in those contests were men of scientific training, almost without an exception. He does not think any of the contestants were hurt very much. He saw one or two of them bleeding from the nose or mouth, and possibly saw one bleeding from the ear. States that he witnessed the Sullivan-Kilrain fight in Mississippi, and describes it very much as the second witness does. The next witness is a police commissioner, and he was present and witnessed most all the contests which took place at the Olympic Club. Having heard the testimony of the last preceding witness, he corroborates it in every particular. States that he considers the contest between Corbett and Sullivan as one of the greatest fights that ever took place, as far as skill and science were concerned. The next witness is a leading lawyer of the New Orleans bar. He states that he witnessed several of the Olympic Club contests, and instances the Corbett-Sullivan contest, which he describes much in the same manner as other witnesses have done. That he saw nothing that was objectionable or brutal in that contest. He testifies—as other witnesses had done—that the assemblage of people who witnessed these contests was orderly and well-behaved; or, as the first witness states, these assemblages of people, in point of personal respectability and behavior, were above the average of ordinary political assemblages. He states he heard the testimony of the third witness, and corroborates it throughout. This witness is a member of the school board, and a gentleman of first respectability. The next witness is also a prominent city lawyer of high reputation,

and a man of affairs. He states that he has witnessed quite a number of the Olympic Club contests, and his description of them, and the manner in which they were conducted, is quite the same as that of other witnesses whose testimony we have commented on. His description of the effect of these contests upon the contestants physically is quite unique. "Q. The exhibitions which you have described, were they at any time bloody, or was blood shed during any of those contests? A. Well, when two men get opposite to each other and begin boxing, unless one has a pretty tough nose, there is going to be a bloody nose. I have had a bloody nose myself twenty times, when I was taking boxing lessons," etc. With regard to the cruelty or brutality of the Olympic contests this witness' statement is also quite unique. "Q. Was there anything brutal or inhuman about it? A. In my judgment, no, sir. As compared with that popular game nowadays known as football, which I think the American people have gone crazy about, the contests that I have seen at the Olympic Club are superior in every respect, and in point of humanity and as appealing to the aesthetic senses," etc. He states that the contestants were scientific and artistic in the management of their hands. They were experts in boxing. It is commonly called "the manly art of self-defense," both in England and in this country." Quite a number of other witnesses—lawyers, doctors, and professional experts—were called, and gave evidence quite in line with the statements we have detailed.

On the other hand, a fair summary of the testimony of the plaintiff's witnesses does not materially differ from that of the defendant's except as to the manner and result of these contests. One witness states that he saw blood running from the ear of one of the contestants in the Goddard-Smith contest,—"just a little." He speaks of the Fitzsimmons-Maher fight as "a bloody fight." He says that in the Sullivan-Corbett contest Sullivan bled at the mouth and nose. He says that in the McCarthy-Callaghan contest the lip of the former was much swollen. Another witness speaks of some of the contestants shedding blood, but his memory of details was not accurate. The case of Maher, in the contest with Fitzsimmons, is the only one about which he is at all positive. The following cross-examination of this witness is worthy of note as characterizing these contests, viz.: "Q. Did you see any of those men bite each other? A. No, sir. Q. Did you see them wrestle with each other, throw each other down, or jump on one another? A. No, not intentionally. Q. This butting you spoke of on the part of Smith was accidentally done, was it not? A. I don't think he fought fairly. Q. You don't think he was a fair fighter? A. No, sir. Q. The referee had to stop them? A. They warned him two or three times about it. Q. But there was no kicking of each other? A. No, sir. Q. They fought, I understand, with five-ounce gloves? A. Yes. Q. They squared themselves for the fight, and from that moment on it was give and take? A. Yes. Q.

Each man trying to land his blows above a certain point? A. Yes. Q. Above his belt? A. Yes. Q. And they used their hands, and nothing but their hands, until the gong struck 'time' for the fighting to end? Q. And the round lasted three minutes? A. Yes."

The testimony of the other witness of the plaintiff is much of the same tenor as that of the two whose evidence we have quoted, and little is left us to say in the way of comment. We have only to answer for ourselves the question the judge's charge propounded to the jury: Does the evidence show that these exhibitions were what are commonly called prize fights or glove contests? We are to make answer to the questions propounded by the state of Louisiana through her attorney general, viz.: Were those contests what are commonly called prize fights? And did each fight constitute an assault and battery, and a breach of the peace? And were they or not in violation of the law and the public policy of the state? Or were they lawful exhibitions of skill in boxing, permissible under the law, or, as the defendant puts it, glove contests, recognized by law? We have only to recur to the instructions that plaintiff's counsel requested the judge to give in charge to jury for a guide in making answer to these queries. They say: "If it were a mere exhibition of skill in sparring with gloves, *not calculated to do great bodily injury*, it was a glove contest, within the provision of the law." They further say: "Gentlemen of the jury, you are to decide this case from the evidence adduced on the witness stand *as to what actually occurred* at the time the several contests or fights referred to in the petition and testified to by witness [took place], and not be your preconceived opinions, or the opinions of any other person, as to whether these were prize fights or not. In other words, you are to decide this case *upon the facts proven by the testimony of the witness on the stand, and the law as given you by the court*, and not in accordance with your preconceived opinions or the opinions of any one else." (Our italics.) Testing the issue presented by the evidence we have detailed—and it is of a kind that all of the evidence is—and the law as given by the court (and that was the reading to the jury of Act 25 of 1890), and there is only one conclusion to which we could come, and that is the one at which the jury arrived, to wit, that the Olympic Club contests were ordinary glove contests, within the terms of that statute, and not "what are commonly called prize fights." Coming within the provisions of a special statute, such contests could not be esteemed assaults and batteries, or as breaches of the peace, unless the evidence should disclose that they were calculated "to do great bodily injury." But the evidence will be examined in vain for any such proof, for its substance and general tenor is to the effect that those contests were but trials of the skill and power of physical endurance between well-equipped athletes; and that, being trained in this so-called "manly art of self-defense," it was matter next to an impossibility for one of the contestants to administer,

"above the belt" of the other, any serious physical punishment, fighting as they did with five-ounce gloves. That a nose was occasionally made to bleed, that now and then a lip was left in a swollen condition, or the face somewhat bruised and disfigured, does not alter the case, as like occurrences are apt to take place in boxing, fencing, or in football. As the state of Louisiana is in court seeking the forfeiture of the defendant's charter on the ground that the corporation has committed acts *ultra vires* of its charter, and is met with the provisions of an act of her own legislature, which in terms authorizes just such contest as the witnesses describe the Olympic contests to have been, this court must be excused for declining to disturb the finding of the jury on the facts in favor of the defendant. If, indeed, such contests are violative of good morals and a sound public policy, the matter comes plainly within the prerogative of the legislative department of the government, which alone can be looked to for relief. As the suit is *sui generis*, the decision of which depends upon the interpretation of a special statute of this state, authorities and decisions of the courts of other states and countries would be examined in vain, for the question is one of fact.

Judgment affirmed.

Miller, J., takes no part in this opinion, not being a member of the court at the time the cause was argued and submitted.

Nicholls, Ch. J., dissenting in part and concurring in part:

The acts prohibited and made criminal by Act No. 25 of 1890 are prize fights, not as defined by professional pugilists, but as commonly known and understood. This appears by the very wording of the statute. Fights which would be prize fights in the popular acceptance of those words should they take place outside of a club do not cease to be such, nor are they saved from criminality, because they take place within the inclosures of an incorporated club, and held under its auspices. This will scarcely be denied. Any construction of the statute, or any portion of the statute, which would lead up to and carry with it as the result of the construction that prize fights as commonly known are any less prohibited inside than they are outside of a club, is, in my opinion, wrong, would convert a prohibitory preventive statute actually into a permissive one, and defeat the object and purpose of the law, not only as ascertained from its language, but as actually intended by those who took part in and were responsible for its enactment. Glove contests are referred to and permitted in the proviso of the statute, but whatever may be the technical meaning of those words and the technical character of those contests, those which are referred to in this statute are necessarily those of such character, and entered into under such circumstances, as to keep the fighting all the time outside of prize fighting as understood by the people at large. If the glove contest, such as they were in this club, would have brought the contestants within the grasp of the statute had they taken place outside of the club, the same

contests inside a club will not protect them. The mere place of exhibition and the patronage of a club does not legally save the situation. It is the popular idea of prize fighting, and the common meaning of those words, and not the ideas of professional sportsmen, which are to control courts in dealing with criminality in this matter. We are not dealing with prize fighting and glove contests technically, but from the standpoint from which the law directs us to view them,—prize fights from the standpoint of what are so considered by the people at large, and glove contests as necessarily subordinated to prize fights as so viewed. I am of the opinion that testimony as to what constitutes prize fighting and what glove contests in a "technical" sense was irrelevant to the issue before the court; that it should have been excluded, but that, having been admitted, it should carry no weight. I am of the opinion that the contests which have been permitted to take place in the Olympic Club fall under the prohibitory terms of the law, and that their further continuance should be checked by injunction. I do not think the charter of the club should be forfeited. I concur in part with and dissent in part from the decision rendered.

Breaux, J. concurring:

The crime of prize fighting is defined with great particularity. The penalty is clearly set forth. No one shall send or make known a challenge to fight what is commonly known as a prize fight, and no one shall engage in such a fight. The penalty is fine and imprisonment. After defining the crime, the act contains a permissive clause, applying to exhibitions and glove contests, within rooms of regularly chartered athletic clubs. It does not refer to mere boxing with padded gloves, which may be practical for exercise, without the necessity of resorting to the rooms of a chartered club. The most extravagant interpretation would not include such exercises within the definition of a prize fight. After denouncing a prize fight, the law expressly excepts exhibitions and glove contests under the auspices of chartered athletic clubs. The character of these glove contests were known at the time, and must have been incorporated in the law, only because it was well known that it would exclude them from the denunciation of a prize fight. If that was not the purpose, the proviso has no meaning. It is a question of legislation. To the legislature all legislative power is granted. Courts, however pleasant to contemplate and inviting it may be at times, are not authorized to decree that one enterprise shall be favored by their decree, even beyond the law, because the purpose in their opinion is praiseworthy, and should receive encouragement. Nor are they authorized to make nugatory a law they deem cannot be sustained on principles of propriety. The legislature must be its own arbiter as to whether glove contests shall be prohibited. Its laws in this as in all other cases must be interpreted by those rules which regulate the decisions of judicial tribunals. I assent to the decision entered in this cause.

A petition for rehearing was subsequently filed in response to which on May 7, 1894, the following opinion was delivered:

On a re examination of this case we have reached the conclusion that expert testimony was improperly admitted at the trial, which may have influenced the verdict of the jury, and the interests of all parties will be best subserved by remanding the cause, with instructions to the judge *a quo* to disallow such evidence. But, as we are satisfied that in no event should the charter of the defendant be forfeited, so much of the decree as appertains thereto will remain undisturbed;

our decree being in all other respects reversed, and the cause remanded for a new trial. It is therefore ordered and decreed that our former decree be annulled, except as to the forfeiture of the defendant's charter, which is left in full force; and it is further ordered and decreed that the remaining issues in the cause be remanded to the lower court for a new trial according to law and the views herein expressed, the defendant and appellee to pay the costs of appeal; those of the lower court to await final trial therein.

Rehearing refused.

ILLINOIS SUPREME COURT.

NORTH & SOUTH ROLLING STOCK CO., *Appt.*, v.

PEOPLE of the State of Illinois *ex rel.*, M. W. SCHAEFER, State's Attorney.

(47 Ill. 234.)

1. The existence of a corporation is admitted by filing an information against it by its corporate name to procure a forfeiture of its charter.
2. The burden of showing that a corporation has committed or omitted acts which amount to a surrender or forfeiture of its rights and privileges is upon the one seeking a judgment of ouster for that reason.
3. A charge of falsely and fraudulently posing as a domestic corporation when it had in fact migrated to a foreign state is not shown by the facts that the local office is not at all times open and the books are not always there, if the corporate property is within the state and the officers and books are frequently at the office, at least as often as the business requires.
4. Nonresidence of the officers, directors, and stockholders of a domestic corporation is not, in the absence of statutory requirements, express or implied, a ground for forfeiture of its franchises.
5. The mere fact that the books of a corporation have been kept most of the time in a foreign state, contrary to a statutory requirement, is not sufficient cause

to forfeit its franchises, if the two places of location are but a short distance apart across the boundary line and they have been produced at the principal office whenever anyone entitled to do so desired to see them.

6. Neglect of the officers of a corporation to have its property listed for taxation is not sufficient cause for a forfeiture of its franchises.

(October 27, 1893.)

APPEAL by defendant from a judgment of the City Court of East St. Louis in favor of plaintiff in a quo warranto proceeding to annul the charter of defendant for violating the laws of the state. *Reversed.*

Statement by Bailey, J.:

This was an information in the nature of a quo warranto, brought by the people of the state of Illinois, on the relation of the state's attorney of St. Clair County, in the city court of East St. Louis, against the North & South Rolling Stock Company. A petition for leave to file the information having been granted, an information was filed, the substantial portions of which are as follows: "M. W. Schaefer, state's attorney in and for said county, who sues for the people of the state of Illinois in this behalf, comes into court on this day, and for the said people, and in the name and by the authority thereof, gives the court here to understand and be informed that the North & South Rolling

NOTE—Migration as a ground for forfeiting of a corporate charter.

From the paucity of decisions upon the question of compelling a corporation to stay at home it would seem that they were either of very domestic tendencies or that the state authorities have not regarded migration as a sufficient offense for them to notice. Probably the fact is that such migration is attended with more serious consequences to the land of adoption than to the land of birth, hence the former have been more often called upon to pass upon the question. The result of those decisions, together with the dicta on that question, will be found in *Cone Export & Commission Co. v. Poole* (S. C.) *ante*, 230.

The decision mentioned in the *ROLLING STOCK CO.* case seems to be the only authority directly in point. In it the court said: "It is the duty of the corporation to keep its principal place of business, its

books and records and its principal offices within the state to an extent necessary to the full jurisdiction and visitatorial powers of the state and its courts and the efficient exercise thereof in all proper cases which concern the corporation," both at common law and by implication of the state statutes, and failure to do so is ground for forfeiture of the charter. *State v. Milwaukee, L. R. & W. R. Co.* 45 Wis. 573.

In another case the court had occasion to determine the validity of acts done in the state of adoption and it was held that the authority of the legislature would be necessary to permit a corporation to migrate, and that, in the absence of such authority, acts done out of the state would not be recognised by the courts of the state which gave the charter. *Aspinwall v. Ohio & M. R. Co.* 20 Ind. 412, 33 Am. Dec. 323.

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Stock Company, for the space of two years last past, and more, in the county and city aforesaid, has used, and still does use, without any warrant, charter, or grant, the following liberties, privileges, and franchises, to wit, of owning, buying, and leasing, selling and operating, railroad rolling stock, all of which said liberties, privileges, and franchises the said company, during all the time aforesaid, upon the said people, has usurped, and still doth usurp, in the county and city aforesaid, to the damage and prejudice of the people, and against the peace and dignity of the same. Whereupon the said state's attorney, for the said people, and in the name and by the authority thereof, prays the consideration of the court here in the premises, and due process of law in this behalf to make the said North & South Rolling Stock Company answer to the said people by what warrant it claims to have, use, and employ the liberties, privileges, and franchises aforesaid." To this information, the defendant filed the following plea: "And now, on this day, comes the said North & South Rolling Stock Company, by L. H. Hite, its attorney, and, having heard read the said information, for plea in this behalf, says it is a duly organized and chartered company, incorporated under the laws of the state of Illinois, with license and charter duly issued by the secretary of state of said state, authorizing it to carry on the business of owning, leasing, buying, selling, and operating railroad rolling stock; said corporation being organized under and by virtue of sections 1 to 28, inclusive, of an act entitled 'An act concerning corporations,' passed by the legislature of Illinois, approved by the governor, and in force July 1, 1872. And by this warrant the said North & South Rolling Stock Company has used, during all the time mentioned in said information, and still uses, the said liberties, privileges, and franchises of owning, leasing, buying, and selling and operating railroad rolling stock, as the said North & South Rolling Stock Company well might and still may; without this that said North & South Rolling Stock Company has usurped or does now usurp, the liberties, privileges, and franchises aforesaid, or any or either of them, upon the said people, as by the said information is above supposed. All which matters the said North & South Rolling Stock Company is ready to verify," etc. "Wherefore, it prays judgment," etc.

To this plea the state's attorney filed two replications, as follows: "And the said people of the state of Illinois say that the plaintiff ought not to be barred from maintaining the said information by reason of anything alleged in said plea, because the defendant has not kept, or caused to be kept, at its principal office or place of business in this state, correct books of account of all its business, as required by the statute in such case made and provided, whereby the defendant has forfeited its franchises aforesaid. And this the plaintiff is ready to verify. And, for a further replication to said plea, the plaintiff says that all the stockholders, directors, and officers of the defendant are now,

and always have been, nonresidents of this state; that the defendant does not now and never has kept an office or place of business in this state, but has hitherto and does now keep its office and place of business in the city of St. Louis, state of Missouri, at which the business of defendant is transacted; that the franchise of the defendant was procured for the purpose of being exercised outside of this state, in the manner aforesaid, and without any intention of making the defendant a domestic corporation, in fact and substance; and that, in truth, the defendant has, since its organization, acted, for all practical purposes, as a foreign institution, and has maintained in this state a mere nominal existence. And this the plaintiff is ready to verify."

The following rejoinder was thereupon filed by the defendant to the second or additional replication, but by order of the court, entered by agreement of the parties, it was subsequently extended so as to apply to both replications: "And the said defendant, as to the additional replication of the people's" etc., "plaintiff, filed herein November 2, 1891, says that said plaintiff ought not, by reason of anything by them in that replication alleged, to have or maintain their aforesaid action against it, the said defendant because it says, that ever since the granting of its said charter, and since its organization, up to the present time, it had kept an office in the city of East St. Louis, in the state of Illinois, where its elections and stockholders' meetings, and meetings of its board of directors, are regularly held, and where all its records and books of accounts and papers have been and are produced for the inspection of any stockholder or his attorney, or other person interested, whenever requested by such person, and that the said charter and its privileges were sought and procured for the purpose of being exercised in the state of Illinois, and since its organization all its dealings in the matter of handling and running its rolling stock have been in the hands of, and with, the St. Louis, Alton & Terre Haute Railroad Company, an Illinois corporation, and that the situs of defendant's only property, its cars and rolling stock, has actually, all the time, been, and now is, in the state of Illinois; that no stockholder or other person interested, has ever sought to obtain any information, or to do any legitimate business, at defendant's said East St. Louis office, and been denied the privilege or right to do so. And this said defendant is ready to verify. Wherefore, it prays judgment if said plaintiff ought to have or maintain the aforesaid action thereof against said defendant."

This rejoinder was traversed, and issue taken thereon to the country. The cause was then tried by the court, a jury being waived by a stipulation of the parties; and at such trial the court found the issues in favor of the people, and rendered judgment ousting the defendant from the franchises in question, and precluding it from exercising the same under any right or claim whatever, and the defendant was also adjudged to pay the costs of the prosecution. From that judgment the defendant has now appealed to this court.

At the trial, the defendant, to maintain the issues on its part, read in evidence an agreement between Henry O'Hara, J. S. Berthold, and C. M. Jennings, dated December 1, 1887, and by which, after reciting that O'Hara and the firm of Berthold & Jennings were the owners of certain railroad freight cars, and were desirous of putting the same under one management and virtual ownership, for the purpose of avoiding conflicting interests, and for the better management of the property, it was agreed by them to form and incorporate themselves into a joint-stock company, under the laws of the state of Illinois, by the name and style of North & South Rolling Stock Company, for the purpose of owning, leasing, and operating railroad rolling stock, and buying and selling the same, and for any other purpose for which like companies are formed. And it was further agreed that the individuals named should subscribe equally to the capital stock of the proposed corporation,—the amount of capital stock, the number of shares, and the par value of the shares to be agreed upon before making application for incorporation; that the affairs and business of the company should be conducted and managed by a board of directors consisting of the stockholders, who, for the first 12 months, and until their successors were elected, should be the three parties to the agreement; that the officers of the corporation should be a president, vice president and manager, and secretary and treasurer, who should comprise the board of directors, as above stated; that O'Hara and Berthold & Jennings should lease to the proposed corporation the railroad freight cars owned by them, respectively, and then running on the St. Louis, Alton & Terre Haute Railroad (Belle-ville & Southern Illinois Division) and connections, for the term of fifteen years, with the privilege of purchase to be specified in the lease; that O'Hara should lease to the corporation 75 stock cars and 200 box cars, described as bearing certain numbers, and marked "St. Louis & Cairo Short-Line Railroad;" that Berthold & Jennings should lease to the corporation 100 refrigerator cars and 156 box cars and 58 coal cars, all bearing certain numbers, and being marked same as above. And it was agreed that the parties would not be interested in any manner in any other rolling stock running on the St. Louis, Alton & Terre Haute Railroad and connections, other than through the proposed corporation, during its existence. The defendant also read in evidence its certificate of incorporation and accompanying documents, whereby it was incorporated under the provision of the act of the general assembly of this state entitled "An act concerning corporations," approved April 18, 1872. Those documents consisted, first, of a statement signed and acknowledged by O'Hara and Berthold & Jennings, for the purpose of forming a corporation under that act, by the name above stated, in which it was declared that the object for which the corporation was formed was that of "owning, leasing, buying, selling, and operating railroad rolling stock;" that the capital stock of the corporation was to be \$300,000, to be divided into 8,000 shares of \$100

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each; that the principal office of the corporation would be at East St. Louis, St. Clair county, Ill., and the duration of the corporation fifty years. Also, the report of the commissioners appointed to open books of subscription to the capital stock of the proposed corporation, showing the full amount of the capital stock had been subscribed, and that the above-named parties had each subscribed for 1,000 shares. Also, the final certificate of incorporation by the secretary of state, showing a compliance with the statute, and declaring the North & South Rolling Stock Company a legally organized corporation under the laws of this state. It was also shown that the certificate of incorporation was duly recorded in the office of the recorder of St. Clair county, February 17, 1888. The defendant also read in evidence an instrument dated February 1, 1888, by which O'Hara leased to the corporation 76 stock cars and 200 box cars, having the numbers and marks above stated, with an agreement to sell his interest in them to the corporation at any time within ten years, at its election; and it was agreed that all of the rolling stock should remain on the line of the St. Louis, Alton & Terre Haute Railroad and its connections and, retain their respective marks and numbers.

Berthold was then called as a witness, and his testimony was, in substance, as follows: "I am acquainted with the defendant corporation. O'Hara, Jennings and I organized it. We three were the stockholders. At that time, we lived at St. Louis, Mo. The corporation has an office in East St. Louis. It is in the office of T. L. Fekete. We pay him rent. Our meetings are held at the office in East St. Louis. We have never held stockholders' or directors' meetings elsewhere. The property of the company consists of railroad rolling stock. The agreement was that the property should be placed, where it has ever since remained, in the hands of the Cairo Short-Line Railroad Company. That is an Illinois corporation. We have our local office for the purpose of daily business in St. Louis. It is at the office of Berthold & Jennings, southeast corner of Fourth and Chestnut streets. That office has been there ever since the organization of the company, and ever since the principal office was located at East St. Louis. There was never a request by any person to examine the books of account and papers at the principal office in East St. Louis but once. O'Hara made the demand, and they were produced, and examined by him. They were free to all stockholders in St. Louis at any time. He was a St. Louis stockholder, and had his office right across the street from our St. Louis office, and knew where the books were. After the first election, O'Hara, Jennings, and I continued to be directors. I was president of the board; O'Hara, vice president; and Jennings, secretary and treasurer. For the last five years the officers of the corporation have visited East St. Louis, the place of the principal office, two or three times a week, on an average. On an average, the president or vice president or some officer of the corporation has been in East St. Louis on an average of two or three times a week on business of the

company." On cross-examination, he said: "At the time the corporation was organized, the persons organizing it, and who became stockholders and officers were nonresidents. These persons all remained nonresidents, and are still stockholders. The company never has had a stockholder or officer who was a resident of the state of Illinois. The capital stock is \$300,000, all paid up. At the time of the organization, each stockholder took \$100,000 of stock. The corporation was organized for the purpose of leasing, buying, selling and operating cars and locomotives. At that time the individual corporators had a lot of rolling stock. All the rolling stock was turned over by us, and that was considered as paying for the stock. At that time the headquarters of the rolling stock was in East St. Louis, but the stock itself may have been in Mississippi, Alabama, Texas, and all over. It was not leased to any one at the time, but we put it on the roads, and got mileage. After the company was organized, it remained with the St. Louis, Alton & Terre Haute Railroad Company, we collecting the mileage. The only property of the corporation that I know of was the rolling stock on the Short Line. We have acquired cars since, but all we have is on that line. I do not know that we ever listed the property for taxation in the state of Illinois. I have been president, and Jennings has been secretary and treasurer, of the company, all the time. O'Hara has been vice president part of the time. The present stockholders are O'Hara, Jennings, George S. Hoke, and myself. O'Hara has 1,000 shares; Jennings, 999; Hoke, 1; and I, 1,000. The only business transacted by the company has been with reference to the use of the cars, and the collection of the mileage. We have books of account, and corporation records showing stockholders' and directors' meetings. We have a regular set of books. Any one can find our office at St. Louis by getting our address, and going to it. There is no sign to show where the office is. We three gentlemen who organized the company have had other business. Jennings and I had a lumber yard. When we come to Illinois it is to see to those cars. I have not been in East St. Louis on private business of my own for four years. I have come to see about those cars. We have clerks who look after the lumber business. Have no yard now. We have an office in Fekete's office, and pay him \$10 a year rent. We have no furniture or other property of the corporation there. The corporation books are not kept there regularly. The only time when the stockholders visit the East St. Louis office is at the directors' meetings. We never did business there, and never had occasion to. We talked over what had been done. That was at a stockholders' meeting. Those meetings were held once a year; it may be, oftener. Anybody interested could find our office in East St. Louis. I do not think the public would need to know where to find it. Our charter calls for a principal office in East St. Louis. We had no sign up there. I go to Fekete's office pretty often. The company never undertook to keep its books there. I do not

know that the company ever paid any taxes in Illinois. It does not show on our books that we ever paid taxes there. I do not know what the Cairo Short Line did. As president, in my visits, of two or three times a week, I have been at Fekete's office, where our principal office is, much oftener than once a year. I never heard of any inquiry being made at that office, or in St. Louis, as to the whereabouts of the corporation. There has been no inquiry made in relation to our property, or otherwise, so far as I know. We never owned any roadbed or right of way, nor assumed to run a railroad."

The foregoing was all the evidence offered, and upon that evidence the court found the issues for the relator, and rendered judgment of ouster.

Mr. L. H. Hite for appellant.

Messrs. M. Millard and M. D. Schaefer, State's Atty. for appellee:

A corporation can have no legal existence beyond the limits of the sovereignty where it is organized; it must dwell in the place of its creation and cannot migrate to another sovereignty.

2 Morawetz, Priv. Corp. 2d ed. p. 918; *Ang. & A. Priv. Corp.* § 104; *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 81, 20 L. ed. 358; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 75 U. S. 8 Wall. 181, 19 L. ed. 860.

Its corporate life continues only so long as the conditions upon which it exists are observed and these are fixed by local laws.

State v. Milwaukee, L. S. & W. R. Co. 45 Wis. 579; *Land Grant R. & T. Co. v. Coffey County Comrs.* 6 Kan. 245; *Hill v. Beach*, 2 N. J. Eq. 81.

At the time this law was passed most courts were holding that board meetings might be held abroad for the transaction of ordinary business.

Reishwald v. Commercial Hotel Co. 106 Ill. 489.

A corporation resides, in point of fact, where its corporate functions are exercised.

Bristol v. Chicago & A. R. Co. 15 Ill. 436; *Bank of North America v. Chicago & V. R. Co.* 83 Ill. 498.

The consequence of obtaining franchises to be exercised in another state or migrating after they have been used here, to the corporation, is a breach of the condition upon which they were granted and a cause of forfeiture.

Ward v. Farwell, 97 Ill. 593; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 547, 28 L. ed. 1084; *State v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 590; *Ohio & M. R. Co. v. People*, 120 Ill. 200.

Bailey, J., delivered the opinion of the court:

To determine the propriety of the finding and judgment of the court in this case, it is important, in the first place, to notice the precise nature of the issues which were submitted for trial. The information was filed by the state's attorney against the North & South Rolling Stock Company, by that name; requiring it to answer by what warrant it claimed to have, use, and exercise the liberties, franchises, and privileges of own-

ing, buying, leasing, selling, and operating railroad stock. The defendant answered by setting up its incorporation under the general law of this state in relation to corporations; the purposes for which it was incorporated, as declared in its certificate of incorporation, being to use and exercise the precise franchises and privileges mentioned in the information. The relator, by proceeding against the defendant by its corporate name, must be deemed to have admitted the fact of its incorporation. The weight of authority may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name, to procure the forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchises, is to admit the existence of the corporation. When, therefore, the information is filed against the defendant in its corporate name, and process is issued and served accordingly, and the defendant appears and pleads in the same corporate character, its corporate existence cannot afterwards be controverted. High, Extr. Legal Rem. § 661.

It will thus be seen that the legality of the defendant's incorporation is not assailed, but the relator seeks to bring the case within that clause of the statute relation to quo warranto which authorizes the filing of an information where "any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation." For the purpose of showing such acts of omission or commission, the relator has filed two replications. The first alleges that the defendant has not kept, or caused to be kept, at its principal office or place of business in this state, correct books of account of all its business, as required by statute. The second replication alleges that all the stockholders and officers of the defendant are now, and always have been, non-residents of this state; that the defendant does not now and never has kept an office or place of business in this state, but has hitherto and does now keep its office and place of business at St. Louis, Mo., at which its business is transacted; that the franchise of the defendant was procured for the purpose of being exercised outside of this state, in the manner aforesaid, and without any intention of making the defendant a domestic corporation in fact and in substance and that the defendant has, since its organization, acted, for all practical purposes, as a foreign institution, and has maintained in this state a mere nominal existence. The rejoinder constitutes a substantial traverse of these allegations, and upon the issues thus formed the case was tried. No question being made by the respondent as to propriety of these replications, or as to whether they do not constitute clear departures from the case made by the information, we are disposed to treat the issues as properly joined. But it may be observed that, as to all the matters thus submitted for trial, the burden of proof was on the relator, and unless he has proved, by a preponderance of the evidence, that the defendant has committed or omitted acts which amount to a surrender or forfeiture of its rights and priv-

ileges as a corporation, the judgment of ouster cannot be sustained. No evidence was introduced, and no witness was called, on behalf of the relator; the cause being submitted upon the documentary evidence introduced by the defendant, and upon the testimony of Berthold, one of the defendant's stockholders and directors, and its president, and who was called as a witness by the defendant.

From the evidence thus introduced, it appears that, on the 1st day of December, 1887, the firm of Berthold & Jennings, who were then, and still are, residents of, and doing business in, St. Louis, Mo., were the owners of a large number of railroad freight cars, which were then leased to the St. Louis, Alton & Terre Haute Railroad Company, a corporation organized under the laws of this state, and were then in use by that company on its Belleville & Southern Illinois Division, commonly known as the St. Louis & Cairo Short Line,—a line of railroad situated in this state; that Henry O'Hara, who also was then, and still is, a resident of, and doing business in St. Louis, was in like manner, the owner of a large number of other railroad freight cars, which were leased to the same Illinois corporation, and in use on the same line of railroad in this state; that for the purpose of placing these cars under one management, and avoiding conflicting interests, and for the better management of the property, these parties agreed to incorporate themselves into a joint-stock company, under the laws of this state, by the name and style of the North & South Rolling-Stock Company; that the three parties should subscribe equally to the capital stock of the proposed corporation, and should constitute its first board of directors and officers; that they should turn over the cars owned by them, respectively, to the corporation, on certain prescribed terms, and should not be interested in any manner, except through the proposed corporation, in any other rolling stock running on the St. Louis, Alton & Terre Haute Railroad or its connections. In pursuance of this agreement, the corporation was organized, its entire property and assets consisting of these cars, and other cars subsequently purchased, and all leased to and in the possession of an Illinois railroad corporation, and in use on a line of railroad in this state, and its entire business, so far as the evidence shows, consisting of periodical settlements with the lessee railroad company for the mileage or other rents earned by the leased cars. It will thus be seen that the property and assets of the corporation, at the time of its organization, were, and ever since that time have been, wholly within this state. To what extent its business has been actually transacted in this state is not clearly shown, but, as the burden of proof on this point is upon the relator, failure of proof militates against the case of the prosecution, rather than that of the defense. It may be said, however, that there is nothing in the evidence tending to show that the corporation had any business which required constant attention on the part of any of its officers or agents, either in this state or elsewhere. As

its rolling stock has been operated by the lessee corporation, the defendant had nothing to do with that part of the business, and its settlements for mileage or rents may, so far as appears, have required attention only at fixed intervals. Where those were made, whether in Illinois or Missouri, the evidence fails to show with certainty, although, perhaps, it may be inferred from the fact that the lessee corporation was resident in Illinois, and had its principal office in East St. Louis, and the further fact that the defendant's president made frequent visits to that place on the defendant's business, that the object of those visits was, in part at least, to make settlements with the lessee.

The testimony of Berthold shows—and in this he is not contradicted—that the defendant, ever since its organization, has kept an office in East St. Louis, and that all official meetings of the stockholders and directors have been held there. He admits that no officer or agent of the corporation has been kept in constant attendance at that office, and there is nothing showing that the business of the corporation has been such as to require that to be done. He testifies, however, that he, as president of the company, has been in the constant habit of going to East St. Louis, as often as two or three times a week, to look after its business; and it may fairly be inferred from his testimony that while there he made his headquarters at the East St. Louis office. He also testified that the other officers of the corporation frequently went over to East St. Louis to look after the company's business. It appears, also, that the defendant has also an office in the city of St. Louis,—that office being at the place of business of Berthold & Jennings, and across the street from the place of business of O'Hara; but the evidence leaves it very much in doubt as to how much and what portion of the corporate business was transacted at that office. It seems to have been more convenient for the three stockholders to have the books kept there, but the witness testified that they were kept part of the time at the East St. Louis office, and that they had always been there when any stockholder or other person had desired to examine them at that place. In view of all the evidence, we are of the opinion that the averments of the relator's replication that the defendant's franchise was procured for the purpose of being exercised out of this state, and without any intention of making the defendant a domestic corporation in fact or in substance, and that since its organization it has acted for all practical purposes as a foreign institution, and has maintained in this state a mere nominal existence, are not proved. The property of the corporation is all located in this state, and is managed, used, and controlled here. Upon its organization, it established an office in this state, which it calls its principal office, and where all meetings of the stockholders and directors have in fact been held, and that office has ever since been, and is still, maintained. A considerable, if not the most material, portion of its business, is, and has always been, transacted, and its substantial interests are, and have always been, in this

state. Under these circumstances, its existence here must be held to be much more than nominal. If it has forfeited its franchise, it must be by reason of some other act than that of falsely and fraudulently posing as a domestic corporation, while it has, in substance and in fact, accomplished its migration to another jurisdiction.

The facts of this case are different in all their essential features from those appearing in *Land Grant, R. & T. Co. v. Coffey County Comrs.* 6 Kan. 245, and *Hill v. Beach*, 13 N. J. Eq. 81, to which we are referred. In the first of these cases, a corporation had been chartered by the legislature of the state of Pennsylvania, and authorized to engage in certain business enterprises in any of the states or territories of the United States, except the state of Pennsylvania. The corporation went to the state of Kansas, and there engaged in railroad building, and brought mandamus in the courts of that state to compel the county commissioners to subscribe to the capital stock of its railroad. The court, in denying its right to that writ, held that the rules of comity did not require that state to permit the corporation to do business within its borders which it was forbidden to do in the state of its creation, and that, where a corporation attempts to migrate in a body to another state, it dissolves into its original elements, and that the persons who comprise it become only individuals. So, in *Hill v. Beach*, a corporation was organized under the laws of New York to carry on the business of quarrying stone in a quarry in New Jersey, and it was held that the company would not be recognized in the courts of New Jersey as a legally constituted corporation, and that persons doing business in that state under such assumed corporate capacity would be treated as, and held to the responsibility of, partners. None of the elements forming the ratio *decidendi* in those cases are present here.

In this case, however, it is proved (1) that the stockholders, directors, and officers of the corporation are nonresidents of this state; and (2) that the corporation has failed to keep its corporate books continuously at its principal office in this state; and it remains to be seen whether either or both these facts constitute a sufficient ground for declaring a forfeiture of its corporate franchise. So far as the ownership of the stock of a domestic corporation by nonresidents is concerned, we are aware of no rule of the common law, and certainly none is prescribed by statute, which forbids it. Nor does the law require that any particular proportion of the stock of such corporation should be owned by residents, except, perhaps, in the single case where a certain part of the directors are required to be residents, and there, doubtless, by implication, the shares constituting the qualification stock of the resident directors must be held by them. But otherwise there seems to be no rule forbidding the ownership of all the stock by nonresidents. Such ownership, as has been frequently decided, has no effect upon the citizenship of the corporation, as affecting the jurisdiction of the federal courts; and we see no reason why, in any

point of view, it should have any tendency to take from the organization the position and status of a domestic corporation. So far as we have been able to find, there is no rule of law requiring the directors of corporations organized under the "Act concerning corporations," approved April 18, 1872, or any portion of them, to be residents of the state. Section 11 of article 11 of the constitution provides that a majority of the directors of all railroad corporations shall be residents of this state, and that provision is repeated, in substance, in section 11 of the Act for the Incorporation of Railroad Companies, approved March 1, 1872. But no such provision is to be found in the constitution or statutes applicable to those classes of corporations which may be organized, as was the one now before us, under the general law concerning corporations. The fair conclusion is that while the public policy of the state, as declared by its constitutional and statutory law, requires that a majority of the directors of railroad corporations shall be residents, no such requirement exists in case of other corporations, and that it is no violation of law, and therefore no ground upon which a forfeiture of its franchises can be declared, that all the directors and officers of the corporation now before the court are, and since its organization have been, nonresidents.

Nor are we disposed to hold that the mere fact that the corporate books have been kept most of the time at the company's St. Louis office is, of itself, a sufficient ground for dissolving the corporation. Its two officers are on opposite sides of the Mississippi river, and but a short distance from each other. Whenever the books have been required at the East St. Louis office by any stockholder or other person entitled and desiring to see and examine them, they have been produced at that office, and there is nothing showing the slightest indisposition on the part of the corporation to have its books there, when needed for any lawful purpose. It is true that keeping its books for most of the time in St. Louis may not be a strict compliance with the statute in that behalf, but it does not appear that any interest, either public or private, has been or is likely to be, imperiled or incommoded thereby. The thirteenth section of the statute under which the defendant was incorporated provides that it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state, correct books of account of all its business, and every stockholder in such corporation shall have the right, at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation. It would seem that the primary object of this statutory provision is to protect the rights of stockholders and the evidence is positive that whenever a stockholder has desired to examine the books at that place, they have been produced there for his examination. It is probable that the statute may have had other objects in view in requiring the books to be kept at the principal office in this state, as, for instance to aid the state in exercising its visitatorial power over the cor-

poration or perhaps to enable creditors of the several stockholders to ascertain the number of shares of stock standing in the names of each, so as to levy their executions or attachments thereon; but there is no reason to suppose that the books would not have been instantly produced whenever required for either of those purposes. It is not every failure to comply with the exact letter of the statute which will expose a corporation to the loss of its franchises. In determining whether such departure from the provisions of the act of incorporation has occurred as will work a forfeiture, the same general principles of construction are applicable in which govern valuable grants to individuals upon conditions subsequent or precedent. In all such cases, a substantial performance of the conditions, according to the intent of the charter, is all that is required, and slight departures are overlooked. High, Extr. Legal. Rem. § 651.

Some stress is sought to be laid upon the fact that neither at the office in East St. Louis, nor at the office in St. Louis, was any sign displayed, advertising to the public the location of the office. But this circumstance seems to have very little significance, when it is remembered that the business in which the corporation was engaged involved no dealings with the general public, but only with the corporation to which its cars were leased, and that there was, therefore, very little if any occasion to advertise its place of business to the public.

Considerable significance is also sought to be given to the fact that the defendant's officers have never listed the corporate property in this state for purposes of taxation. Whether it was listed by the lessee, who had it in possession, is not shown. The property was all tangible property, existing in this state, and was within the reach of the officers whose duty it was to levy and assess taxes. But, even if its property escaped taxation solely through the negligence of its officers to see to it that the property was properly listed, we are unable to see how such fact would have a tendency to sustain the judgment in this case. Important as is the duty of every property holder, whether a natural person or a corporation, to have his property properly listed for the purpose of taxation, so that each may bear his proper share of the public burdens, we are not aware that a failure by a corporation to list its property for that purpose has ever been held to be an act amounting to a forfeiture of its corporate franchise.

The relator, in his argument, has relied very largely upon the case of *State v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 579. While we are not prepared to yield our assent, in all respects, to either the reasoning or conclusion of that decision, it is sufficient for our present purposes to distinguish that case from this by pointing out the fact that in that case there was a demurrer to the information, whereby the facts alleged were all admitted. Those facts were that the principal or general office of the corporation was in the city of New York; that the books and records of the corporation were not, and

never had been, kept within the state of Wisconsin, and were then in the city of New York; and that none of the general officers of the corporation resided in Wisconsin, but that its president, secretary, and treasurer all resided in the city of New York. These facts being all admitted, it was held that sufficient ground was shown for dissolving the corporation. In some respects the decision is based upon Wisconsin statutes which are essentially different from ours. In the present case, however, issues were taken upon the allega-

tions of the relator, and many of them failed of being proved; thus necessitating, in our opinion, a different result from that reached in the Wisconsin case.

After carefully considering the entire case, we find ourselves unable to concur with the decision of the learned judge who tried the case in the court below.

The judgment, therefore, will be reversed, and the cause will be remanded to the City Court of East St. Louis.

INDIANA SUPREME COURT.

John O. HENDERSON, City Auditor, *Appl.*,
v.

STATE of Indiana *ex rel.*, James W. STOUT.

(.....Ind.....)

1. **The compensation of officers, whether of state, county, or township, is a matter which may be embraced in a single statute.**
2. **A provision requiring officers to tax and collect fees for the creation of a fund out of which their salaries shall be paid is within the scope of the title of act entitled "an act fixing the compensation and prescribing the duties of officers."**
3. **The constitutional provision that "justice shall be administered freely and without purchase" is not violated by a statute authorizing officers to tax and collect reasonable fees for services, to create a fund out of which their salaries are to be paid.**
4. **A statute applying alike to all officers elected, after it takes effect, is not local or special because officers previously elected are exempt from its provisions.**
5. **The invalidity of a statute as to fees of officers on the ground that it is local and special as far as it applies to other officers does not make it invalid as to sheriffs, if the provisions as to the latter are complete within themselves and capable of being executed independently of provisions relating to other officers.**

(McCabe, J., dissents.)

(January 25, 1894.)

APPPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of relator in a proceeding brought to compel defendant to draw a warrant on the state treasurer in favor of relator in satisfaction of a claim alleged to be due to relator as sheriff of Vigo County for delivery of convicts at the southern state prison. *Reversed.*

The facts are stated in the opinions.

Messrs. Blackledge & Thornton, with *Mr. Alonso G. Smith, Atty. Gen.*, for appellant:

Section 12 of the Bill of Rights has no refer-

ence to the payment of court fees, but refers to the exacting by judges and court officers of gratuities to secure the administration of justice or the withholding of it.

Wallace v. Marion County Comrs. 87 Ind. 883; *Fulk v. Monroe County Comrs.* 46 Ind. 150; *Harrison v. Willis*, 7 Heisk. 35, 19 Am. Rep. 604; *State v. Howran*, 8 Heisk. 824; *Adae v. Zangs*, 41 Iowa, 586; *Steele v. Central Railroad of Iowa*, 43 Iowa, 109; *State v. Verwayne*, 44 Iowa, 1621; *State v. Lancaster County Comrs.* 4 Neb. 587, 19 Am. Rep. 641; *Perce v. Ballett*, 18 R. I. 363; *Lee County v. Abrahams*, 34 Ark. 166; *Murphy v. State*, 38 Ark. 514; *State v. Nutt*, 79 N. C. 263; *State v. Common Pleas Ct. Judges*, 31 Ohio St. 11; *State v. Fogus*, 19 Nev. 247; *State v. Ream*, 16 Neb. 681.

The subject of the act is compensation of officers and the provisions prescribing and providing for fees are simply matters properly connected therewith.

Warren v. Britton, 84 Ind. 14; *Bitters v. Fulton County Comrs.* 81 Ind. 125.

A statute exacting fees for services rendered by officers for the purpose of compensating such officers is not a statute for the raising of revenue.

Hingle v. State, 24 Ind. 28; *Bitters v. Fulton County Comrs. supra*; *Benson v. Christian*, 129 Ind. 585.

A section in the Liquor Law of 1878 conferring jurisdiction to determine violations thereof on the circuit and common pleas courts was held valid.

Farrell v. State, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Hingle v. State, supra*.

So a section in the charter of the bank of the state of Indiana, providing that the capital stock of the bank and its branches should not be taxed for municipal purposes.

Bank of State of Indiana v. New Albany, 11 Ind. 189. See also *State v. Sullivan*, 74 Ind. 121; *Indianapolis v. Huegele*, 115 Ind. 581; *Reed v. State*, 12 Ind. 641; *Brandon v. State*, 16 Ind. 197; *Kuhns v. Kramm*, 20 Ind. 490; *Hunter v. Burnsville Turnp. Co.* 56 Ind. 213; *Walker v. Dunham*, 17 Ind. 483; *McCasin v.*

NOTE.—Significant of the condition of affairs in respect to the administration of justice in the United States is the language of the court in the present case concerning the constitutional provision that justice shall be administered freely and without purchase, that "it may well be doubted as to whether a case has ever arisen in this country 34 L. R. A.

to which the clause of the constitution under immediate consideration was applicable." In respect to the attempted application of the clause in the present case the opinion of the court seems very fully to present the authorities which have any bearing upon it.

State, 44 Ind. 151; *Madison & I. R. Co. v. Whittenack*, 8 Ind. 217; *Robinson v. Skipworth*, 23 Ind. 811; *Gillespie v. State*, 9 Ind. 380; *State v. Montgomery County Comrs.* 26 Ind. 522.

There is but one subject, and that subject is covered by the title.

State v. Admson, 14 Ind. 296; *Bright v. McCullough*, 27 Ind. 223.

A law is not local or special that only affects officers of a particular class.

Groesch v. State, 42 Ind. 547; *Gilson v. Rush County Comrs.* 11 L. R. A. 885, 128 Ind. 65; *Hanlon v. Floyd County Comrs.* 53 Ind. 123; *State v. Reitz*, 62 Ind. 159; *McLaughlin v. Citizens Bldg. L. & Sav. Assn.* 62 Ind. 264.

A law, to be of "uniform operation," as used in the constitution, does not involve identity of time, so as to make it necessary to take effect at the same time upon all subjects to be governed by it.

People v. Henshaw, 76 Cal. 436; *Cody v. Murphey*, 89 Cal. 522.

The Act of 1891 did not repeal the Fee and Salary Law of 1879, except so far as the two laws are in conflict.

Payne v. Conner, 8 Bibb, 180; *Williams v. State*, 86 Ind. 400; *State v. Reynolds*, 108 Ind. 358; *Zonker v. Cowan*, 84 Ind. 398; *Lewis v. Stout*, 22 Wis. 236; *Smith v. People*, 47 N. Y. 338; *King v. Rogers*, 10 East, 572; *State v. Baldwin*, 45 Conn. 134; *State v. Cunningham*, 72 N. C. 477; *Warren v. Britton*, 84 Ind. 14; *Campbell v. Dwiggins*, 83 Ind. 480; *Hays v. Tippy*, 91 Ind. 102; *Maxwell v. Fulton County Comrs.* 119 Ind. 28.

The Fee and Salary Act of 1891 is complete so far as it applies to clerks and sheriffs.

It is within the power of the Legislature to put counties into classes and to legislate for a particular class, to the exclusion of the remaining classes.

Cody v. Murphey, and *People v. Henshaw*, *supra*; *Knickerbocker v. People*, 102 Ill. 218; *Hanlon v. Floyd County Comrs.*, *supra*.

The Act of 1891 is not necessarily local or special because of the omission of three Shelby county officers.

People v. Newburgh & S. Pl. Road Co. 86 N. Y. 1; *Lankford v. Somerset County Comrs.* 11 L. R. A. 491, 73 Md. 105; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *State v. Shearer*, 46 Ohio St. 275; *McGill v. State*, 34 Ohio St. 228; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Dorman v. State*, 84 Ala. 216; *Hughes v. Felton*, 11 Colo. 489.

When there is doubt of the validity of a statute the courts will uphold it.

State v. Insurance Co. of North America, 115 Ind. 284; *Brown v. Buzan*, 24 Ind. 194; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 618; *State v. Denny*, 4 L. R. A. 79, 118 Ind. 382.

Messrs. Ayres & Jones, with *Messrs. Byron K. Elliott and William F. Elliott*, for appellee:

No special law upon the subject of fees and salaries can be valid.

As the Act of 1891, entitled, "an act fixing the compensation and prescribing the duties of certain state and county officers, and providing penalties for the violation of its provisions," is special, it is void.

24 L. R. A.

The omission of one county is as fatal to the act as the omission of many.

Lodi Trop. v. State, 6 L. R. A. 56, 51 N. J. L. 402; *Davis v. Clark*, 106 Pa. 384; *Morrison v. Bachert*, 112 Pa. 322; *Edmunds v. Herbrandson*, 14 L. R. A. 725, 2 N. Dak. 270; *State v. Hudson County, Chosen Freeholders*, 50 N. J. L. 82; *State v. Camden*, 50 N. J. L. 87; *Manning v. Klippel*, 9 Or. 367; *Miller v. Kister*, 68 Cal. 142.

The attempt to cure the omission by the "errata" is futile.

O'lie v. Kirkpatrick, 2 Idaho. 976; *Evans v. Broune*, 30 Ind. 514, 95 Am. Dec. 710; *Hender v. State*, 53 Ind. 254; *Madison County Comrs. v. Burford*, 93 Ind. 333; *Stout v. Grant County Comrs.* 107 Ind. 843; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294; *Sutherland, Stat. Constr.* 39, *note*.

Where an act is void it does not repeal former laws, but leaves them in force.

Messmeier v. State, 11 Ind. 432; *Cooley, Const. Lim.* 5th ed. 218.

Where the provisions of an act are not clearly independent and distinct, and part is void, the entire act must fail.

Allen v. Louisiana, 103 U. S. 80, 83, 26 L. ed. 818, 319; *Warren v. Charlestown*, 2 Gray, 84; *Griffin v. State*, 119 Ind. 520; *People v. Porter*, 90 N. Y. 68.

The Act of 1891 assumes to construct a general scheme, and the provisions are so interlocked that severance is impossible.

Where a classification by counties is attempted, it must be a complete classification. *Edmunds v. Herbrandson*, *supra*.

All officers are entitled to compensation in a constitutional mode, although this compensation may be graded according to population, so that any one of them has a right to demand compensation under the valid law.

Cooley, Const. Lim. 6th ed. 222.

The Act of 1891 operates as official terms expire, if operative at all, and uniformity of operation is impossible.

To be valid a law must be general in its scope and uniform in its operation. Uniformity of operation is as essential as generality of expression. The practical operation of a statute and not its form determines its generality and uniformity.

State v. Pugh, 43 Ohio St. 98; *Edmunds v. Herbrandson*, *supra*; *Mitchell v. McCorkle*, 69 Ind. 184; *King v. State*, 3 L. R. A. 210, 37 Tenn. 364.

The act assumes to make one rule for some counties and other rules for other counties.

The salaries are not uniform, nor can they be, inasmuch as they depend entirely upon uncertain contingencies.

The salaries depend entirely upon the fees collected and not upon the population. Special funds, special and local to each county, are provided out of which salaries shall be paid. No fees, no fund; no fund, no salary. It is not possible for uniformity or generality to exist; there is nothing but diversity, all is special, nothing general.

Fulk v. Monroe County Comrs. 46 Ind. 150.

There must be one rule for all counties, and an act which can not operate uniformly in all counties, and upon all officers of a class is void.

State v. Herrmann, 75 Mo. 340; *Nichols v. Walter*, 87 Minn. 270.

No matter what the language of an act may be, its practical operation must be general and uniform throughout the entire state or it is void.

State v. Wood, 49 N. J. L. 88; *Coutieri v. New Brunswick*, 44 N. J. L. 58; *State v. Hammer*, 42 N. J. L. 495; *Council Grove Corporate Powers*, 20 Kan. 619; *State v. Mitchell*, 31 Ohio St. 592; *Com. v. Patton*, 88 Pa. 258; *Topeka v. Gillett*, 82 Kan. 481; *Devine v. Cook County Comrs.* 84 Ill. 590; *State v. Herrmann, supra*; *State v. Common Pleas Ct. Judges* 21 Ohio St. 11; *Ex parte Westerfield*, 55 Cal. 560, 86 Am. Rep. 47; *State v. Bjordan*, 24 Wis. 484; *State v. Boyd*, 19 Nev. 43.

The suspension of an act until manifold and uncertain contingencies happen renders generality and uniformity impossible.

Freeman, in a note to *State v. Ellet*, 47 Ohio St. 80, 21 Am. St. Rep. 772; *People v. Cooper*, 83 Ill. 585.

The Act of 1879 is in force in all its parts, or else the Act of 1891 is practically in force; if so, there is no uniformity, because one act is in force in some localities as to some counties, and as to some persons, while as to some other localities, some other persons, and some other counties, another law is in force.

Travelers Ins. Co. v. Onwego Twp. 55 Fed. Rep. 361.

The legislature has assumed to put the act in force in a mode unknown to the constitution and it is therefore without force.

The constitution provides two modes, and two only, in which statutes can be put into force. These modes are by the declaration of an emergency and by publication.

Const. art. 4, § 28.

The rule that the express mention of one thing implies the exclusion of all others applies with greater force to written constitutions than any other instrument.

Page v. Allen, 56 Pa. 388, 98 Am. Dec. 272; *State v. Hyde*, 121 Ind. 21; *Evansville v. Blend*, 4 L. R. A. 98, 118 Ind. 442.

The Act of 1891 is in conflict with the amendment of 1881.

The Act of 1891 lays a tax on justice, and in so doing violates the constitutional provision which requires that justice shall be "freely" administered.

Wallace v. Marion County Comrs. 37 Ind. 383; *Fulk v. Monroe County Comrs.* 46 Ind. 150.

The cases which hold that under an appropriate general title details may be prescribed, do not authorize the conclusion that independent subjects may be grouped in one act.

Greencastle Twp. v. Black, 5 Ind. 566.

A matter must be legitimately connected with the principal subject, and must be part of the particulars or details of that subject, otherwise it must be embraced in a separate act.

State v. Bowers, 14 Ind. 195.

The Act of 1891 is void because of the inefficiency of its title.

Henderson v. London & L. Ins. Co. (Ind.) 20 L. R. A. 874; *Madison County Comrs. v. Baker*, 80 Ind. 874; *Igos v. State*, 14 Ind. 239; *Grubbs v. State*, 24 Ind. 295; *State v. Young*, 47 Ind. 150; *Gillespie v. State*, 9 Ind. 380; *State v.* 24 L. R. A.

Bowers, supra; *Spaugh v. Huffer*, 14 Ind. 306; *Mewherter v. Price*, 11 Ind. 199; *Greencastle Twp. v. Black, supra*; *State v. Wilson*, 7 Ind. 516; *Blakemore v. Dolan*, 50 Ind. 194; *People v. Hall*, 8 Colo. 429; *People v. Fleming*, 7 Colo. 280. Stronger cases are those of *Doless v. Pierce*, 124 Ill. 140; *Middleport v. Altna L. Ins. Co.* 83 Ill. 562; *Lockport Trustees v. Gaylord*, 61 Ill. 276; *State v. Waubesa County Comrs.* 45 Kan. 731; *Com. v. Mercer*, 9 Pa. Co. Ct. Rep. 461; *Com. v. Greer*, 9 Pa. Co. Ct. Rep. 444; *People v. Mahaney*, 18 Mich. 481; *Davies v. Saginaw County Suprs.* 89 Mich. 295; *State v. Smith*, 47 N. J. L. 200; *Glenn v. Lynn*, 89 Ala. 608; *Wiegel v. Hastings*, 29 Neb. 379; *Montgomery v. State*, 88 Ala. 141; *People v. Beadle*, 60 Mich. 23; *State v. Palmes*, 23 Fla. 620; *Re Breane*, 14 Colo. 401; *O'Callaghan v. Chipman*, 59 Mich. 610; *Fargo v. Auditor General*, 57 Mich. 598; *People v. Congdon*, 77 Mich. 851; *Henrico County Suprs. v. Magruder*, 84 Va. 828; *Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co.* 86 Va. 1; *State v. Murray*, 41 Minn. 123.

Where the subjects of an act cannot be segregated, the whole act must fail if the title is insufficient.

People v. Parks, 58 Cal. 658; *Walker v. State*, 49 Ala. 329; *State v. Silver*, 9 Nev. 227; *St. Louis v. Tiefel*, 42 Mo. 590.

There is no mention of judicial officers in the title.

Judicial officers are neither state nor county officers, so that there is not only a distinct and independent subject, but there is also a defective title.

State v. Tucker, 46 Ind. 855.

There is no mention of fees.

Fees are charges allowed officers, and are taxable as costs against litigants and against others for services rendered them by officers.

Apperson v. Mutual Ben. L. Co. 33 N. J. L. 390; *Camp v. Bates*, 13 Conn. 1.

They are not charges due the state or any of its governmental subdivisions. The subject of "fees" is, therefore, a distinct subject.

The words "fees" and "compensation" are not synonymous.

Jefferson County Suprs. v. Johnson, 64 Ill. 149.

Messrs. Lamb & Beasley also for appellee.

Coffey, J., delivered the opinion of the court:

On the 25th day of April, 1898, the appellee filed a petition in the Marion circuit court, the purpose of which was to compel the appellant, as state auditor, to draw a warrant on the state treasurer in favor of the relator, as sheriff of Vigo county, as compensation for the delivery of convicts at the Southern State Prison. It is alleged in the petition, among other things, that the relator is the sheriff of Vigo county, having been elected to that office at the November election in the year 1892; that in the year 1892, and in the year 1893, as such sheriff, he conveyed from Vigo county to the state prison south, and delivered to the warden a given number of convicts, convicted and sentenced in the Vigo circuit court; that he was entitled to receive as mileage for the performance of

such duty the sum of fifteen cents for each mile traveled, going and returning, for each convict conveyed to the prison, except when more than one was taken at the same time, to be paid out of the general funds in the state treasury; that there is in the general fund in the treasurer's office far more than sufficient to pay the relator's claim; that on the 21st day of April, 1893, the relator demanded of the appellant, who then was and still is the auditor of state of the state of Indiana, that he draw a warrant on the treasurer of state for the sum due him, to which demand the appellant refused to accede, putting such refusal upon the sole ground that the relator was not entitled to any warrant whatsoever, because the act of the general assembly of the state entitled, "an act fixing the compensation and prescribing the duties of certain state and county officers, and providing penalties for the violation of its provisions," passed notwithstanding the objections of the governor thereto, March 9, 1891, does not allow the sheriff of the state to receive mileage for such services; that the claim of the appellant that the Act of March 9, 1891, precludes the relator from receiving the mileage claimed by him, is wholly and totally unfounded in this, that the act is in conflict with the provisions of the constitution of the state, and is utterly void.

To this petition, and to the alternative writ of mandamus issued thereon, the circuit court overruled a demurrer, and the appellant failing and refusing to answer further, a peremptory writ was ordered, from which action and judgment of the court this appeal is prosecuted. The assignment of error calls in question the propriety of this ruling.

On the 9th day of March, 1891, the general assembly of the state, notwithstanding the governor's objections thereto, passed an act entitled: "An act fixing the compensation and prescribing the duties of certain state and county officers and providing penalties for the violation of its provisions."

The act purports to fix the compensation of the governor of the state, lieutenant-governor, secretary of state, auditor of state, treasurer of state, attorney-general, state librarian, clerk of the supreme court, and his deputies and assistants, including his stenographer and type-writer, superintendent of public instructions, director of the department of geology and natural resources, inspector of mines, assistant inspector of mines, chief of bureau of statistics, inspector of mineral oils, secretary of the state board of health, judges of the supreme court, law librarian of the supreme court, sheriff of the supreme court, judges of the circuit courts of the state, judges of the superior courts, judges of the criminal courts, prosecuting attorneys, county auditors, county treasurers, county recorders, clerks of the circuit courts and sheriffs of the several counties of the state.

It requires certain state officers to tax the fees therein fixed, and pay the same into the state treasury. It also requires the clerks of the circuit courts and sheriffs of the several counties to tax the fees therein specified

against litigants in court, and pay the same into the county treasury.

The twenty-first section of the act is as follows: "The county officers in this act named shall be entitled to receive for their services the compensation specified in this act, which compensation is graded in proportion to the population and the necessary services required in each of said several counties, subject to the conditions herein prescribed and they shall receive no other compensation whatever."

Section one hundred and twenty-three provides that the sheriffs of the several counties of the state shall, on behalf of their respective counties, tax and charge the fees provided by law on account of services performed by such officers; the fees and amounts so charged shall be designated "sheriff's costs," but they shall in no sense belong to or be the property of the sheriff, but shall belong to and be the property of the county. This section further provides that, in addition to his salary, the sheriff shall be allowed his actual traveling expenses for taking each convict to the state prison, to be paid out of the state treasury upon the certificate of the warden of the prison, accompanied by an itemized statement of such expenses, verified by the affidavit of the sheriff.

The act undertakes to compensate county clerks, sheriffs, auditors, treasurers and recorders by a fixed salary, payable quarterly out of the county treasury, from funds to be known respectively as "clerk's fund," "auditor's fund," "treasurer's fund," "sheriff's fund," and "recorder's fund." The clerks, sheriffs, and recorders cannot draw from the treasury, on account of salaries, a sum in excess of the fees taxed, collected and paid in by each of them prior to the payment of their respective salaries.

Section one hundred and thirty-six of the Act is as follows: "Where any clerk, auditor, recorder, treasurer or sheriff has been elected by the people of his county before the taking effect of this act, such officer so elected, during the time that he holds such term, shall not be subject to the provisions of this act. He shall hold such term of office and perform the duties thereof, and receive the compensation prescribed by law, the same as if this act had not been passed."

The pleadings, including the assignment of error in this case, are in such form as to present for our consideration and decision the question as to whether this enactment is a valid law under the constitution of the state.

In passing upon and deciding the numerous intricate and important questions presented in this case by the learned counsel who have so ably briefed and argued them, it is important that we should constantly keep in mind the oft repeated declaration and rule that the power to declare a statute unconstitutional is a high one, and will never be exercised in doubtful cases. To doubt the constitutionality of a law is to resolve in favor of its validity. An act of the legislature is not to be declared unconstitutional unless it is clearly, palpably, and plainly in conflict

with the constitution. It is well to keep in mind also the well-known rules that courts will pass upon such constitutional questions only as are necessary to a decision of the cause upon its merits. *Brown v. Buzan*, 24 Ind. 194; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613; *State v. Insurance Co. of North America*, 115 Ind. 264; *State v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *Parker v. State*, 183 Ind. 178, 18 L. R. A. 567, 579.

Against the validity of the law it is contended by the appellee:

First. That it violates section 19, article 4, of the State Constitution, which declares that, "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."

Second. That it violates section 12, article 1, of the Constitution, which requires that, "justice shall be administered freely and without purchase, completely and without denial, speedily and without delay."

Third. That it violates section 22, article 4, of the Constitution of the state, which provides that the general assembly shall not pass any local or special laws, "in relation to fees and salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required."

Fourth. That it violates section 23, article 4, of the Constitution, which provides that: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."

The constitutional provision set out in the first objection to the law under immediate consideration has often been before this court for construction and application. It has been repeatedly declared that the purpose of this provision is: first, to prevent the passage of an act under a false and delusive title, which did not indicate the subject-matter contained in the act, whereby legislators might be deceived into the support of measures in ignorance of their true character, and, second, to prevent the combining together in one act of two or more subjects having no relation to each other, whereby members, in order to procure such legislation as they wished, were often constrained to assist in passing other measures obnoxious to them. *Hingle v. State*, 24 Ind. 28.

It has been truthfully said that this provision has been the source of much perplexity, both in the legislature and in the courts. The proper construction of its provisions was announced, we think, in the case of *Bright v. McCullough*, 27 Ind. 223, where it was said by this court: "The constitution does not assume to divide the general scope of legislation and classify the parts under particular heads or subjects; but, of necessity, has left that power to be exercised by the legislature, as it in its wisdom and discretion shall deem proper. The Constitution assumes that different subjects of legislation do exist, and requires that each act shall embrace but one subject, and matters properly connected

therewith, which subject shall be expressed in the title. The purposes of the provision, in view of the evils intended to be guarded against, can only be affected by requiring that the subject expressed should be reasonably specific, or, in other words, should be such as to indicate some particular branch of legislation, as a head under which the particular provisions of the act might reasonably be looked for. . . . But it should be borne in mind that the Constitution only requires that a proper subject of legislation should be expressed in the title, and not the particular features or details of the law. If these relate to the subject expressed, it satisfies the constitutional provision. The words, 'An Act concerning highways,' would express but a single subject, and yet would constitute a comprehensive title, under which almost any desired provision relating to highways might be enacted."

It has been often decided that the title of an act need not go into details, and that it is sufficient if it indicates with reasonable precision and clearness the subject it embraces. Nor is an act invalid because it includes details not mentioned in the title, if the details are germane to the general subject designated in the title. If the subject is properly designated in the title to an act of the general assembly, any legislation properly connected with the subject may be enacted, though there be no mention in the title of such details. In other words, it is always necessary to designate in the title of an act the subject of legislation, but it is never necessary to mention the matters properly connected with the subject. *Warren v. Britton*, 84 Ind. 14; *Bitters v. Fulton County Comrs.* 81 Ind. 125; *Benson v. Christian*, 129 Ind. 535; *Farrell v. State*, 45 Ind. 371; *Thomasson v. State*, 15 Ind. 449; *Reams v. State*, 23 Ind. 111; *Hingle v. State*, *supra*; *State v. Sullivan*, 74 Ind. 121.

It is contended by the appellee that this act embraces a multiplicity of subjects, and that it is for that reason void. It is contended that it embraces the following subjects, namely: (1) county officers; (2) state officers; (3) judicial officers; (4) the duties of officers; (5) compensation of officers; (6) public revenues; (7) fees; (8) salaries, and that each of these are separate and distinct subjects, wholly disconnected.

We are unable to agree with the appellee in this contention. Some of the matters mentioned as subjects are matters properly connected with the subject designated in the title, while others are simply divisions of that subject. The subject of legislation as designated in the title of this act is the compensation of certain state and county officers. It is no uncommon thing in legislation to prescribe the duties of public officers in the same act which fixes their compensation. Nor is it uncommon in this state to fix in one general law the compensation of public officers belonging to different classes. Such was the Fee and Salary Law of 1879 (Acts 1879, p. 130), which fixed the fees and salaries of the state officers and the fees of county and township officers. Of like character was the

Act of 1852, Rev. Stat. 1852, p. 493. To the same effect was the Fee and Salary Law of 1859, Act 1859, p. 174.

The same practice was followed by the general assembly in enacting the Fee and Salary Law of 1865, Acts of 1865, p. 128. The same course was pursued in 1875, Acts of 1875, p. 81. Nor are we able to perceive any valid objection to such a course. The title of the act in such cases is sufficiently comprehensive and specific to call every legislator's attention to the subject under consideration. The compensation of the state's public servants, for services rendered, whether such services be rendered for the people of the state at large, or for the people of a single county or township, embraces, we think, but a single general subject, which may be embraced in a single act of the general assembly. To hold otherwise is to affirm that the public officers of the state have been compensated for their services under void legislation since 1852. We cannot give our assent to such a contention. We are unable to perceive any reason which could be urged against such an act, which would not apply also to a single act fixing the fees and salaries of the state officers, because the state is divided into three separate and distinct departments.

We think that a provision requiring officers to tax and collect fees for the purpose of creating a fund with which they may be paid is properly connected with the subject of compensating such officers for their public services, as well as a provision fixing the fees to be taxed and collected. *Bitters v. Fulton County Comrs. supra*; *Walker v. Dunham*, 17 Ind. 489; *Bank of State of Indiana v. New Albany*, 11 Ind. 189; *State v. Sullivan, supra*; *Indianapolis v. Huegels*, 115 Ind. 581; *Reed v. State*, 12 Ind. 641; *Brandon v. State*, 16 Ind. 197; *Robinson v. Skipworth*, 28 Ind. 311; *Hunter v. Burnsville Turnp. Co.* 56 Ind. 218; *Gillespie v. State*, 9 Ind. 380; *State v. Montgomery County Comrs.* 26 Ind. 522.

Section 12, article 1, of the Constitution has been before this court for construction on two separate occasions. *Wallace v. Marion County Comrs.* 37 Ind. 896; *Fulk v. Monroe County Comrs.* 46 Ind. 150.

In the first case, the judges of this court were equally divided upon the question of the constitutionality of a law requiring fees for services performed by a county officer to be paid into the county treasury. In that case Judge Downey wrote an opinion holding that such a law was valid, while Judge Warden wrote an opinion holding the opposite view. In the latter case of *Fulk v. Monroe County Comrs. supra*, a majority of the court adopted the opinion of Warden. Neither of these opinions is elaborately reasoned, nor does either of the learned judges cite a single authority in support of his opinion. The case of *Fulk v. Monroe County Comrs.*, we believe stands almost entirely, if not quite alone, and is out of line with all the authorities upon the subject of which it treats. The validity of provisions similar to those found in this statute upon the subject of paying fees into the county treasury, 24 L. R. A.

has been affirmed by the supreme courts of Tennessee, Iowa, Nebraska, Rhode Island, Arkansas, North Carolina, and Nevada. *Harrison v. Willis*, 7 Heisk. 135, 19 Am. Rep. 604; *State v. Howran*, 8 Heisk. 824; *Adae v. Zangs*, 41 Iowa, 536; *Steele v. Central Railroad Co. of Iowa*, 48 Iowa, 109; *State v. Verwayne*, 44 Iowa, 621; *State v. Lancaster County Comrs.* 4 Neb. 537, 19 Am. Rep. 641; *Perce v. Hallett*, 13 R. I. 363; *Lee County v. Abrahams*, 34 Ark. 166; *Murphy v. State*, 38 Ark. 514; *State v. Nutt*, 79 N. C. 263; *State v. Common Pleas Ct. Judges*, 21 Ohio St. 11; *State v. Fogus*, 19 Nev. 247; *State v. Remm*, 16 Neb. 681.

It is plain, we think, that the general assembly never designed by this act to levy a tax for general revenue. Its purpose in requiring fees, to be taxed and collected is to create a fund out of which those who perform official services may be paid the salaries fixed by the law. It is a matter of no concern to a litigant whether the sheriff who serves his writs is paid by him direct, or whether he receives his pay through the medium of the county treasurer, provided the amount paid by him is the same in either case. The sheriff's fees taxed to litigants under this law is less than the fees taxed under the Law of 1879, and yet we have a litigant here, seeking to overthrow this law on the ground that the fees taxed under it are a tax on litigation, in order that he may collect the higher fees for his own use. The claim, we think is unreasonable, and without a shadow of equity to support it.

In the case of *State v. Common Pleas Ct. Judges, supra*, the supreme court of Ohio said: "It is competent for the legislature to provide for compensating all its public officers by salaries. If it should see proper to do so, we know of no provision of the constitution that would forbid exacting from persons requiring, and who are specially benefited by the performance of official services a reasonable compensation therefor, to be paid into the public treasury, to reimburse the public for the expense incurred in providing and maintaining such offices. It is not essential to such exactions that they should enure to the personal benefit of the officer. The officers are but the agents of the state for transacting the public business, and it is, in its nature, a matter wholly immaterial to those requiring their services whether the amount to be paid therefor goes to the officer or into the public treasury, provided no more is exacted than is just and reasonable for the facilities afforded and the services performed. If the exactions are called taxes, they become none the less such, as to those on whom they are imposed, by being paid to the officer than if paid into the public treasury."

This argument would seem to be unanswerable. Indeed, it may well be doubted as to whether a case has ever arisen, in this country, to which the clause of the constitution under immediate consideration was applicable. It is first found, in substance, in Magna Charta, and was intended as a death blow to the corrupt and disgraceful

practices of a corrupt judiciary in demanding oppressive gratuities for giving or withholding decisions in pending causes.

We are clearly of the opinion that the provisions of the statute under consideration are not in conflict with clause 12, article 1, of our State Constitution.

In support of the third and fourth objections to the validity of this enactment, it is contended that it is local and special, because it does not include in its provisions persons who were elected to office prior to the time it took effect. It is said that under its provisions, we have a class of officers in one county receiving fees under one law, while the same class of officers in other counties are receiving salaries for the same class of services under another and different law, and that by reason of this fact the statute is local and special in its operation. We are unable to agree with the appellee in this contention. This statute is not different in legal effect from what it would be did it read: "Be it enacted by the general assembly of the state of Indiana, that all state and county officers hereafter elected shall receive the following fees and salaries and no other." In other words, it was intended to, and does apply alike to all officers elected after it took effect. We do not think such a statute is in conflict with any provision of our state constitution. If such a law is invalid, then it would be utterly impossible to make a valid statute reducing the salaries of our judicial officers, for it is expressly provided by the constitution that such salaries shall not be reduced during the term of an incumbent. A statute which is of general and uniform operation throughout the state, and operates alike upon all persons under the same circumstances, is not subject to the imputation of being local and special. *Gilson v. Rush County Comrs.* 128 Ind. 65, 11 L. R. A. 835.

It is further contended by the appellee that this statute is local and special, in that it fails to fix a salary for the auditor, treasurer and recorder of Shelby county. This statute does fix a salary for the clerk and sheriff of every county in the state, including Shelby county, and whether this appellee can be heard to complain that the general assembly failed to fix a salary for the auditor, treasurer and recorder of that county depends upon the preliminary question as to whether the provisions of the statute are so interlocked and so dependent upon each other that the act must stand or fall as a whole, for we will not permit him to litigate a matter in which he has no interest. A party cannot be permitted to harass others and take the time of the courts in litigating matters in which he has no interests, and for this reason, if the provisions of the act under immediate consideration are of such a character as that it can stand as to the appellee, while it might fall as to the auditors, treasurers and recorders, we will not stop to inquire whether it is or is not valid as to the latter.

The principle that a statute may be constitutional and valid in part, and unconstitutional and invalid in part is elementary. The rule is that where a part of a statute is unconstitutional, if such part is so connected

with the other parts as that they mutually depend upon each other as conditions, considerations or compensations for each other, so as to warrant the belief that the legislature intended them as a whole, and if they could not be carried into effect, the legislature would not have passed the residue independently of that which is void, the whole act is void. On the other hand, where a part of a statute is unconstitutional, if by striking from the act all that part which is void, that which remains is complete in itself, sensible, capable of being executed wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the legislature would have passed it independent of that which is in conflict with the constitution, then the courts will reject that which is void, and enforce the remainder. *Griffin v. State*, 119 Ind. 520; *State v. Blend*, 121 Ind. 514; *State v. Gorby*, 122 Ind. 17; *State v. Friedley* (Ind.) 21 L. R. A. 634.

The argument of the appellee is that this statute embraces but one entire scheme, and for this reason, if any portion of the law is unconstitutional, the scheme fails and the entire act must fall.

We cannot bring our minds to the conviction that the attorney-general of the state, for the purpose of obtaining the larger salary given by former statutes, could defeat this law because it was defective as to the type-writer in the clerk's office of the supreme court. Nor do we think the clerk of the supreme court, for the purpose of retaining the fees taxed in his office, could defeat it because it was defective as to circuit judges. Nor do we think the governor of the state could defeat it because it was defective as to some county officer. There is as little connection between the duty of a county sheriff, as such, and the duty of a county recorder, as there is between the duty of the attorney-general and the type-writer in the clerk's office, and his duties are as distinct from those of the county treasurer as the duties of the clerk of the supreme court are from that of a circuit judge. In fact there is no connection whatever, so far as his official duties are concerned, between a county sheriff and a county auditor, treasurer or recorder. This statute as to county sheriffs is complete within itself, and capable of being executed independent of its provisions relating to county auditors, treasurers, and recorders.

In arriving at a conclusion as to whether the legislature would probably have passed the act independent of the provisions relating to auditors, treasurers and recorders, it is not unimportant to consider the evils which the law was intended to remedy. It is a matter of common notoriety, of which the courts take notice, that for many years prior to this enactment, there was a bitter complaint against the practice of taxing what is known as constructive fees. Penal statutes had been passed, as well as statutes inflicting forfeitures, but it was found, on actual experience, that they did not eradicate the evil. The sum illegally demanded and collected in the way of constructive fees was

large in the aggregate, but the amount taxed against each individual litigant was so small that it was cheaper to pay than to contest it. This complaint was wholly directed against the clerks and sheriffs of the state, and had no connection whatever with the office of auditor, treasurer, or recorder. It was the purpose of the legislature in enacting this statute to strike an effective blow at the practice of taxing illegal and constructive fees by placing the officers who had previously taxed them upon a salary, depriving them of all fees and thus removing the temptation to wrong-doing in that direction. In view of the evil to be cured and the manifest purpose of the general assembly, we think it not at all improbable that it would have passed this statute independent of its provisions relating to auditors, treasurers, and recorders. Having reached this conclusion, the rule that we will not decide a constitutional question when not necessary to a decision of the cause upon its merits, applies, and we will not, therefore inquire as to whether the statute is or is not valid as to county auditors, treasurers, and recorders.

The title of the act is broad enough to include county sheriffs. The legislature has declared in the act, as we have seen, that the salaries of county officers in the several counties of the state are graded according to the population and the necessary services to be performed. In view of this declaration, we must assume that it had before it all the necessary information to enable it to fix such salaries upon a just and equitable basis, with a view of giving to each officer therein named a reasonable compensation for the services performed. To say that the law in this respect is perfect would perhaps be saying too much, but if there are hardships and inequalities in the law, the remedy is with the legislature, and not with the courts.

We are of the opinion that this statute, so far as it relates to county sheriffs, is not subject to the constitutional objections urged against it, and that it is as to them a valid law.

It follows from this that the circuit court erred in overruling the appellant's demurrer to the complaint in this cause.

Judgment reversed, with directions to the circuit court to sustain the appellant's demurrer to the complaint.

McCabe, J., dissenting:

I heartily concur in the foregoing opinion in so far as it holds the act not unconstitutional because of there being a plurality of subjects of legislation embraced therein. I also concur in the prevailing opinion as to the duty of the courts to resolve doubts as to the constitutionality of a statute in favor of its constitutionality, because of the extraordinary power exerted in overthrowing the deliberate act of a co-ordinate branch of the state government. But in the balance of the opinion I cannot concur. When there is no doubt as to the unconstitutionality of an act, as in my opinion is the case here, then the highest and most sacred duty that ever devolved on a tribunal or court calls loudly on the court to uphold the constitution and

let the statute go down. Statutes, though entitled to implicit obedience when valid, are temporary and can be remodeled every two years. But constitutions are supreme and permanent. They are not so ephemeral as statutes. Our state is now seventy-eight years old, and yet during that whole time we have made but one new constitution. One of the most formidable objections urged against the constitutionality of the act is the provision in section 186, by which it is provided that, "whenever any clerk, auditor, recorder, treasurer or sheriff has been elected by the people of this county before the taking effect of this act, such officer so elected during the time that he holds such term shall not be subject to the provisions of this act. He shall hold such term of office and perform the duties thereof and receive the compensation prescribed by the law, the same as if this act had not passed." Section 20 makes the same provision as to state officers. It is claimed that this makes the act both special and local, in violation of sections 22 and 23, of article 4 of the Constitution. So much of said sections as is applicable reads as follows:

"22. The general assembly shall not pass any local or special law in any of the following enumerated cases, that is to say: then follows seventeen subjects enumerated, among which is the following: "In relation to fees and salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required." The words italicized were added to the section by the amendment to the Constitution March 14, 1881.

"Sec. 23. In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."

It is contended that the act is local, because it only operates in those counties where the several officers named have been elected since the passage of the act, and in those counties where a part only of those officers have been elected since the passage of the act, it only partially operates in such counties. An act may be special that is not local, within the meaning of this provision of the constitution, that is, special as it applies only to a part of certain things, all of which would be included if it were made general, or to a part of the people, all of whom would fall within its purview if it were made general. *Mitchell v. McCorkle*, 69 Ind. 184.

Where a statute applies to and operates only in a certain locality in the state, it may then be said to be both special and local. Local because it is confined in its operation to a certain locality, and special both because it is confined in its operation to that locality, and to the people of that locality. *Sutherland*, Stat. Constr. § 127.

On the seventeen subjects named in section 22, above quoted, before the amendment of March 14, 1881, the enactment of both special and local statutes was forbidden. Section 23 forbids such legislation as to all other subjects, "where a general law can be

made applicable," all of which general laws it required to be of uniform operation throughout the state. It is not even claimed by the learned counsel for the appellant that section 23 has been so changed by the amendment of March 14, 1881, as to authorize the enactment of the special provision exempting from its operation all officers elected prior to the taking effect of the act, but it is contended that the act is not made special by that provision, but that its operation remains general and uniform throughout the state, notwithstanding such provision. Special and local laws upon the subject of fees and salaries are still forbidden under this provision of the constitution, with the one exception, namely, that the laws "may be so made as to grade the compensation of officers in proportion to the population and the necessary services required."

The provision that all officers elected before the taking effect of the act shall not be subject to its provisions, has nothing whatever to do with "grading the compensation of officers in proportion to population and necessary services required." Nor are these provisions either in aid of, incident to, or necessary for the accomplishment of such gradation. It could have been accomplished as well, and even better without such a provision. Had the act been made local and even special, necessarily in accomplishing the constitutional permit "to grade compensation of officers in proportion to population and necessary services required," a very different question would have been presented. The question then is, Does this provision make the whole act special and not of uniform operation throughout the state within the meaning of the two sections of the constitution referred to? It may be readily conceded that the legislature in passing a new law to take the place of an old one, often has and may provide for special cases falling close to the line where the old law goes out and the new comes into force, to the effect, that such cases are to be governed by the old law, even after the new law takes effect. The power to so legislate arises out of necessity, because without such power some cases would have no law to govern them. This court has held that "the legislative authority of this state is the right to exercise supreme and sovereign power subject to no restrictions except those imposed by our own constitution, by the Federal Constitution, and by the laws and treaties made under it." *Beauchamp v. State*, 6 Blackf. 299; *McComas v. Krug*, 31 Ind. 330, 42 Am. Rep. 135; *Campbell v. Dwiggins*, 33 Ind. 473; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768.

This broad and sweeping power to legislate by necessary implication carries with it the power to legislate so as to provide for every conceivable case, and so that no case will be without a law to govern it. But there was no such necessity in this act. It would have been so framed that all officers would have been subject to its provisions whether elected before or after it took effect, and so that all people who are liable to pay costs and fees to such officers under its provisions would

have been alike entitled to its benefits, or, on the other hand, if not beneficial, that all alike would have been subject to its burdens. So that we conclude that in order to conform to the sections of the constitution referred to in respect to the objection under consideration, the act must be general and of uniform operation throughout the state. This leads us to inquire what is a general law? And when is a law of general and uniform operation throughout the state? The attempt to define such a law was made by this court in *Grosch v. State*, 42 Ind. 547, where it is said: "It cannot be held that the framers of the constitution intended that the operation of laws throughout the state should be uniform in any other sense than that their operation should be the same in all parts of the state under the same circumstances and conditions."

And in *Hanlon v. Floyd County Comrs.* 53 Ind. 126, the definition is, that a statute is general when "it operates uniformly and alike in all parts of the state, under like facts." The same definition was repeated and adopted in *State v. Reitz*, 62 Ind. 159, and in *Gilson v. Rush County Comrs.* 128 Ind. 69, 11 L. R. A. 835, a general statute was defined to be one that "operates alike upon all persons under the same circumstances." These cases are confidently relied on by the learned counsel for the appellant as a complete refutation of the charge that the Act of 1891 is special, because they say it operates throughout the state, on all persons, under the same circumstances and under like facts. It must be confessed that the act does operate throughout the state upon all persons under the same circumstances, and under like facts. This leads us to inquire whether or not the foregoing definitions of what it takes to constitute a general statute of uniform operation throughout the state are not too narrow for all cases. They were broad enough, and strictly correct as applied to the cases in which they were used. But it is manifest that there may be cases in which such definitions would be entirely too narrow. For instance, suppose, instead of the provisions that officers elected prior to the taking effect of the act should not be subject to its provisions, it had provided that officers less than five feet high, or officers with blue eyes, officers of a designated political faith or party, or officers of a certain religious denomination, or officers of a certain nativity, should not be subject to its provisions. It is believed that no one would be bold enough to assert that such a law would be general and of uniform operation throughout the state, and that all must admit that it would be special within the meaning of the constitution. And yet if the foregoing definitions are to be accepted as broad enough to cover all cases, such a law must be held to be no infringement of the sections of the constitution referred to. The courts of last resort in other states have encountered the same difficulty that this court has in attempting to define what it takes to constitute a general statute of uniform operation throughout the state. In *State v. Wood*, 49 N. J. L. at p. 88, it is said: "Such a law must embrace all

and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class."

In *People v. Cooper*, 88 Ill. 585, it is said: "A law is not 'general' in any correct sense of the term, but is 'special' where it is suspended in one locality where there exists a proper subject-matter on which to operate, but remains in full force and vigor in another locality of exactly the same kind."

Mr. Freeman, in a note to *State v. Ellet*, 47 Ohio St. 90, 21 Am. St. Rep. 772, states the law thus: "Any legislation which is arbitrary, which deals with particular persons or things of a class, or which confers privileges or burdens on towns or cities while other cities or towns in like situation are excepted from its operation, is special and void."

In *Ex parte Westerfield*, 55 Cal. 552, 36 Am. Rep. 47, it is said: "A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object."

Sutherland on Statutory Construction, § 127, says: "Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances. Local laws are special as to place. When prohibited, they are severally objectionable for not extending to the whole subject to which their provisions would be equally applicable, and thus permitting a diversity of laws relating to the same subject. The object of the prohibition of special or local laws is to prevent this diversity. Each subject as to which such laws are prohibited is by such inhibition designated as a subject of only general legislation, which shall have a uniform operation. Generality in scope and uniformity of operation are both essential. A law which embraces a whole subject would still be special, if not framed to have a uniform operation."

It will be observed from these quotations, that the task of adequately and satisfactorily defining what is meant by the term "general laws of uniform operation throughout the state" is a difficult one. It may be that no general definition can be devised that will suffice in all possible cases, and that each particular case as it may arise in the future may add to the material out of which a satisfactory and sufficient definition may be constructed. This case furnishes the means of adding something to the definition hitherto given by this court, correct enough so far as it went, and as applicable to those cases. A statute cannot be rendered general and of uniform operation throughout the state within the meaning of the constitution by an arbitrary act of the legislature in fixing a certain set of circumstances and facts under which all persons must come or be found, before the statute can operate upon them, if those facts and circumstances are such as to deprive those not coming or found under such circumstances of their equal rights as between man and man, or citizen and citizen. And the same would be true if the facts and circumstances arbitrarily fixed deprived those found or coming under such circumstances, and upon whom alone the law is to operate, of their equal rights possessed by them in

common with those upon whom the law is not to operate. The equal rights of all before the law is a principle inherent in the genius of our government, and the maintenance of that principle is amply secured by the various sections of article 1 of our State Constitution, commonly called the Bill of Rights.

If the Act of 1891 is an improvement of the condition of the officers upon whom it operates, if it is more beneficial than the old law, then there is no principle of right, justice or equality of rights between men that can justify the provision that these officers, both state and county, who were elected before the taking effect of the act, shall not be subject to, and entitled to the benefits of its provisions, while those elected since are entitled to such benefits, and likewise, if its provisions are beneficial to the numerous persons who are to pay costs and fees, there can be no justification on the principle of equality of rights, in depriving them of the benefits of the act which it does, simply because the officers to whom they are to pay such fees and costs happened to be elected before the taking effect of the act, while all those officers who are elected since the taking effect, and all those persons who are to pay to them fees and costs specified in it are to enjoy its benefits and advantages simply because such officers happened to be elected since the taking effect thereof, while the officers elected prior to the taking effect of the act, and those who are to pay them their fees and costs are bearing the burdens heaped upon them by the old law. On the other hand, if the new law is less beneficial and more burdensome to the officers and those who are to pay them the costs and fees provided for, there can be no justification on the principle of equality of rights in compelling them to bear the increased burdens and disadvantages of the new law simply because such officers happen to be elected since the taking effect of the act, while those officers elected prior to the taking effect of the act, and all those who are to pay them the fees and costs, are bearing the lighter burdens and enjoying the superior advantages of the old law. This court must take judicial knowledge of the fact that many of the clerks, auditors and recorders had been elected to four year terms prior to the taking effect of the act, and which terms did not begin until long after it took effect. Thus very many four years terms began and will end after the new law was to take effect, and consequently, if the law is upheld, there will scarcely be a county in the state where one and the same law will prevail regulating fees and costs. In nearly every county, some of the officers and some of the persons who pay costs and fees will be governed by one law, and other officers and those who pay costs and fees to them will be governed by another law. I do not mean to assert that the legislature has no power to pass a local or special law. On the contrary, our cases abundantly establish that on any subject other than the seventeen mentioned in section 22, article 4, of the Constitution, the legislature may pass a special or local law, if a general law cannot be made applicable. But

the act here in question falls within the category of one of the seventeen subjects where a special law is absolutely prohibited, unless it be in the gradation of the compensation of officers in proportion to population and necessary services required. As we have already seen, the provision in question has no reference to or effect upon such gradation.

Appellee's counsel make copious quotations from the case of *People v. Henshaw*, 76 Cal. 436, in support of their contention that the Act of 1891 is not special. The legislature of that state had created a police court for the city of Oakland, with a schedule of fees payable to the city. Afterwards, a general act was passed, providing that the police powers of every city having over thirty and under one hundred thousand inhabitants should be vested in a police court, to be held therein by the city justices to be designated by the mayor. Exclusive jurisdiction was given to these courts over certain offenses. The act then provided as follows: "The act to go into effect upon the expiration of the term of office of the present police judge of said cities, or when a vacancy occurs therein."

It is hardly necessary to say that the case is not very strongly in point because it only applied to one officer in each municipal government, so that perfect uniformity of operation of the law as to everybody and everything within each municipal government was strictly preserved. A citizen or office holder of one of such municipalities has no right to complain because the term of the police judge in another municipality expired before that of the police judge in his own municipality expired, thereby bringing the new law into effect in his neighboring municipality before it did in his own. This would afford him no more ground for complaining that such law was not of general and uniform operation then would the fact that the rate of taxation in his own municipality for municipal and local purposes is much higher than in his neighboring municipality.

Other reasons might be suggested why that case is not in point. But the supreme court of California has decided a case that is exactly in point here. The legislature of that state having passed a fee and salary law, afterwards passed an act making important and extensive amendments thereto. The following provisions were added to the amended law:

"Sec. 3. The salaries herein provided shall not take effect nor be in force until the expiration of terms of the present officers, except as hereinafter provided.

"Sec. 4. The salaries herein provided for the officers of the tenth, thirty-fifth and forty-sixth classes shall take effect and be in force from and after the first day of the first month next succeeding its passage."

The court said: "By these sections, the operation of the law upon the subject of the compensation of officers in the fifty-two counties of the state, except the counties of three classes, is suspended until the expiration of the terms of the then incumbents in office, and is put in force almost immediately upon officers of the three specified classes.

Unquestionably, the legislature has power to suspend the operation of the general laws of the state. 'But when it does so,' says Judge Cooley, in his work on Constitutional Law, page 391, 'the suspension must be general, and cannot be made in individual cases, or for particular localities.' A law speaks from the time it goes into effect. *People v. Johnston*, 6 Cal. 673. In forty-five of the forty-eight classes into which the fifty-two counties of the state have been divided, the Statutes of 1885 do not speak at all. They speak only in counties of three classes. In other words, after classifying the counties of the state and regulating the compensation of the county officers therein, the laws by which the classification and regulation are accomplished are declared inapplicable during the terms of officers of forty-five of the forty-eight classes, and applicable during the terms of office of three classes only; the operation of the law is therefore exceptional and eccentric, and is causative of discrimination between the officers upon whom it is to operate. It in effect declares that the law shall not operate upon the large majority of county officers in the counties of the state, but shall operate upon the officers of three or four counties only. The very few are thereby excluded from the privileges accorded to the many. This the legislature could not do. The constitution requires that all laws of a general nature shall have a uniform operation. Sec. 11, art. 1. Where particular persons are excepted from the operation of a general law, it destroys the uniformity of its operation. *Omnibus R. Co. v. Baktzin*, 57 Cal. 165. So it is said in *French v. Teschemaker*, 24 Cal. 544: "The legislature cannot discriminate or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation, that is to say, it must operate equally upon all persons and upon all things upon which it acts at all."

It will not do to say that the holding of the act in question special, and therefore unconstitutional, for the reasons stated, would result in declaring it constitutionally impossible for the legislature to reduce the salaries of the judges of the supreme and circuit courts. The true and only reason why a legislative act reducing the salaries of the supreme and circuit judges must and can only be made to apply to those elected or appointed after the taking effect of such an act, is that section 18 of article 7 of the Constitution forbids their salaries from being reduced while they are in office. Therefore, an act making such reduction to apply only to such judges as were elected or appointed after the taking effect of such act would not be special within the principles I have laid down, because it would operate upon every one of the class to which it refers, on whom it would be constitutionally possible for it to operate. No such principle applies to county and State officials. I cannot entertain a shadow of a doubt that the act is general in its nature, and that it is made special within the meaning of the constitution by sections 20 and 136. I think it is also in conflict with section 12 of article 1 of the Constitution, Rev. Stat. 1881, § 57. That section requires-

justice to be "administered freely and without purchase." And this leads me to inquire what was the intention of the framers of the amendment of March 14, 1881, to section 22 of article 4 of the Constitution as to the nature and kind of legislation on the subject of fees and salaries and compensation of officers, they and the people had in mind in adopting it. They must have intended to so change that section of the Constitution as to permit such legislation as the section inhibited as it stood before. That section did not forbid legislation before, requiring officers to pay into the county or state treasury fees and costs collected for services rendered by them, and the amendment is utterly silent upon that subject. Therefore, no purpose or intention to authorize legislation requiring such payment into the treasury can be gathered from the section as amended. At the time of the adoption of the amendment, decision of this court had been standing for seven years, and it still stands undisturbed, to the effect that a fee and salary law requiring officers to pay into the public treasury fees and costs collected by them for services rendered, was and is unconstitutional, because a violation of said section 12 of article 1 requiring justice to be administered freely and without purchase. *Fulk v. Monroe County Comrs.* 46 Ind. 180; *Wallace v. Marion County Comrs.* 87 Ind. 888.

If it had been the intention of the framers of the amendment to authorize or permit a fee and salary law, or a law providing compensation for officers, to require them to pay costs and fees collected, for services rendered by them, into the public treasury, they would undoubtedly have framed an amendment to said section 12. Because we must presume that the framers of the amendment know that this Court had long since decided that that section was an insurmountable obstacle in the way of such legislation, and that such a system for the compensation of officers could not be authorized by statute. I am therefore of opinion that it was not within the contemplation or intention of the framers of the amendment of March 14, 1881, to so change the constitution as to permit legislation providing for the compensation of public officers so as to require them to pay into the public treasury costs and fees for services by them collected, and that therefore the Act of 1891, is in that respect in violation of the constitution and void. But it seems to me that the purpose and manifest intention of the framers of the amendment was to so change the section amended as to permit the enactment of a statute upon the subject that the section before forbid; so, as it now stands, no local or special law can be enacted "in relation to fees and salaries; except that the laws may be so made as to grade the compensation of officers in proportion to the population and necessary services required." That is, if it is necessary, in order to so grade the compensation that act may be made both special and local in the accomplishment of that object, and not otherwise. We take judicial notice that one important factor that gave rise to the amendment was the fact that according to the ordinary schedules of fees

and costs which would produce no more in a county of small population than a reasonable compensation for its officers, would in counties of the largest population produce large fortunes to the officer in a single term. Now, it was to obviate this evil that the amendment was adopted. The design was to authorize such legislation as would prevent such officers from drawing from those who unfortunately are liable to pay their costs and fees, a greater amount than will make a reasonable compensation for such service when the whole official service for a year or a term is considered together. This has always been the guide in fixing the rate of fees and costs, namely, what rate will raise a sufficient sum at the end of a given period to adequately compensate the officer for his service and his time. When the constitution was adopted, no large centers of population existed in the state, and the population of each county was sparse compared with what it was at the end of thirty years thereafter, when the amendment of 1881, was adopted. The increase of business has more than kept pace with the increase of population, thereby rendering any fixed schedule of fees for all the counties alike, as was required before the amendment, wholly unjust; that is, if it should be fixed low enough to make only a reasonable compensation for time and service of the officers in the more populous counties, it would not yield enough to compensate the officers in the counties of smaller population. And on the other hand, to fix the schedule high enough to yield a sum sufficient to adequately compensate the officers of counties of smaller population for their time and service, it would yield a sum sufficient in the counties where centers of population existed, to make fortunes in a single term for some of their officers. The necessity for legislative power to regulate the compensation according to population and service was at once seen, and hence the amendment was suggested and adopted. Before the amendment, the rate to be fixed in the schedules must necessarily be the same in every county, because to fix a different rate for different counties would make the act so doing both special and local, in direct contravention of the section before its amendment. Before amendment, it read thus: "22. The general assembly shall pass no local or special law in the following enumerated cases: . . . that is to say: . . . In relation to fees or salaries." Since the amendment, it reads thus: "22. The general assembly shall pass no local or special laws in the following enumerated cases: . . . that is to say: . . . In relation to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and necessary services required." All will agree that it was the manifest purpose and intention of the amendment to so change the section as to permit legislation of a character in relation to fees and salaries that the section before forbid, else there would have been no reason for making the amendment. There can be no gradation of compensation of state officers in proportion to population, and therefore the amendment had reference to

county officers alone. Their compensation can be graded both in proportion to the population and services required. The scheme of the Act of 1891 is to accomplish such gradation by placing all county officers on salaries varying in amount in proportion to population and necessary services required. This is conceded by appellee's counsel. And as a part of that scheme, a schedule of fees and costs is fixed for official services which litigants and persons liable are required to pay, and all of which is to be paid after collection by the officers into the county treasury. Now that part of the Act of 1891 which places county officers on salaries in proportion to population and services required, was not certainly within the purpose of the amendment of the Constitution already referred to, because this court had expressly decided in *Hendon v. Floyd County Comrs.* 53 Ind. 128, that such a gradation of compensation of county officers was not a violation of the section of the constitution in question before its amendment. That case had stood as the declared law unquestioned for fifteen years when the amendment was adopted, and still so stands. The framers of the amendment must be presumed to have known what the law was, as every body is presumed to know what the law is. They knew that no amendment of the constitution was required to authorize the legislature to make such a gradation of compensation to county officers. They therefore must have had in contemplation some other method of gradation than that embodied in the Act of 1891, or that of 1875, held valid in the case above referred to, the gradation in both Acts being alike so far as the question here involved is concerned.

Another reason why the method of gradation and compensation adopted in the Act of 1891 was not designed by the framers of the amendment is found in the fact that such method is a violation of the section as amended. What is it that the section as amended requires to be graded in proportion to population? The section as amended almost answers the question itself. Local or special laws are prohibited by it, "in relation to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and necessary services required." Manifestly, fees are to be graded as well as salaries. Graded how? Why, in proportion to population and necessary services required. What does that mean? It means, as all candid minds must admit, that the amount of the fee to be fixed in the statute for a designated official service, shall bear some relation to the work of the service, and also to the size of the population in the county. It means that both of these matters must be taken into consideration in fixing the size or amount of the fee in the statute for each item of official service. It can mean nothing else, because there is nothing else to which the words can be applied. In a county containing a great center of population, a lower fee ought to be fixed than in a county of small population, and yet the necessarily increased service on account of increased population must not be ignored, and must be taken into consideration

also in fixing the amount of fees. In other words, the intention was to require the fees to be fixed at such amount as would be a fair compensation for the service to be performed, taking into consideration these two elements. But the method adopted in the Act of 1891 is utterly contrary to this intention. The same fees are fixed by it for a county of the largest population, that are fixed for a county of the smallest population. No matter what the service required, no matter what the population, the fees are the same throughout the state, just as was required by the section before its amendment. There is no gradation of fees according to population and necessary services required, and therefore the act violates the manifest purpose and intent of the section as amended. But that is not all. The fees are made the property of the county and a source of public revenue, and enure to the benefit, not of the class who were the sufferers by the old system, but enure to the benefit of the public, who did not suffer under the old system. The evils complained of under the only system allowed before the amendment, and which gave rise to the amendment, were that those who had to pay costs and fees were compelled to pay too much, more than the service was worth, so that a single official term, in some instances, would make a fortune for the officer. In determining what meaning words in a constitutional provision were intended to have, it is proper to consider the circumstances under which the provision was adopted and its purpose. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416. The act, instead of supplying a remedy for the relief of the only sufferers from the evils complained of, which was the manifest design of the amendment, leaves those evils practically untouched so far as those sufferers are concerned, and turns the stream of unearned wealth unjustly taken from them without value received, into the public treasury, as a source of public revenue. Instead of relieving the unfortunate who have the costs and fees to pay, by reducing them down to the actual value of the service, considering population with necessary service, they are placed at such a rate, regardless of service and population as will yield a public revenue beyond the amount necessary to pay the officers' salary. Multitudinous ways have hitherto been devised in governments among men for raising revenue. The incomes of the rich and the luxuries of the wealthy, and those who succeed to property by inheritance or devise, have all been taxed in various ways to raise public revenue, but it has been reserved to the nineteenth century to lay tribute upon men's losses and misfortunes to raise public revenue out of costs of litigation, and that too, under a constitution requiring justice to be administered freely and without purchase. Clearly, the method of regulating fees adopted in the Act of 1891, was not intended and not contemplated in the amendment to the Constitution of March 14, 1881. There is only one other method the framers of that amendment could have contemplated, and that is to classify the counties according to population and necessary services required, and fix a separate and dif-

ferent schedule and rate of fees for each class. Such a method could not have been adopted before the amendment, but is in perfect harmony with it, and accords with all the circumstances leading up to its adoption. But it may be suggested that the method designed in the amendment is only permissive, and not mandatory or compulsory on the legislature; that the old method of fixing a schedule or rate of fees uniform throughout the state is not inhibited by the section as amended. That may be conceded, and yet if the fees are not "graded in proportion to population and necessary services required," then there is nothing in the act to take it out of the operation of the inhibition in the section as amended, against the enactment of a special law in relation to fees and salaries; and we have seen the act is special, and not of general and uniform operation throughout the state. As before remarked, the amended section permits a law in relation to fees and salaries to be both local and special, when that is necessary in order to grade fees and salaries in proportion to population and necessary services, and in no other case. Therefore, as the local and special feature of the act is not in aid of a gradation of fees according to population and service required, the only case in which such special and local features is allowed, and outside of which it is forbidden, the act is clearly in conflict with the constitution in that respect.

I think the act is unconstitutional in another respect. It provides a schedule of fees to be taxed by all county officers in the state and make such fees when taxed the property of the county in which they are taxed. It provides a salary for every county officer in the state, except in Shelby county, where it provides no salary or compensation for the treasurer, auditor or recorder. As we have seen, that makes the act both local and special, and it is not done in aid of, or as incident to a gradation of fees nor salaries.

In speaking of a similar act, the supreme court of Pennsylvania said: "It was not then a general act. It did apply to a great number of counties, but there is a dividing line between a local and a general statute. It must be either one or the other. If it apply to the whole state, it is general. If to a part, it is local. As a legal principle, it is as effectually local when it applies to sixty-five counties out of sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the act makes it local." *Montgomery v. Com.* 91 Pa. 125; *Devine v. Cook County Comrs.* 84 Ill. 590; *McCarthy v. Com.* 110 Pa. 243.

Another act applicable to one county was held local. *Com. v. Patton*, 88 Pa. 258; *State v. Herrmann*, 75 Mo. 840; *Weinman v. Wilkinsburg & E. L. Pass. R. Co.* 118 Pa. 192; *Sutherland*, Stat. Constr., § 127, *supra*, and §§ 128, 129.

Nor can I agree with the prevailing opinion that conceding this constitutional objection well taken, that it only nullifies a part of the act, and that the other part can stand. That is, I understand the prevailing opinion to hold that at most, the objection could only vitiate so much of the act as relates to audi-

tors, treasurers and recorders, and as the appellee here is a sheriff, and not an auditor, treasurer, or recorder, it does not vitiate as to sheriffs and clerks, and therefore that appellee has no interest in the question, etc. It is true that a part of a statute may be unconstitutional and another part constitutional, and when the part constitutional does not depend upon the unconstitutional part, and is capable of being enforced and operative without the aid of the unconstitutional part, then the unconstitutional part may be stricken down and the other part upheld and enforced. But that only can be done when the part upheld is not rendered local or special, or otherwise conflicting with the constitution by striking down the other part. *State v. Blend*, 121 Ind. 154, and authorities there cited.

If, by striking down an unconstitutional part of a statute, the remaining part is thereby brought into conflict with the constitution, such part cannot be upheld simply because such part is not inimical to the constitution while the whole stands together. Therefore, if it be conceded that by leaving out treasurer, auditor, and recorder of Shelby county, the act is unconstitutional as to the three offices named, all over the state, the part of the act relating to clerk and sheriff is not relieved from the charge of being special by striking down that relating to the other three offices, but is thereby made more special than before. There is no escape from this unless we assert successfully that the fees and salaries of clerks and sheriffs belong to one subject of legislation, and that those of auditor, treasurer and recorder belong to another and entirely different subject. To successfully maintain that proposition would be to render the whole act void for conflicting with another provision of the constitution. To hold that the act may be upheld as to sheriff and clerk, and stricken down as to auditor, treasurer and recorder is to hold that clerks and sheriffs, as to fees and salaries, may be governed by the Law of 1891, and auditors, treasurers, and recorders may be governed by the Law of 1879, or no law at all. It is to assert that clerks and sheriffs shall not own the fees they tax for their services, and that such fees shall belong to the county, but that they shall be compensated by a salary while auditors, treasurers, and recorders shall own the fees they are authorized to tax, and shall receive them in compensation for their services. If this does not make the act special within the meaning of the constitution, then all the authorities I have quoted on that point are at fault. To say that appellee's relator, Stout, is not interested, because the defect in the law as to Shelby county does not affect sheriffs, and the defect as to being special in not applying to those elected prior, as he was elected sheriff since it took effect, seems to me wholly without foundation in reason or authority. He presented a claim to the auditor of state, every dollar of which, amounting to over two hundred dollars, he was entitled to receive in the form in which he presented the claim to the auditor, if the Act of 1891 is unconstitutional and void, and

not a cent of which is he entitled to receive if the act is valid, besides, if the act is valid, he must pay the costs of this litigation, amounting probably to one hundred dollars more, none of which would he have to pay if the act is invalid. If he can secure a decision that the act is unconstitutional, he gains three hundred dollars; if not, he loses it. It seems to me that makes him so much interested that he is not a mere volunteer. This brings him within the requirement of the law to enable him to raise the question of the constitutionality of the act. *Cooley*, Const. Lim. 6th ed. 196, 197; 3 Am. & Eng. Encyclop. Law, p. 676.

In *People v. Purdy*, 2 Hill, 86, it was said by Bronson, J.: "Written constitutions will soon become of little value if their injunctions may be lightly overlooked, and the experiment of setting a boundary to power will prove a failure." Again, in the same case, in the court of errors, *Purdy v. People*, 4 Hill, 898, it was said: "If courts venture to substitute for the clear language of the instrument their own notions of what it should have been, or was intended to be, there will be an end of written constitutions. In construing the language of the constitution, courts have nothing to do with the argument from inconvenience." "Their sole duty is to declare, *ita lex scripta est*," thus saith the constitution. *People v. Morrell*, 21 Wend. 584.

I think the judgment should be affirmed.

Petition for rehearing overruled May 15, 1894.

George A. DICKSON *et al.*, App'ts.

v.

Henry E. WALDRON.

(.....Ind.....)

1. The proprietor of a theatre is liable for acts of a janitor and ticket taker, although he is also a special policeman, in wrongfully assaulting a person because he has engaged in a dispute as to his change with the ticket seller, who has attacked and beaten him,—especially when he has on his part committed no assault.

(On rehearing.)

2. That the complaint of one suing for damages for personal injuries alleges injury to his mind does not prevent the court in its discretion from permitting him to testify at the trial.

(June 7, 1898.)

APPEAL by defendants from a judgment of the Superior Court for Marion County in favor of plaintiff in an action brought to recover damages for assault and battery, alleged to have been inflicted on plaintiff by defendant's servant in such a way as to render defendant liable therefor. *Affirmed*.

The facts are stated in the opinions.

NOTE.—As to the liability of a master for assaults committed by his servant, see note to *Davis v. Houghtelin* (Neb.) 14 L. R. A. 787.

24 L. R. A.

Messrs. Elliot & Elliot, for appellants:

If the board of police commissioners had seen fit to appoint another person than Kiley as the special policeman for appellant's theatre they would have been bound to have taken the man selected, and it would be contrary to the best settled rules of jurisprudence to compel a party to answer for the acts of one chosen to fill the place of peace officer by state or municipal authority. This doctrine is declared in the numerous cases which hold that the municipal corporation is not liable for officers acting in its behalf but not chosen by it. It is a matter of common knowledge that special policemen, ordinarily called merchant policeman, are appointed by the police commissioners in cities; that they are paid by business men and private citizens and act as watchmen and policemen with reference to particular and private property, both residence and business. It certainly would not be contended that if one of these officers in making an arrest wrongfully assaulted the person and used excessive force, that the citizen would be liable for any excess of force that the officer might use in making such arrest; still, such would be an analogous case to the one at bar.

2 Dill. Mun. Corp. §§ 974, 975; *Faulkner v. Aurora*, 85 Ind. 180, 44 Am. Rep. 1; *Lafayette v. Timberlake*, 88 Ind. 880.

If the city cannot be held responsible for the wrongful acts of its police officers acting within the scope of their duty as such officers, how can it be held that a private citizen shall be held liable for the acts of a police officer in the performance of his duty, or while acting as such officer within the scope of his official duty, when he has, like the city, no power to appoint or discharge, and no control over the acts of the officer?

Mali v. Lord, 89 N. Y. 381, 100 Am. Dec. 448; *Herahey v. O'Neill*, 86 Fed. Rep. 168; *Bishop*, Non-Cont. L. § 761; *Buttrick v. Lowell*, 1 Allen. 172, 79 Am. Dec. 721; *Pollock v. Louisville*, 18 Bush. 221, 26 Am. Rep. 260; *Jardine v. Cornell*, 50 N. J. L. 485; *Wood, Mast. & S.* p. 587.

Messrs. Miller, Winter & Elam, Elliott & Elliott, Pierce Norton and Hawkins & Smith, in support of petition for rehearing:

A private citizen cannot make a public officer his agent as to any act within the general scope of the officer's duty.

Kiley, the policeman, was an officer appointed according to law, owing his place solely to the appointing power and exclusively under the control of that power.

Where a public officer acts within the scope of his duty he cannot be the agent of a citizen, hence the doctrine of *respondet superior* cannot apply.

If the appellants instructed Kiley, the policeman, to assault Waldron, the appellee, they may, if the assault was unlawful, be charged as wrongdoers but they cannot be held liable upon the general ground that Kiley was their agent.

Where there is an unlawful act all who wrongfully unite in it are liable as joint wrongdoers, but not otherwise.

Sagers v. Nuckolls, 8 Colo. App. 95.

The theory upon which the case was tried is that the policeman was the agent of the ap-

pellants, and as that theory is unsound, the judgment must be reversed.

Meers. Otto Gresham, Joseph B. Kealing, and Martin M. Hugg for appellee:

Howard, J., delivered the opinion of the court:

On October 1, 1887, and at the time of the bringing of this suit, appellants were the lessees and managers of the Park Theater, in the city of Indianapolis. At the entrance to the theater, about three feet from the sidewalk, a flight of stairs ran up to a landing at the rear of which was the box office for the sale of tickets. At either side of the landing a flight of stairs led up to the east and west entrance doors to the theater. At the top of the first flight of stairs, at the edge of the landing, gates were placed, four feet high, to keep the crowd back. Between these gates was an opening where the chief officer of the theater, named Klingensmith, an employé of appellants, stood while the crowd was coming up, after which the gates were opened and this officer went to keep order in the gallery.

Appellants also managed and controlled other theaters in Indianapolis and elsewhere, and in their absence John Dickson, brother of the appellant, George A. Dickson, was the general manager of Park Theater, acting for appellants. He also assisted in selling tickets.

John M. Kiley was the head janitor of the theater, and lived with his family in the theater building. He was also door keeper and stood at the west door, but could leave in case of emergency. At the request of appellants, he was granted special police powers by the metropolitan board of police of the city of Indianapolis, such powers to be exercised at the Park Theater. He received his pay from appellants. He had been in the employment of appellants at the theater before receiving his police powers, and his pay was not increased after receiving such powers. Appellants requested his appointment at the suggestion of the chief police officer, Klingensmith, for the purpose of assisting him in preserving order in the theater. He was not relieved of any of his duties in the theater after being appointed special policeman. His instructions from appellants were not to make any arrests, except to assist Klingensmith, unless otherwise ordered by appellants, or by John Dickson. In Klingensmith's absence, Kiley acted for him. Joseph Gordon was treasurer and ticket-seller for the theater.

On the evening of October 1, 1887, Joseph Gordon was in the box office selling tickets. John Dickson was also in the box office assisting in the sale of tickets. On that evening, appellee, who was a conductor on the I. D. & W. Railroad, came, with four friends, to attend an entertainment at the theater. Appellee testifies that he went up stairs to the ticket office for a ten-cent ticket; that he gave the ticket-seller, Joseph Gordon, a silver dollar, and received from him his ticket and only seventy cents in change, and that another of the party, named Doran, also

had some misunderstanding as to the purchase of his ticket. The testimony of appellee then proceeds: "I do not remember just exactly whether Doran had purchased his ticket before me or after I did. He wanted a ticket to go up stairs too, and they gave him a ticket to go down stairs, and I says to the ticket-seller like this, I said: 'Here is five of us in a party and want to go together; you have made a mistake in our tickets.' He said: 'What is the matter with you? Get away from that window and give others a chance.' I said: 'I am not going until I get my right change. You have made a mistake in my change, too,' and held out my hand. I had not taken my hand down from the shelf in front of the window and he reached through the window and grabbed my change and ticket and slapped me in the face at the same time and said: 'Damm you, get away from that window,' and reached for my brakeman and grabbed his ticket and said, 'Police' or 'Johnny.' I do not know which, 'Police' or 'Johnny,' arrest that man for a vag.' A man named Kiley there, a private policeman for the theater company, stepped up at the side of me or behind me and knocked me down." He testifies that the first blow was on the left forehead, which knocked him partly down on his left elbow; that when he attempted to rise Kiley struck him again; that altogether, he was struck six times on the head, three times on the left shoulder, and twice on the left forearm; that during this time Kiley said nothing to him, but that he asked Kiley what he was beating him for, "and I said if he had anything to arrest me for to arrest me, and for God's sake not to beat my brains out." That somebody then interfered and Kiley for the time withdrew, and then Gordon came out of the ticket office and grabbed appellee about the neck with his left arm and began pounding him in the face with his fist, then knocked him down and kicked him two or three times; that Kiley then arrested him and sent him to the police station.

The testimony of appellant's witnesses as to the transaction differs in almost all the details from that given by appellee, but not in the main facts; that is, the beating of appellee in front of the ticket office by Gordon and Kiley; that the quarrel resulted from disputes as to the purchase of tickets; that both assaults were made upon appellee before his arrest by Kiley, and that appellee did not strike either of his assailants.

The testimony of Joseph Gordon and John Kiley shows their treatment of appellee to have been most brutal. Gordon testifies that he and John Dickson were in the ticket office when appellee came up and threw down a silver dollar and asked for a ticket, not specifying what priced ticket; that he gave him his ticket and the proper change. His testimony then proceeds: "He," Waldron (appellee) "said, 'You did not give me my right change.' I said, 'Yes sir.' He said, 'No sir.' I said, 'I gave you just the exact change with your ticket, and if you did not get your change somebody else got it.' He said, 'You did not.' I said, 'I did.' . . .

I sold two or three tickets while he stood there arguing." That appellee then called him a vile name. "I said, 'Be careful, I won't take that off of anybody, you or anybody else.' He said, 'I want my change.' I said, 'your change was right, and if it is not, when we make up the house our cash will show it, and if there is any over we will make it good to you.'" That thereupon appellee repeated the vile name and Gordon went out of the ticket office and attacked appellee. "He was standing up pretty near the office, and I hit him and he turned around and squared and I hit him again. . . . I could not say how hard I hit him. I hit him pretty hard; I tried to.

In the face." That there was nothing said between them after Gordon came out of the office. "Then we got on over to the stairway and I hit him again, and got my arm around his neck and we were about three or four steps down from the top. . . . I caught him around the neck with my arm and pulled him down. . . . I got him down on the stairway and hit him two or three times more and I kicked him a couple of times. . . . I hit him in the face.

I hit him three or four times there and kicked him and then he said 'I have enough.' Mr. Kiley was down

stairs at the time, out on the sidewalk. . . . I had quit when he holloed, 'I have enough.' Kiley was coming up when he said that, and I said, 'Kiley, arrest this man.' " When Kiley came up "I started to let go when (some) fellow said, 'Give it to him,' Kiley hit him with the mace." That when Kiley hit Waldron (appellee) the latter was "partially down; just about half way up. . . . I was very near up on my feet. . . . When Kiley came up and hit him, I let go of him and went upstairs and went into the office and sold tickets."

The witness Adkins, who was ticket-holder at the east door, testified, "I thought I would go down and see and stop that fussing if I could. . . . They had hold of each other when I got there. . . . I just stooped down and put my hand under their shoulders and assisted them. . . . Just as I was in the act of raising them up I threw my eyes down the stairway and saw Mr. Kiley coming up, and just about the time they got straightened on their feet. Mr. Gordon said to Mr. Kiley, 'Arrest that man.' Mr. Kiley came up to him and I saw Mr. Kiley throw up his left hand, . . . and the next I saw he struck him . . . with his mace."

Kiley himself testified that the appellant, Henry M. Talbott had instructed him that his "duties were to take tickets at the door and supervise the cleaning of the house and assist Mr. Klingensmith in making arrests, or preserving order." That sometimes when employes would come to him and tell him that there was a disturbance in some part of the house he would go there. As to the disturbance he testified, "I was walking up the stairway and happened to glance up and I saw Mr. Gordon having a fight, fighting with a man on the stairway. . . . The man's head was up against the casing on the west side of the stairway. . . . He was sitting

facing me as I came up. . . . He (Gordon) was on the step above him and had hold of him. . . . I did not hear the man say anything; Gordon only said, 'Arrest this man.'" "What did you do after striking Mr. Waldron?" "I arrested him."

John Dickson had remained during the whole time in the ticket office and had seen the greater part of the conflict as detailed by Gordon, and Kiley in his testimony corroborates most of their statements. He says: "I went on selling tickets and took no further notice of it. Things of that kind are liable to occur every once in a while." That he remained selling tickets; did not go out during the whole trouble; did not say anything to Gordon when he first told him what the trouble was, did not give any directions to anybody; saw Kiley coming up the stairs to where Gordon had hold of Waldron and they were struggling and partly raised up, getting on their feet. "I do not think I said anything to him (Kiley) . . . I went on selling tickets."

The appellant, George A. Dickson, testified that Kiley was not to assist in any arrest unless called upon by Klingensmith or unless under instructions of appellants, or of John Dickson; that John Dickson acted for them in their absence.

The appellant Henry M. Talbott testified that he agreed with the evidence given by his co-appellant, and that the answers given by him were correct. He stated further that while Kiley was in the theater he generally did what appellant told him, but was not sure that he gave Kiley orders personally; that "John Dickson was deputized to look after that." John Dickson was not only present on this occasion, but was generally at the theater during entertainments. He testified that he "wore off his vest" leaning against the inside shelf of the ticket office. He acted for appellants in signing the firm name to the request made for Kiley's appointment as policeman. This request was as follows:

"To the Board of Metropolitan Police Commissioners of the City of Indianapolis, Ind.
"Indianapolis, Ind. April 21st, 1887.

"The undersigned respectfully request your board to confer special police powers on John M. Kiley, who is employed and paid by the undersigned, the said Police powers to be used in and about Park Theater and Dime Museum, Indianapolis, Ind. And in consideration of said grant of police powers the undersigned hereby become responsible for his obeying your rules, and for all illegal acts done by said John M. Kiley while doing duty as said special policeman.

Dickson & Talbot.

J.

"Approved N. R. Ruckle, Pres't Bd. M. P. Commrs."

The complaint was in seven paragraphs, alleging three causes of action against appellants: assault and battery, false imprisonment, and malicious prosecution. The court refused to admit evidence as to the charges of false imprisonment and malicious prosecution, and instructed the jury to find for the appellants on those issues. The court also

instructed the jury that the appellants were not liable for the alleged assault and battery by Gordon, the ticket-seller. Whether there was error in such ruling and instructions in favor of appellants we need not inquire, since appellee has not insisted on it. The jury found a general verdict for appellee as to the assault and battery and for appellants as to the other two charges.

The jury also found, in answer to special interrogatories, that John M. Kiley, while in appellant's theater, on October 1, 1887, struck appellee a number of blows upon the head with a mace and thereby inflicted severe wounds. That such blows resulted in appellee's losing the hearing of his left ear and otherwise permanently disabling him and causing him to lose his situation as freight conductor. That appellee at the time and place mentioned, in the view of John M. Kiley, did not commit any crime or violate any ordinance of the city of Indianapolis, and that the said Kiley had no warrant for the arrest of appellee. That John M. Kiley at the time alleged was an employé of appellants; that he said nothing to appellee before assaulting him; that it was one of the duties of Kiley, as the servant and employé of appellants, to preserve order and suppress disturbances in appellants' theater, and that he had received from appellants general authority for that purpose. That appellee while in appellants' theater on said occasion had not committed any crime nor violated any ordinance of said city; that the said Kiley, at said place and time, assaulted and beat appellee on the head with his mace before he arrested him; that the said Kiley when so assaulting appellant, was acting as the servant and employé of appellants and engaged in their business, and acting within the general scope of the duties of his said employment. That John T. Dickson, brother of one of the appellants, was at said time present in the box office of said theater and did, on said occasion and prior thereto, sell tickets for appellants; that with the knowledge of appellants, at and prior to said time, the said John T. Dickson went to said theater and gave instructions to appellant's employés, and that in the absence of appellants, the said John T. Dickson was deputized to act for them at their said theater as manager; that he signed the firm name to the application for police powers to be conferred upon the said John M. Kiley, and that he had authority to so sign said firm name.

That appellants were at said time the lessees and managers of said theater; that all the injuries received by appellee in and about said theater on said evening were inflicted by said John M. Kiley.

That said Joseph Gordon was an employé of appellants, as one of the ticket-sellers on said evening, and was then and there on duty.

That said John M. Kiley was an employé of appellants as janitor and as ticket-taker at the west entrance door of said theater on said evening; that he was commissioned as special policeman about April 22, 1887, to act in connection with his other duties at

appellant's said theater, and at their special request.

That at the request of said Gordon, said Kiley did arrest appellee on said evening; that all the wounds and bruises received by appellee at said theater on said evening were inflicted by said Kiley near said ticket office and before the arrest of appellee.

That neither of appellants was present at the time appellee received his injuries, and neither of them had directed or advised any assault upon appellee.

It is enough to say that these answers are fully sustained by the evidence in the record. The main question in this case, and perhaps the only one that need be decided, is whether appellants are liable to appellee for the injuries inflicted upon him by their employé, John M. Kiley.

The treatment due from a carrier to his passenger, from an inn-keeper to his guest, and from a theatrical manager to his patron, while perhaps differing in degree, is similar in kind.

The duty of a railroad company to its passengers is well expressed in *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202. This was a case where a passenger, having purchased his ticket, was in the company's station on his way to his train, when he was assaulted by one of the "gatemens," and it was contended by the company that the gateman in making the assault was not acting in the scope of his employment. The court said: "It seems to us reasonably clear . . . that the servant was, at the time of doing the acts complained of, on duty for his master, and at or near his proper place, and that the assault was committed on appellee while he was properly on the master's ground and under charge of the master's servants and entitled to their protection rather than their abuse. . . . Moreover, the appellee did not bear the relation of a stranger to the appellant, but, on the contrary, it owed to him an affirmative duty to protect him from the violence and insults of its own servants at the station. It is well settled that one who has purchased his ticket, and is passing at the proper time from the depot to the train, is a passenger, and entitled to the rights of a passenger. . . . One of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants, nor does the question of its liability for a breach of this duty depend upon whether or not the servant in the performance of the act is within the scope of his employment."

In *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 87 L. ed. 97, it is said: "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal." *Citizens' Street R. Co. v. Willosby*, 184 Ind. 568.

In *Chicago & N. W. R. Co. v. Bayfield*, 87 Mich. 205, Cooley, Ch. J., speaking for the court, says: "It is, in general, no excuse to the employer that an injury which has oc-

curring was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risks of such disobedience when he puts the servant into his business and the reasons for holding him responsible for the servants' conduct are the same whether the injury results from a failure to observe the master's directions, or from a neglect of the ordinary precautions for which no specific directions are deemed necessary. It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master can not be held responsible; this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an excess of authority committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority; the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction."

In *Higgins v. Waterlot Turnp. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293, the following is quoted with approval from an English case: "It is said that though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibuses generally, and that such authority must be taken to include an authority to remove any who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger and the plaintiff was one. But the master, by giving the guard authority to remove an offensive passenger, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibuses, and he puts his guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible."

In *Drew v. Peer*, 93 Pa. 284, which was a case where Peer and his wife had purchased tickets and entered a theater, and were ejected with force by the attaches of the theater because of their being colored persons, the following were approved as correct instructions to the jury: "If the ticket agent had called upon any one of the crowd 'to put that nigger out,' and some ruffian had done so, the defendant would be liable. . . . If the injury was committed by an agent out of the usual course of employment, the defendant was not responsible; but if the injury was committed by the defendant's door-keeper or ticket-taker, then it was in the course of their employment."

In the case at bar, it was the ticket agent, Joseph Gordon, who called out to have appellee arrested, and it was not a ruffian bystander who put him out, but it was appellant's door-keeper, acting in the course of

his employment. In this case also, the evidence shows, and the jury so found, that appellee was without fault. The trouble was occasioned entirely by a dispute as to the purchase of tickets, and both the ticket-seller and the door-keeper acted within the business of their employment, maintaining that side of the controversy which was in their master's interest. In *Higgins v. Waterlot Turnp. & R. Co. supra*, it was claimed that no authority had been given to turn out an inoffensive passenger, and that therefore there was no liability for the servant's acts; but the court held that the authority to remove an offensive passenger necessarily carried authority to determine whether any passenger was offensive or not. So here, the matter was about the master's business, and the servant, of necessity, must be the judge as to whether the conduct of appellee was such as to require his removal; and if a mistake was made, and an inoffensive patron of the theater was unjustly attacked and injured, the master must respond.

"It is not convenient for the master personally to conduct the (business of keeping order in his theater) and he puts his guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible." See also *Goff v. Great Northern R. Co.* 8 El. & El. 678.

But this case is even stronger; not only as the master here represented by his ticket agent and his janitor or door-keeper, but his special agent, John Dickson "deputized to act in his absence," was present in the theater ticket office and looking out through the window upon the whole transaction. He testifies that he said and did nothing in the premises, and his silence can be taken only as his and appellant's approval of what was done. Indeed, no rule is better established than that a principal is responsible for the acts of his agent performed within the line of his duty, whether the particular act was or was not directly authorized, and whether it was or was not lawful. *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 783; *Pennsylvania Co. v. Weddle*, 100 Ind. 141; *American Exp. Co. v. Patterson*, 73 Ind. 480; *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319.

But common carriers, inn-keepers, merchants, managers of theaters and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them. *Chicago & E. R. Co. v. Flezeman*, 103 Ill. 546, 42 Am. Rep. 39; *Craker v. Chicago & N. W. R. Co.* 86 Wis. 657.

But it is said that John M. Kiley was a policeman, and therefore appellants are not responsible for his attack upon appellee. Whether, at the time of the injuries complained of, Kiley was acting as a policeman

or as agent of appellants, must depend upon the acts done by him; because he was a police officer it does not follow that all his acts were those of a policeman; and because he was an agent of appellants, it does not follow that all his acts were those of such agent. Even if he were a regular patrolman, called in off the street by appellants or their agents, to aid in enforcing the regulations of the theater, he would for such purpose be only an agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater, he should discover appellee in the act of violating a criminal law of the state, or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then appellants would not be responsible. *Jardine v. Cornell*, 50 N. J. L. 485.

In this case, however, such questions do not arise. The court expressly withdrew from the consideration of the jury the issues made under the allegations of false imprisonment and malicious prosecution, and directed a verdict for appellants on these issues. Nor was any evidence admitted on these issues. Besides, the evidence given by both appellants and appellee showed unquestionably that all the injuries received by appellee were inflicted upon him before he was arrested, and it is still further established that appellee had done no act for which he should be arrested, and the jury so find.

Kiley's acts as a policeman were committed after he had assaulted and beaten appellee. It could not be seriously contended that Kiley could do no wrong as a janitor and door-keeper, but that every wrong done by him should be charged to his official character. This would enable a proprietor to have all his employes commissioned as police officers, and thus escape all liabilities for their misconduct to his patrons.

It is a question whether appellants should not be held liable for all the acts of Kiley, whether as special policeman acting only for his employé, or as janitor or door-keeper, all being within the scope of the business of his employment, but, as we have seen, such question is not before us. The verdict of the jury is in favor of the appellee on the charge of assault and battery, and the evidence, as well as the findings of the jury, show that all assault and battery committed upon appellee was committed before Kiley exercised any of his powers as police officer, and before he made the arrest of appellee. If appellee had attempted to resist arrest, or if he had attempted to get away after arrest, and he had received his injuries in consequence of such attempts, or if he had even committed any crime for which he should be arrested, there might be some reason in appellant's contention on this point. But, on the contrary, it is clear that appellee was innocent of any wrong doing for which he should be arrested; he never even struck back at either of his

assailants. He neither resisted arrest nor tried to get away when arrested. The only words uttered by him were rather a request to be arrested and so avoid further danger to his person. "I asked him what he was beating me for, and I said if he had anything to arrest me for to arrest me, and for God's sake not to beat my brains out."

The case of *Mali v. Lord*, 39 N. Y. 881, 100 Am. Dec. 448, and *Hershey v. O'Neill*, 86 Fed. Rep. 168, are cases relied upon by appellants. In the first of these cases it seems to be held by the court that a clerk or superintendent of a store has not, by virtue of such employment, authority "to arrest, detain and search any one suspected of having stolen and secreted about his person any of the goods kept in such store." We think this cannot be the law. It is not in harmony with the weight of authority, nor with sound reason. If a superintendent or clerk of a store has such suspicions aroused in his mind by the actions of some visitor at the store, but two courses remain for him, either to let the supposed thief go free or to search him. The first course cannot be taken without unfaithfulness to the interests of the employer. The employer must therefore be held to sustain his superintendent in taking the second course, and if a mistake is made, the employer must certainly be liable. He has selected his clerk, and must rely upon his judgment to act for his interests in his store. The clerk in securing the stolen property is not acting for himself but for his employer.

In the case of *Hershey v. O'Neill*, the court places its decision, not on the grounds assumed by appellants, but on the grounds that the plaintiff had, in fact, been guilty of an attempt to steal the goods, and that, consequently, a just verdict had been rendered, which ought not to be disturbed.

The other alleged errors discussed by counsel for appellants show no sufficient reason for disturbing the judgment rendered. The complaint was sufficient under the statute.

There was no available error in the rulings of the court on the evidence. The instructions to the jury were all that appellants were entitled to ask, and were more favorable to appellants than to appellee. There was a verbal error in one of the answers of the jury to an interrogatory, but it was harmless to appellants; the interrogatory was fully answered by the answer to the preceding interrogatory. The verdict and the answers to interrogatories are fully sustained by the evidence, and we find no available error in the record.

The judgment is affirmed.

On petition for rehearing:

Howard, J.:

Owing to the importance of this case, we have given particular consideration to the petition for a rehearing, and to the reasons therefore advanced by counsel, but find no cause to change our opinion on the merits of the case.

Because the complaint alleged that appellee's mind had been impaired by reason of his injuries, and because evidence in support

of this allegation had been received, it is urged that the court erred in allowing appellee to be called, and to testify as a witness. Whether, at the time of the trial, the appellee, or any other person offered as a witness, was in fact competent to testify, was a question that must be decided by the court then and there. The witness was before the court and jury, and, whether he had been injured in body or in mind on the occasion of the assault, it does not follow that at the trial he was incompetent to testify. That was a question for the court to determine, and we do not find that any abuse of discretion was shown. It was for the jury to give such credit to the testimony offered as it was entitled to receive.

Counsel also argue that, because Kiley was appointed special policeman by the board of metropolitan police commissioners under the statute of the state, therefore this case is widely different from the cases cited in support of the opinion, in which police powers are conferred by law upon a particular class of persons in a particular line of employment, as, for instance, conductors on railway trains. Counsel say that such persons are not appointed by any public official and that their choice and selection, their employment and discharge, are entirely within the power and control of the persons who are their superiors, and who are engaged in carrying on the business with which such appointees are connected; and counsel conclude that the reason for the difference between such appointees and special police officers is founded upon the principle that the person who selects another to act for him is bound to select one who will do no wrong.

When police powers are conferred by law upon a particular class of persons in a particular line of employment, it is difficult to see why a different rule should apply from that which obtains when such powers are conferred by a public official who himself derives his authority, also, from the law. In the one case, the law confers the powers directly. In the other, the powers are conferred by an official authorized by the law itself to do so. In both cases, the selection is made by the person for whom the officer is to act, as, in this case, Kiley was selected by the appellants, and they expressly bound themselves that they would be responsible for his acts; in other words, that he would do no wrong. Kiley, by this appointment, was not "made appellants' agent without their consent," but was appointed police officer for their house at their special instance and request, as the record shows. He received his pay from, and was employed solely by, appellants, and they might discharge him at any time.

But, besides this, the jury found that the wrong done by Kiley was not done in his capacity as policeman, but that, "when he assaulted and beat the plaintiff, he was acting as the servant and employé of the defendants, and engaged in defendants' business, and within the general scope of the duties of his employment by the said defendants." And these findings are supported by the evidence.

The petition for a rehearing is overruled.

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Jennie L. McILHINNY, Impleaded, etc.,
Appl.,

v.

Anna C. McILHINNY.

(.....Ind.....)

The word "issue" is a word of purchase and not of limitation, in a deed creating a life estate with remainder to the issue of the body of the life tenant.

(April 18, 1884.)

A PPEAL by defendant, Jennie L. McIlhinny, from a judgment of the Circuit Court for Fayette County in favor of plaintiff in an action brought to quiet title to certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Floren & Broadus for appellant.

Messrs. Conner & Frost for appellee.

McCabe, J., delivered the opinion of the court:

Suit by appellee to quiet title against appellant. Overruling appellant's exceptions to the conclusions of law stated on a special finding by the court is assigned here for error. The substance of the special finding is that on the 21st day of December, 1881, one William Merrill, the father of appellee, was the owner in fee simple and in possession of the real estate described in the complaint, which was 65 acres of land. That on said day, while he was such owner, he and his wife executed to his daughter, Annie Merrill, then aged fourteen years, a deed for said real estate, reading as follows: "This indenture witnesseth that we, William Merrill and Annie Merrill, his wife, of Fayette county, in the state of Indiana, convey and warrant to Annie Merrill, Junior, of Fayette county, Indiana, for and during her life, with remainder over to the issue of her body born alive, but, in the event of the said Annie Merrill, Junior, dying without issue of her body born alive, then with remainder over to John Merrill, for and in consideration of the sum of eight thousand dollars, as an advancement made to the said Annie Merrill, Junior, by the said William Merrill in his estate, the following real estate in Fayette county, in the state of Indiana, to wit [then follows a description of the land]. In witness whereof the said William Merrill and Annie Merrill,

NOTE.—While the rule in *Shelley's Case* has been abolished in so many states that it is now much less important than formerly, it is still in force in some jurisdictions and in these the above decision will be of interest. The decision is clearly in harmony with established doctrine as to the scope of the rule, as shown by decisions to the same effect in respect to the use of the word "children," but it seems nevertheless to have very few precedents in respect to the effect of the word "issue" under this rule.

As to the word "issue" in wills, see *Hills v. Barnard* (Mass.) 9 L. R. A. 211; *Jackson v. Jackson* (Mass.) 11 L. R. A. 805 and note; *Drake v. Drake* (N. Y.) 17 L. R. A. 664; *Pearce v. Rickard* (R. L.) 19 L. R. A. 472.

his wife, have hereunto set their hands and seals this 21st day of December, A. D. 1881. William Merrill. Annie Merrill." That the execution of said deed was duly acknowledged before the proper officer on the same day by the grantors. That the plaintiff, Anna C. McIlhinny, is the same person named in said deed as Annie Merrill, Jr. That at the time of said deed the plaintiff was an unmarried daughter of said William Merrill, and did not have born to her any children until the 27th day of July, 1890. On that day Jennie L. McIlhinny was born to the plaintiff, she being the plaintiff's first and only child, and is now living. That after the execution of the deed the appellee took possession of the premises conveyed. That the defendant John Merrill is the John Merrill mentioned in the deed. That John Payne is now, and was before the beginning of the suit, the legal and qualified guardian of said Jennie L. McIlhinny. That the appellee has not parted with the title to said real estate conveyed to her by said deed, but is still the owner of whatever title said deed conveyed to her. That John Merrill and John Payne, appellant's guardian, both claimed, prior to bringing the suit, that the appellee was not the owner in fee simple, and that they had some interest in the land. That said claim casts a cloud upon the title of appellee in fee simple. The conclusions of law are "that appellee, Annie C. McIlhinny, was at the beginning of the suit, and is now, the owner in fee simple of the real estate described in the complaint, setting out the description by metes and bounds; and that said John Merrill and Jennie L. McIlhinny have no interest in said real estate."

It is contended by the appellee's counsel that the rule in *Shelley's Case* applies to the deed, and that, by that rule, a title in fee simple vested in the first taker by virtue of the deed. The appellant's counsel contend that the rule in *Shelley's Case* does not apply, and, if that rule does not apply, the plainly-expressed intention of the grantor was to vest a life estate in the appellee, with remainder over in fee to the issue of her body born alive. It is not denied by the appellee's counsel that such was the apparent and plainly-expressed intent of the grantor, but, invoking the aid of the rule in *Shelley's Case*, and quoting from *Chancellor Kent*, they say: "And yet it [the rule in *Shelley's Case*] is admitted to interfere in most cases with the presumed, and in many others with the declared intention of the parties to the instrument to which it is applied." They therefore conclude, if the deed in question falls within the rule in *Shelley's Case*, the question of intention is foreign to the discussion in this case. The rule in *Shelley's Case* is this: "Where a freehold is limited to one for life, and by the same instrument the inheritance is limited, either mediately or immediately, to heirs of his body, the first taker takes the whole estate either in fee simple or fee tail; and the words 'heirs' or 'heirs of the body' are words of limitation, and not of purchase." *Andrews v. Spurlin*, 85 Ind. 202. In *Ridge-way v. Lamphear*, 99 Ind. 253, this court said: "The rule in *Shelley's Case*, 1 Coke, 83, is

the law of this state, and in all cases where the facts make it applicable we must enforce it, although we may think there was not much reason for it at the time of its adoption, and none at all under the existing system of tenures and conveyances. But in accepting the rule, we take it as construed and enforced by the courts which formulated and proclaimed it. Pressed by the evils wrought by the rule, and shocked by the great number of instances in which it operated to utterly overthrow the intention of the testator, these courts centuries ago affirmed that there existed an important difference between wills and deeds, and that the rule should not be so strictly enforced in the case of a will as in the case of a deed. It has long stood as the law that there is a material distinction between wills and deeds, and that the rule in *Shelley's Case* will not be allowed to override the manifest and clearly-expressed intention of the testator, but that the intention will always be carried into effect if it can be ascertained. It is true that, where the words used are such as bring the case within the rule, it will be given full force and effect; but where the context clearly shows that the testator annexed a different meaning, that meaning will be adopted, and the rule will not be allowed to frustrate his intention."

But the appellee insists that *King v. Rea*, 56 Ind. 1, is parallel to and directly supports, the conclusions of law stated by the trial court in the case at bar. It must be confessed that, if that case was correctly decided, the judgment in this case must be affirmed. One of the deeds involved in that case, executed by Andrew Wallace, reads: "Conveys and warrants to Martha W. Rea, during her life, with remainder to the issue of her body, their heirs and assigns forever." The court held that Martha W. Rea, by the deed from Andrew Wallace, took a fee simple in the lands, and that the words "issue of her body" must be held as words of limitation, and not words of purchase. It was held in *Gonzales v. Barton*, 45 Ind. 295, Downey, J., delivering the opinion of the court, that the words "lawful issue" were words of limitation, and not words of purchase."

This court, in following that case, lost sight of the fact that that case was one involving the construction of a will, and the distinction between the force of the word "issue" when used in a deed and when used in a will. It has long been established law that when used in a will the word "issue" may be a word of purchase or it may be a word of limitation, depending on the testator's intention as expressed in the context; but when used in a deed it is always a word of purchase. *Elphinstone, Interpretation of Deeds*, 318, 819; *Bagshaw v. Spencer*, 2 Atk. 583; *Doe v. Collis*, 4 T. R. 294; *Bowles' Case*, 11 Coke, 79b; 11 Am. & Eng. Encyclop. Law, 876, 877, and authorities there cited; 2 Washb. Real Prop. 5th ed. *654, 655. It also is held in *Nelson v. Davis*, 85 Ind. 478, and in *Shimer v. Mann*, 99 Ind. 192, 50 Am. Rep. 82, that the word "issue" is very frequently a word of purchase. It was properly enough held in *Gonzales v. Barton*, *supra*, that the word "issue" in the will involved in that

case, under the context therein, was a word of limitation, and not a word of purchase. Quite a large number of English cases are therein cited to support that construction of the word, but they are all will cases. It is quite natural that in the light of all those cases construing the word "issue" to be a word of limitation, and not a word of purchase, the distinction between the force and effect of the word when used in a will and when used in a deed should escape the notice of the court in citing *Gonzales v. Barton*, *supra*, in support of the ruling in *King v. Rea*, *supra*, and therefore this court felt constrained to say "this case must be followed." The legitimate offspring and fruit borne by *King v. Rea*, *supra*, is *Fletcher v. Fletcher*, 88 Ind. 418, which is also cited and relied upon by the appellee here. In that case, Stoughton J. Fletcher and Allen M. Fletcher sued their minor children to quiet title to real estate, showing that at the date of the execution of the deed they were unmarried, and neither of them ever had any children born unto them, but that since the execution of said deed both of them had become married, and had children born unto them, who are still living, naming them as defendants. The deed was by Stoughton A. Fletcher and wife, who "convey and warrant to Stoughton J. and Allen M. Fletcher during their lives one undivided moiety each, and then, after their death, to their children respectively, in fee simple, for the sum of \$39,000, the following real estate in Marion county, in the state of Indiana. Then follows a description of the land. In witness whereof, the said Stoughton A. Fletcher and Julia A. Fletcher, his wife, have hereunto set their hands and seals this 30th day of December, A. D. 1873. S. A. Fletcher. Julia. A. Fletcher." The foregoing deed is such as at common law would be a conditional fee, and was called a "fee tail" or "estate tail," the quality of which is defined to be that it is liable to be defeated by the failure of the contingency or condition on which it is made to depend; and in that event, at common law, it reverted to the donor. 1 Washb. Real Prop. 5th ed. 106, 107, and authorities there cited; 6 Am. & Eng. Encyclop. Law, 879, and authorities there cited. By our Statute (2 Burns' Rev. Stat. 1894, § 3378) "estates tail are abolished and any estates which, according to the common law, would be adjudged a fee tail, shall hereafter be adjudged a fee simple, and if no valid remainder shall be limited thereon, shall be a fee simple absolute." Now, as the contingency of the grantor, in the foregoing deed, having children surviving might never have happened, the estate was a conditional one, and at common law would have been a fee tail or estate tail, and, but for the latter clause of the above-quoted statute abolishing such estates, it would be a fee simple absolute in the first takers, and their children would have taken nothing. The question, then, arises, was there a valid remainder limited thereon? If there was, then the first takers did not take a fee simple absolute, unless the rule in *Shelley's Case* applies. Section 3380 of the same statute provides that "a remainder may be limited on a contingency

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which, in case it should happen, will operate to abridge or determine the precedent estate." Accordingly it has been held by this court, and so ruled at common law, that a valid remainder might be limited on a particular estate for life to unborn children, and on their birth during the life tenancy the remainder would immediately vest. The remainder is contingent before and vested after the birth of the remainderman. *Amos v. Amos*, 117 Ind. 19, 117 Ind. 87; 20 Am. & Eng. Encyclop. Law, 854, 855; 2 Washb. Real. Prop. 5th ed. *610, 611; *Glass v. Glass*, 71 Ind. 892. It follows that the deed in the *Fletcher Case* limited a valid remainder upon the particular estate granted, and, the children to whom it was limited being unborn, it was a contingent remainder until their birth, when it became vested, unless this manifest intent was defeated by the operation of the rule in *Shelley's Case*. That rule is cited, along with *King v. Rea*, *supra*, as authority for the conclusion reached. That the rule in *Shelley's Case* has no application to that case is too plain for argument. The word "children" used in the deed has always been held in this court and the courts of England as a word of purchase, and not a word of limitation. *Sorden v. Gatewood*, 1 Ind. 107; *Doe v. Jackman*, 5 Ind. 283; 3 Am. & Eng. Encyclop. Law, 229-238, and authorities there cited. The result is, if we follow the two cases of *King v. Rea*, and *Fletcher v. Fletcher*, *supra*, we shall extend the rule in *Shelley's Case* further in this state than it was ever extended in England or in this country, so far as we have been able to discover. While it is a rule of law too firmly established to be shaken by the courts, and which the courts should enforce, not because it is just or wholesome, but because it is law, yet its operation more frequently defeats the just and undoubted intention of grantors and testators than any other effect it has. For this reason the courts everywhere are inclined to circumscribe its operation within the strict limits of its own boundaries.

It follows from what we have said that there was no word of limitation used in the deed to the appellee, but that, the word "issue," used therein, being a word of purchase, the rule in *Shelley's Case* does not apply. Therefore we are left free to give effect to the manifest intent of the grantor therein, William Merrill. That intention is very clearly expressed to create a life estate in his daughter, the appellee here, with remainder over to the issue of her body born alive, but, in the event of her dying without such issue born alive, then with remainder over to John Merrill. Such a deed, as we have seen, would have conveyed what is known at common law as a conditional estate or fee, called an "estate tail," liable to be defeated by the failure of the condition, namely, issue of her body born alive, and failure of the contingent remainderman, John Merrill, to be living at the termination of her life estate. In such case, at common law, the estate would revert, as we have seen, to the donor. But our statute, as we have seen, charges that feature of the estate, and makes it a fee simple in

the first taker,—the appellant,—unless there was a valid remainder over, limited to the issue of her body, or, on failure of such issue, to John Merrill. As we have already seen, the remainder limited was a valid one, both under the statute and at the common law. It was contingent at the date of the deed, and became vested by the birth of the appellant as issue of appellee's body born alive. Having become vested in appellant, the contingency on which John Merrill's interest depended, his contingent interest has ceased, and he has and can have no further interest. 2 Washb. Real Prop. 629; 20 Am. & Eng. Encyclop. Law, 850, and authorities there cited. The remainder vested in appellant on her birth, subject to be opened up to let in those afterwards born alive as issue of appellee's body before the termination of her life estate. 20 Am. & Eng. Encyclop. Law,

855, and authorities there cited. In so far as *King v. Ren*, *supra*, is inconsistent with this opinion, it is modified, and *Fletcher v. Fletcher*, *supra*, in so far as it conflicts with this opinion, is overruled.

It is but just to the learned judge of the trial court to say that he was under legal compulsion to follow the cases just referred to so long as they stood unmodified, and not overruled by this court; hence he was fully justified in holding in line with those cases that the rule in *Shelley's Case* applied, and that the appellee took a fee simple. We are of opinion that the trial court erred in its conclusions of law.

The judgment is reversed, and the cause remanded, with instructions to the trial court to restate its conclusions of law in accordance with this opinion.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.* GERMAN INS. CO. of Freeport,

v.

Thomas C. WILLIAMS.

(145 ILL. 573.)

1. An eligible person lawfully appointed to a vacant office of town clerk

and duly notified thereof may be compelled to accept, by mandamus.

2. The imposition of a penalty for failure to serve in a public office does not preclude proceedings to compel the service.

3. No demand is necessary before application for a mandamus to compel acceptance of a public office.

(March 31, 1893.)

NOTE.—Compelling citizen to accept office.

The enforceable duty of one who had been elected to office, to accept and serve in the same, seems to have been settled so early that the records of the case in which it was established have been lost. In the folios, records of proceedings against persons who had been elected to office, for refusing to accept same, are quite frequent, and there does not appear to be any question at that time but that the proceeding was a proper one.

In *Rex v. King*, 3 Keb. 197, an information was filed against one for refusing the office of constable, and after adjournment for consideration, a judgment was rendered for plaintiff at page 230 of the same volume.

So, in *Rex v. Bernard*, Skin. 669, Comb. 416, an indictment was filed against one for not taking the office of constable, and a similar proceeding for a similar offense appears in *Anonymous*, 1 Vent. 344.

In *King v. Shacklington*, Andr. 201, *note*, an information was moved against a Quaker for not taking the office of sheriff.

In *Rex v. Lone*, 2 Strange, 920, it was held that an indictment would lie for not taking the office of constable.

In *Rex v. Woodrow*, 3 T. R. 731, the court granted an information against one refusing to take upon himself the office of sheriff.

In *Rex v. Burder*, 4 T. R. 778, Nolan, 111, an indictment against one for refusing to take the office of overseer of the poor was held good.

So it was held that an indictment will lie against one for not taking upon himself the office of overseer of the poor, although he occupied the house which was relied upon to make him a householder only by a clerk for a majority of the time, coming to the property himself daily merely for the purpose of business. *Rex v. Poynder*, 1 Barn. & C. 173, 2 Dowl. & R. 268.

In *Rex v. Bedford*, 1 East, 79, in which the question was as to the propriety of ordering a new election, the court said: "Supposing the election to have been properly made, the refusal of the one elected to take upon him the office did not avoid the election, but rendered him indictable for such refusal."

In *State v. Ferguson*, 31 N. J. L. 107, the court as the basis for their decision that an officer cannot resign his office, lays it down as established law that one may be compelled to take upon himself an office to which he has been elected by the sanctions of the common law.

It seems to have been doubted for some time whether or not the provisions of the toleration act were sufficient to protect one who was not qualified for office because he had not complied with the requirements of the church from prosecution for not accepting the office.

In *Rex v. Larwood*, 1 Salk. 167, 3 Salk. 134, Skin. 574, Comb. 316, 2 Vent. 243, *note*, Holt. 503, Carth. 306, 1 Ld. Raym. 29, 4 Mod. 270, 12 Mod. 67, in which it was held that a dissenter could not plead the toleration act as an excuse for not qualifying himself for the office of sheriff, it was stated: "That the king hath an interest in every subject and a right to his services, and no man can exempt himself from the office of sheriff but by act of parliament or letters-patent." But in the report in 4 Mod. 270, it is said that defendant was merely fined for his refusal, and it would seem that the fine was the municipal penalty for refusal to accept, although that element is not brought out in the reports in the other books. In the report in 12 Mod. 67, it is said, a majority of the court would not give an opinion upon the question, but that Justice Samuel Eyre declared that the statute excused the defendant.

In *Harrison v. Evans*, 3 Bro. P. C. 465, it was held that a dissenter was not even liable for the penalty for not taking an office which he could not take

and duly notified thereof may be compelled to accept, by mandamus.

PETITION for a writ of mandamus to compel defendant to assume the duties of town clerk. *Granted.*

Statement by Shope, J.:

This is an original proceeding in this court to mandamus to compel the respondent, Thomas C. Williams, to accept, assume, and take upon himself, and execute the office of town clerk of the town of Mt. Morris, in the county of Ogle, in this state; to take and subscribe the oath of office; and to file such oath in the office of the town clerk. The petition shows that on the 31st day of March, 1891, the board of town auditors of the town of Mt. Morris, in said county, acting under a peremptory writ of mandamus issued from this court, audited and allowed to the relator in this proceeding the sum of \$45,050, as indebtedness owing by said town upon its bonds belonging to the relator, and made a certificate thereof in conformity with the statute. It is then alleged that the town clerk of said town had absconded from the state of Illinois, and there being no town clerk of said town then present, and the justices of peace of said town, and the supervisor thereof, having failed and neglected to fill the vacancy in said office of town clerk by appointment, the said board of town auditors did not, nor could, deliver said certificate to the town clerk of said town, to be by him kept as required by law, and the aggregate amount thereof be certified by the town clerk to the county clerk of said Ogle county, as required by law in such cases.

The petition then shows that at the annual town meeting held in 1891 a town clerk of said town was elected, but the person so elected neglected and refused to qualify as by law required. The petition alleges, further, that, after the failure of the elected town clerk to qualify as aforesaid, there was sued out of this court an *alias* peremptory writ of mandamus, directed, among others, to the supervisor of the town of Mt. Morris, the town clerk, the justices of the peace of said town, commanding them, as they had theretofore been commanded, that they immediately, without further excuse or delay, do every act and thing devolving upon them by law, as such officers, for the levy, collection, and payment of a tax sufficient to pay the amount of said claim, etc., and that they certify obedience, etc.; that said writ was served upon all of said officers, except the town clerk; that thereafter divers and sundry persons eligible to said office were, and have been by the said justices of the peace and supervisors of said town, duly and successively appointed to said office of town clerk of said town, and duly notified thereof, all of whom have neglected and refused to accept, qualify, and serve said office, as required by law; that no annual town meeting or election whatever has been held in said town since the annual election of 1891; that no town clerk has been elected, said office continuing vacant; that a pluries writ of mandamus issued, but that, said office of town clerk continuing and remaining vacant, said pluries writ cannot be served upon that

because of his disability in failing to qualify himself by taking the sacrament.

And in *Rex v. Grosvenor*, 2 Strange, 1193, 1 Wills. 18, an information was vouched against a dissenter for refusing the office of sheriff, it appearing that there were acts of the common council that had provided penalties against refusers, and the information was refused on the ground that the penalty was the proper remedy; especially since it had never been settled whether the refusal was a crime or not.

Penalties imposed by corporations.

Apparently as a means of self-protection, municipal corporations at an early date began to provide for penalties to be exacted from those who refused to serve in offices to which they were elected.

And it was held that a corporation may pass a by-law fining members who will not take office. *London v. Vanecker*, 1 Ld. Raym. 493, 5 Mod. 423, 12 Mod. 299, Carth. 480, Holt. 431.

If the steward of a city neglects to take the oath required by statute, he is subject to the fine provided by the by-laws. *Exeter v. Starre*, 2 Show. 159.

When this mode of procedure became firmly established, the objection began to be made that the municipal penalty was the only one to which the refusing candidate was liable.

And informations to compel persons to accept the office of common councilman were refused in *Anonymous*, 11 Mod. 122; *Reg. v. Hungerford*, Id. 142.

But in *Rex v. Jones*, 2 Strange, 1146, which was an indictment for not taking the office of overseer of the poor, it was objected that Statute 43 Eliz. 42, had inflicted pecuniary penalties for neglected duty, and that therefore an indictment would not 24 L. R. A.

lie; but the court said these penalties were for neglect of duty after taking the office, and did not prevent an indictment for refusing the office.

And apparently in accordance with such contentions and the qualified recognition which it received, the court in *State v. McEntyre*, 26 N. C. 171, held that the legislature may make it an indictable offense to refuse the office of town magistrate and commissioner, but there is no principle of the common law making it such.

So a statute providing a penalty for not taking the office of town constable is not unconstitutional. *London v. Headen*, 76 N. C. 72. In that case *State v. McEntyre*, *supra*, is approved, but it is said that the doctrine of the common law is that every citizen, in peace as well as in war, owes his services to the state when they are demanded.

In *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314, it is stated that in England a person elected to a municipal office subjected himself to a penalty by the refusal to accept it.

Before the penalty can be collected under a by-law for failure to serve in an office, there must be some evidence that the one elected was qualified to take the office. *Reg. v. Richmond*, 11 Week. Rep. 65.

Debt for a fine for not serving in the office of sheriff was brought in *York v. Tounie*, 1 Ld. Raym. 502, 5 Mod. 444, but the form of action seems to have met with disapproval.

An action of debt failed in *Worthingham v. Johnson*, Cas. t. Hardw. 235, because the by-law under which the action was brought had not provided a penalty for refusal to take the particular office refused in that case.

Mandamus.

Just how mandamus came to be resorted to as a remedy in this class of cases is not clear, but

officer, but remains in the hands of the sheriff, awaiting the filling and incumbency of that office, to be served. The petition shows that since the audit, allowance, and certification of said \$45,050 was made, the said board of town auditors of said town have audited and allowed the further sum of \$2,650 to the relator, as interest upon said bonds, in addition to said previous audit and allowance. The petition further alleges that, there being a vacancy in the office of town clerk of said town, on the 17th day of September, 1892, the justices of the peace of said town, and the supervisor thereof, again met on that day in said town, for the purpose of filling said vacancy in said office, and by their warrants, under their hands and seals, appointed one Thomas C. Williams, who for more than ten years then last past had been a resident of said town, and who was on said day a legal voter, and had been for five years or over next before his said appointment; that said board of appointment forthwith notified him of his said appointment, but the said Thomas C. Williams has hitherto wholly neglected and refused to accept said office, and take and subscribe the oath required by law, whereby said office of town clerk has continued to be vacant. It is then alleged that, because of there being no town clerk of said town, the said certificate of audit so made by said board of town auditors cannot be delivered to the town clerk of said town, to be by him kept, etc., nor can the aggregate amount thereof be certified to the county clerk of said county at the same time and in the same manner as other amounts required to be raised for town purposes in said town, to be levied and collected as other town taxes, as is by law required, whereby the relator is unable to obtain the levy and

collection of a tax upon the property of said town, wherewith to pay the amount so audited and allowed. The prayer is that, as ancillary to the original proceeding before mentioned, wherein the said several peremptory writs issued have proved unavailing, by reason of there being no town clerk upon which to serve the same, a writ of mandamus be now here awarded, commanding said Williams to accept, assume, and take upon himself said office, etc. The respondent filed a general demurrer to the petition.

Mr. J. A. Crain for relator.

Mr. Rector C. Hitt, for respondent:

Was this the common law of England prior to the fourth year of James the First? If, said *Best, J.*, this application—one to hold an election, had been made a century ago, it would not probably have been granted, for at that time a mandamus was held to be only to compel the performance of a ministerial duty, but modern cases have gone much further, and a mandamus will now lie for the performance of any public duty.

King v. Forcey, 2 Barn. & C. 596.

This was said more than two centuries after the adoption of the common law in this country, and shows that anciently mandamus was confined to very narrow limits. The ruling of *Lord Mansfield* in *Rea v. Barker*, 1 W. Bl. 800, 8 Burr. 1265, was made over a century and a half after our adoption of the common law, and is not binding.

Clarks v. Bishop of Sarum, was decided in 1788, 2 Strange, 1082; and *King v. Bower*, in 1823, 1 Barn. & C. 596.

The petitioner does not show that it has made a demand upon the defendant to accept the office. A demand and a refusal are necessary.

that it was resorted to is certain, and it is also certain that in England it came to be regarded as an unquestionable remedy.

In 56 Geo. III. a mandamus was granted to compel one elected to the office of mayor to take it upon himself, although the result would be to compel him to remove his residence from the country into the town, and to prevent him from acting as magistrate for the county. *Rex v. Leyland*, 3 Maule & S. 184.

So payment of the fine will not relieve from a mandamus unless it is stated in the by-law to be in lieu of the service. *King v. Bower*, 1 Barn. & C. 596, 2 Dowl. & R. 842.

And one may be compelled to take the office of mayor either by mandamus or indictment. *Rex v. Colchester*, 4 Dougl. 14.

American decisions.

The question has not been frequently raised in this country and the few decisions that have been made are on rather minor branches of the question.

It was said *arguendo* in *Hinze v. People*, 22 Ill. 406, that no man can be compelled to give his time and labor to the public without compensation.

In *Smith v. Moore*, 90 Ind. 294, it was held that one might refuse to take the office of justice of the peace to which he had been elected, for the purpose of rendering himself eligible to be elected county treasurer. And in the dissenting opinion it is said: "We cannot hold that a man selected or chosen against his will or consent is, so far as concerns his own rights, elected so as to be ineligible 24 L. R. A.

to other offices, however it may be as to the public."

So one elected to two offices at the same election may accept the one he chooses, and will not be compelled to accept both, nor can he be indicted for refusal to accept the rejected one. *Hartford Twp. v. Bennett*, 10 Ohio St. 441.

An act imposing a penalty of \$100 on every person who shall refuse to discharge the duties of election officer, if appointed thereto, is constitutional. *Brooklyn v. Scholes*, 81 Hun, 110.

In New York, one appointed inspector of elections is bound to accept the office under a penalty. *Goettman v. New York*, 6 Hun, 132.

One not accepting an office may be liable to a penalty therefor, but cannot be liable to the penalties provided for neglect of the duties of the office. *Bentley v. Phelps*, 27 Barb. 524.

Under the New York act providing a penalty for refusing to take the office of overseer of highways, the penalty is in lieu of the service, and after one has refused the office and paid the penalty, he cannot during the same term be again appointed to the same office. *Haywood v. Wheeler*, 11 Johns. 432.

But the penalty cannot be exacted unless the town proceeds to a new election. *Winnegar v. Roe*, 1 Cow. 258.

Under the Wisconsin statutes, it seems that a refusal to accept office is permitted. *State v. Washburn*, 17 Wis. 658.

As to the right to resign an office, see *note* to *Reiter v. State* (Ohio) 23 L. R. A. 661. H. P. F.

People v. Hyde Park, 117 Ill. 462.

Mandamus will not lie against a private citizen.

State v. Powers, 14 Ga. 388; *State v. Larabee*, 3 Wis. 788; *State v. Bridgeman*, 8 Kan. 458.

This defendant is a private citizen.

See *State v. Powers*, *supra*.

Shope, J., delivered the opinion of the court:

The principal question presented is whether mandamus will lie to compel acceptance of a municipal office by one who, possessing the requisite qualification, has been duly elected or appointed to the same. It is stated by text writers that no case has arisen in this country involving this precise question (*Merrill*, *Mandamus*, § 145; *Dill*, *Mun. Corp.* § 162); and in the researches of counsel, and our own examination, none have been found. There are, however, a number of cases where analogous questions, involving the same principle, have been elaborately discussed and determined in the state and federal courts. Very many English cases are found in which it has been held that it was a common-law offense to refuse to serve in a public office, to which one had been elected or appointed under competent authority, and that mandamus will lie in such case to compel the taking of the official oath, and entering upon the discharge of the public duty. It is objected that these cases do not show that mandamus would lie, for the refusal to accept public office, prior to the fourth year of James the First. If the contention be true, it is unimportant whether the particular remedy was by mandamus, by the ancient common law, or not. The important subject of inquiry is whether it was a common-law duty to accept and discharge the duties of a public municipal office. The writ of mandamus was in use as early as the fourteenth and fifteenth centuries. *Rez v. University of Cambridge*, *Fortes*, 202; *Rez v. Gover*, 3 Salk. 280. It appears from *Dr. Widdrington's Case* (A. D. 1662), 1 Lev. 28, that mandamus had been in use as early as in the time of Edward II. and Edward III., between 1807 and 1877. Originally it was a letter missive from the sovereign power, commanding the party to whom it was addressed to perform the act or duty imposed. Later it obtained sanction as an original writ emanating from the king's bench, where, by fiction of law, the king was always present. But it does not seem to have been frequently used, nor adopted as the remedy to compel the acceptance of office, until late in the seventeenth century. In modern times the uses of the writ, and the purposes to which it will be applied, have been greatly enlarged, and it has come into general use wherever there is a legal duty imposed, and no other remedy is provided by law for a failure to discharge it; and in many other cases, against those exercising an office or franchise, where there may be another remedy, but it is less direct and effective. In this state, as in most if not all the states of the Union, the proceeding is regulated by statute. *Rev. Stat.*, chap. 87. 24 L. R. A.

The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of, the common law, prior to the fourth year of James I. (excepting certain statutes), and which are of a general nature, and not local to that kingdom, are by our statutes made the rule of decision until repealed by the legislature. Thereby the great body of the English common law became, so far as applicable, in force in this state.

It is held in numerous English cases that by the common law it was the duty of every person having the requisite qualification, elected or appointed to a public municipal office, to accept the same, and that a refusal to accept such office was punishable at common law. The case of *Rez v. Lons*, 2 Strange, 920, was an indictment for refusing to execute the office of constable by one who had been chosen to it, and it was held that he was indictable by the common law. *Rez v. Jones*, Id. 1145, was an indictment for not taking upon himself the office of overseer of the poor. It was held that the offense was indictable upon the principles of the common law. See *Rez v. Burder*, 4 T. R. 778. *Rez v. Larwood* (A. D. 1695), 4 Mod. 270, was an information against the defendant for his refusal to take the office of sheriff, to which he had been duly appointed. The defense was that the defendant, being a dissenter, had not taken sacrament within a year before he was chosen, and so his appointment was void, under 25 Car. I., chap. 2, 80 Car. I., chap. 1, disabling papists, etc. It was held that it was the fault of the defendant not to have received the sacrament, and that his neglect of duty was no excuse, and that he was liable, etc. In *Vanacker's Case* (A. D. 1699), 1 Ld. Raym. 496, it was held that the city of London, a municipal corporation, of common right possessed authority by by-law of the corporation, to impose penalties for refusal to accept office; *Lord Holt* remarking that, "if a franchise be granted to a corporation, it is under a trust that the corporation shall manage it well. . . . The acceptance of the charter obliges the body politic to perform the terms upon which it was granted, and, as every citizen is capable of the benefit of the franchise, so he ought to submit to the charge, also. . . . And therefore, as they have advantage by some franchises, so they ought to submit to the charges of others. . . . Therefore it is necessary that they should have coercive power to compel persons to take the office upon them, and that without any custom, otherwise this office might be lost to the city." *King v. Raines*, 8 Salk. 162. About the beginning of the eighteenth century the English courts adopted mandamus as an appropriate remedy in such cases, as it would seem, and the practice has been since followed. *Reg. v. Hungerford* (decided in 1708), 11 Mod. *142, was an information in the nature of quo warranto, against a common councilman of Bristol, for refusing to take upon himself the office, etc. The remedy was denied, but it was said, "If they had applied to the court for mandamus, they

fendant to take the oath, and to take upon himself, and execute, the office of common councilman of the borough and town of Lancaster. The court said: "It is an offense at common law to refuse to serve an office, when duly elected," and refused to hold that the payment of a fine imposed by by-law of the corporation discharged the obligation to accept and serve in the office, and a peremptory writ was awarded. See *Rea v. Bedford*, 1 East, 79; *King v. Fowey*, 2 Barn. & C. 584; *Clarke v. Bishop of Sarum*, 1 Strange, 108; *Pelton's Case*, 2 Lev. 252; *Vintner's Co. v. Passey*, 1 Burr. 239; *Rea v. Grosvenor*, 1 Wils. 18; *Rea v. Whitwell*, 5 T. R. 86; *Rea v. Leyland*, 8 Maule & S. 184.

Further citation from cases will not be necessary. So uniformly has the doctrine been maintained that there is a legal duty to accept an office when duly elected or appointed, in a public or municipal corporation, at common law, and that mandamus is an appropriate remedy in cases of refusal, that it is accepted by all the text writers. Thus Mr. Grant (Law of Corporations, p. 230) states the rule: "On the other hand, when, not being exempt or disqualified, a man is duly elected to an office, the court, if the corporation is a public one, and the office of a sufficiently important nature to justify its interference, and in all cases where the office is connected with the administration of local jurisdiction vested in the corporation, or the administration of justice, will interfere by mandamus to compel him to take upon him and serve, the office." To the same effect, see Willcock, Mun. Corp. 128; Mechem, Pub. Off. § 243; High, Extr. Legal Rem. § 834; Shortt, Information, 324-328; Tapping, Mandamus, 189. In *Merrill on Mandamus*, § 145, it is said: "A party who has been elected to an office owes a duty to the public to qualify himself therefor, and to enter upon the discharge of his duties. Such duty being incumbent on him by law, he may be compelled by the writ of mandamus to assume the office, and take upon himself the duties thereof. Though he may be subject to an indictment or fine for failure to do so, still the writ of mandamus will be granted, because neither the indictment nor the fine is an adequate remedy in the premises, since it does not fill the office, and prevent a failure of the discharge of the public duties." It follows, necessarily, if to refuse the office is a common-law offense, and punishable as such, that a legal duty attaches to the person to take upon himself the office, which may now be enforced by mandamus.

While this class of offices, in England were accepted as a burden, they have not been generally so regarded in this country. Under our system of local government, even the smallest offices are generally accepted, either because they are supposed to lead to those which bring higher honors and greater emoluments, or because of a sense of duty. To this fact, and perhaps to the prevalent but mistaken idea that one holding a public office may resign at will, is to be attributed the absence of decision in this country upon

ordinarily arisen where the incumbent has sought to resign from public office; and it has been uniformly held that the power to resign did not exist, or resignation become effective to discharge the officer from the public duty, until accepted by lawful and competent authority. In *Edwards v. United States*, 108 U. S. 471, 26 L. ed. 314, Edwards had been elected supervisor of the town of St. Josephs, Berrien county, Mich., on April 8, 1876, and entered upon the duties of his office, and on the 7th of June following resigned in writing, and filed the same with the town clerk. No action upon such resignation was alleged to have been taken by the township authorities, and the question was, "Was the resignation complete without an acceptance of it, or something tantamount thereto, such as the appointment of a successor?" The court held that it was not, and says: "In England a person elected to a municipal office was obliged to accept it, and perform its duties, and he subjected himself to a penalty by a refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and good government, to bear." And it is said that it followed from this, as a matter of course, that, after the office was assumed, it could not be laid down at will; and, that court holding that the common-law rule prevailed in Michigan, the judgment awarding a peremptory writ compelling the performance of the duty as supervisor, etc., was affirmed. In the case of *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677, it is said, in passing upon the question there at issue: "An officer may certainly resign, but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both." And after saying that the acceptance of resignations, in respect of lucrative offices, has been so much a matter of course that it has become the common understanding that to resign is a matter of right, but the law is otherwise, it is said: "The public has a right to the services of all the citizens, and may demand them, in all civil departments, as well as the military." In *State v. Ferguson*, 31 N. J. L. 107, the question was whether the respondent, at the time of the service of the writ of mandamus, was an overseer of highways, etc. The respondent proved that, before the service of the mandamus, he had sent in his resignation of said office, on which certain of the township committee had indorsed acceptance. It was insisted that the officer had a right to resign at will, and that the mere notification of the proper officers of the fact relieves him from performance of the official duty. The chief justice, after reviewing the common-law authorities, says: "I think it undeniable, therefore, that upon general principles of law, as contained in judicial decisions of the highest authority, the refusal of an office of the class to which the one under consideration belongs was an offense punishable by a proceeding in behalf of the public. Regarding, then, the doctrine

of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled, by force of the sanction of the criminal law, to accept the office, cannot afterwards resign it *ex mero motu*. If his recusancy to accept can be punished, it cannot be that he can accept, and immediately afterwards, at his pleasure, lay down, the office." The same principle has been announced more or less directly in *Van Orsdall v. Hazard*, 8 Hill, 243; *London v. Headen*, 76 N. C. 72; *Winnegar v. Roe*, 1 Cow. 258; *People v. Barnett Twp. Supra*, 100 Ill. 832; *Badger v. United States*, 98 U. S. 599, 23 L. ed. 991. The reason assigned in *Re v. Larwood*, 1 Salk. 168, for the public duty is "that the king hath an interest in every subject, and a right to his service, and no man can be exempt from the office of sheriff but by act of parliament or letters-patent." In a republic the sovereign power rests in the people, to be expressed only in the forms of law; and if the duty, preservative of the common welfare, is disregarded, society may suffer great inconvenience and loss before, through the methods of legislation, the evil can be remedied. Upon a refusal of officers to perform their functions, effective government *pro tanto* ceases. In civilized and enlightened society, men are not absolutely free. All citizens owe the duty of aiding in carrying on the civil departments of government. The burden of government must be borne as a contribution by the citizen in return for the protection afforded. The sovereign, subject only to self-imposed restrictions and limitations, may, in right of eminent domain, take the property of the citizen for public use. He is required to serve on juries, to attend as a witness, and, without compensation, is required to join *posse comitatus* at the command of the representative of the sovereign power; and he is required to do military service at the will of the sovereign. In all these, private right and convenience must yield to the public welfare and necessity. It is essential to the public welfare, necessary to the preservation of government, that public affairs be properly administered; and for this purpose civil officers are chosen, and their duties prescribed by law. A political organization must necessarily be defective which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the public duty imposed by its laws, and necessary to the exercise of the functions of government.

It is admitted by the demurrer that the respondent was legally appointed town clerk of the town of Mt. Morris. The office is connected with, and necessary to, the levy of taxes to carry on the municipal concerns of the town, and the administration of its local jurisdiction. It is shown that there was a public necessity, as well as that relator had a private interest in the performance of the duties of that office. No election had been held in the town since the annual town meeting of 1891. Numerous persons had been appointed to said office, but it remained vacant, and the duties, consequently, undis-

charged. It is admitted by the demurrer, also, that claims against the town in favor of the relator, to a large amount, had been audited by the board of town auditors of said town, and allowed, and certificate thereof duly made, as provided by law, but that the same could not be delivered to, or filed with, the town clerk, because of such vacancy in said office, nor could the aggregate amount thereof be certified to the county clerk of said county, to be levied and collected as other town taxes. It is conceded that the respondent was eligible to the office; that a vacancy therein existed; that he was appointed conformably to the law, and duly notified thereof. Rev. Stat., art. 10, chap. 189, §§ 1-3. The statute provides that every person appointed to the office of town clerk, before he enters upon the duties of his office, and within ten days after he shall be notified of his appointment, shall take and subscribe before some justice of the peace, etc., the oath or affirmation of office prescribed by the constitution, and within eight days thereafter file the same in the office of the town clerk. Rev. Stat., art. 9, chap. 189, § 2. Section 8 of the same article provides that if any person elected or appointed to said office shall neglect to take and subscribe the oath, and cause the same to be filed as aforesaid, such neglect shall be deemed a refusal to serve. And section 7 of the same article provides: "If any person elected to the office of . . . town clerk shall refuse to serve, he shall forfeit to the town the sum of \$25." One of the special duties enjoined upon a town clerk is: "He shall annually, at the time required by law, certify to the county clerk the amount of taxes required to be raised for all town purposes." Rev. Stat., art. 12, chap. 189, § 4. Rev. Stat., 1874, chap. 120, §§ 127, 128, provides that the county clerk shall determine the rate per cent upon the valuation of the property of towns, etc., that will produce not less than the net amount of the sums certified to him according to law, to be extended by the county clerk upon the equalized valuation of property in such town, etc. The only mode provided by law by which a tax can be levied upon the property of a town for the payments of its debts or current expenses is by the certificate of the town clerk of the town to the county clerk, as thus prescribed. It is apparent, therefore, that a public necessity exists for the discharge of the public duty.

It is insisted that, the legislature having provided a penalty for the refusal to accept the office, that remedy is exclusive, and that a payment of the penalty imposed was intended to be in lieu of the service. We cannot concur in this view. The purpose of imposing the penalty was to enforce the acceptance of the office, and performance of its duties; and the statute cannot be construed as intending that the person chosen should be discharged from the duty by payment of the penalty, and thereby the purposes of the creation of the office frustrated, and the public duty remain unperformed. Authorities *supra*. It is to be presumed that, had the legislature intended that the payment of the fine should be in lieu of the service, they

would have so enacted, and, not having done so, the duty remains, notwithstanding the imposition of the fine or penalty. High, Extr. Legal Rem. § 834, *supra*.

It is also insisted that the demurrer should be sustained for the reason that no demand is averred to have been made upon respondent to accept the office, and perform its duties. It is alleged that he was duly, forthwith, notified of his appointment, by the board authorized by law to make the same (Rev. Stat., 1874, art. 10, chap. 189, § 8), and that he refused and neglected to accept the office. Upon being notified, it was his duty, by law, to take and subscribe the oath of office, and file the same, and enter upon the discharge of the duties.

Relator was not alone interested, nor did the failure of respondent to qualify affect

its interest only. On the contrary, the duty, the performance of which is sought to be enforced, is a public duty, commanded by public law. The case is therefore clearly distinguishable from one in which the act sought to be enforced is for the benefit of some private party. In cases of this class no formal demand was necessary, as preliminary to the application for mandamus. *People v. Upper Alston School Dist. Board of Education*, 127 Ill. 624.

We are of opinion that the respondent ought to be required to accept the office of town clerk of said town, to which he has been duly and legally appointed, to take and file the oath as such town clerk, as provided by law, and to discharge the duties of said office, and a *peremptory writ of mandamus* is awarded accordingly.

MINNESOTA SUPREME COURT.

STATE of Minnesota

v.

C. E. CORBETT.

(..... Minn.)

- *1. Laws 1893, chap. 66, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," is not unconstitutional, either as "class legislation" granting special privileges to carriers.
2. Or as a delegation of the police power of the state to grant licenses to engage in a business.
3. Or as an interference with interstate commerce.
4. Or (at least as to tickets purchased after the passage of the act) as depriving a citizen of his property "without due process of law."
5. If a business, as that of common carriers, is a proper subject of police regulation, so are its incidents and accessories; as, for example, the issue and sale of transportation tickets.
6. The word "owner," as used in the act includes all those who operate a railroad or steamboat in the transportation of passengers; as, for example, lessees, receivers and the like.

(May 25, 1894.)

CERTIFICATION by the District Court for Ramsey County for the opinion of the Supreme Court of a demurrer to an indictment for selling railroad tickets contrary to law, after the entering of an order sustaining the demurrer. *Order reversed*.

The facts are stated in the opinion.

Messrs. H. W. Childs, Atty. Gen., Pierce Butler and C. W. Bunn for the state.

*Headnotes by MITCHELL, J.

NOTE.—As to validity of statutes against ticket brokerage or "scalping" see *Burdick v. People* (Ill.) 24 L. R. A. 152 and note.

24 L. R. A.

See also 43 L. R. A. 264.

Messrs. Horton & Denegre, for defendant.

The law is unconstitutional as class legislation.

It places in the exclusive control of a privileged class the right to buy and sell a certain kind of personal property. It is not questioned but that a railroad ticket is property.

Hoffman v. Northern Pac. R. Co. 45 Minn. 58.

As property easily transferred and assigned it is merchantable. The privilege granted under the law is the exclusive right to sell railroad tickets and the donee of this privilege is the railroad company. A railroad corporation as such can only act through agents. It is difficult then to perceive how a burden is placed upon them by the provisions of a law which directs that they operate in the natural way through agents, licensed by themselves, and make redemption of their unused tickets, or parts of tickets, in most instances at a profit to themselves and in no cases at a loss. The agent licensed under this act is but a creature of the railroad who creates and exterminates him at pleasure. The state can license only such as the railroad selects. The privilege of selling the property rights in a railway ticket is thus limited to the appointees of the railroad, and thereby raises in them a favored class with privileges that no others can enjoy.

Everybody has the right to dispose of his property as he will so long as he does not interfere with his neighbor.

Arrowsmith v. Burlingim, 4 McLean, 497.

The law secures to every citizen the right to do with his own what he will.

Giozza v. Tiernan, 148 U. S. 662, 37 L. ed. 601.

The law is in violation of section 1, article 14, of the Amendments to the Constitution of the United States, in that it deprives the citizen of his liberty and property without due process of law.

A ticket even though purchased from one not a licensed agent entitles the holder to

travel thereon and such a contract is valid and can be enforced.

Sleeper v. Pennsylvania R. Co. 100 Pa. 259, 49 Am. Rep. 380.

The general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.

Cooley. Const. Lim. 181.

The only possible justification that can be found for this law is the police power of the state. This term means simply "the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all and is but the power to enforce the maxim *sic utere tuo ut alienum non laedas*."

Rippe v. Becker (Minn.) 23 L. R. A. 837; *Willis v. Standard Oil Co.* 50 Minn. 297.

The legislature certainly cannot give to an act the character of a police regulation by calling it such.

Tiedeman, Pol. Powers, § 186.

The business is legal.

Hirschfeld v. Dallas, 29 Tex. App. 242.

A man's business if legal, is one of his most sacred property rights. In destroying the business of ticket brokerage, this law takes from the ticket broker his property in a manner otherwise than by the law of the land and deprives him of the liberty guaranteed him in the bill of rights.

Tiedeman, Pol. Powers, § 102; *Dent v. West Virginia*, 129 U. S. 115, 121, 32 L. ed. 623, 625; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226; *Wynshamer v. People*, 13 N. Y. 878, 434.

In order to prohibit the prosecution of a trade altogether, the injury to the public which furnishes the justification for such a law must proceed from the inherent character of the business.

Tiedeman, Pol. Powers, § 102; *People v. Marx*, 99 N. Y. 877, 52 Am. Rep. 84; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 828; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 106, 21 L. ed. 894, 418; *Live Stock D. & B. Assn. v. Crescent City, L. S. L. & S. H. Co.* 1 Abb. U. S. 388; *People v. Gillson*, 109 N. Y. 889; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 469, 24 L. ed. 527, 529; *Ex parte Garland*, 71 U. S. 333, 18 L. ed. 366; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209.

It has never been questioned and the scalper law of Illinois is to-day a dead letter.

People v. Gilbert, 25 Chicago Legal News, 312.

The Texas law was declared unconstitutional in *State v. Mercer*, Houston Daily Herald of October 6, 1893.

The law is in violation of section 8, article 1, of the Constitution of the United States, which provides: "That congress shall have power to regulate commerce with foreign nations and among the several states and with the Indians tribes."

Warren v. Charlestown, 2 Gray, 84; *Slauson v. Racine*, 13 Wis. 899; *Allen v. Louisiana*, 108 U. S. 80, 26 L. ed. 818; *Burkholls v. State*, 16 Lea, 71; *Western U. Teleg. Co. v. Texas*, 62 Tex. 630; *Jones v. Jones*, 104 N. Y. 384; Pom. Const. Law, § 878; *Welton v. Mis-*

souri, 91 U. S. 275, 23 L. ed. 347; *North River S. B. Co. v. Livingston*, 8 Cow. 718; *People v. Raymond*, 34 Cal. 492.

The power to regulate interstate commerce is exclusively vested in congress, and any attempts to do so on the part of the states are void. It makes no difference in what language the statute is framed, its purpose must be determined by its nature and reasonable effect.

Leisy v. Hardin, 185 U. S. 100, 127, 34 L. ed. 128, 138, 3 Inters. Com. Rep. 86; *Hannibal & St. J. R. Co. v. Husen*, *supra*; *Hall v. DeCuir*, 95 U. S. 485, 489, 24 L. ed. 547, 548; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618, 3 Inters. Com. Rep. 595; *Chy Lung v. Freeman*, 92 U. S. 275, 28 L. ed. 550; *Henderson v. Wickham*, 92 U. S. 259, 28 L. ed. 548.

This law attempts to destroy the rights of property in tickets owned in this state though purchased and to be used upon railroads in another state; it attempts to destroy the right of property in tickets purchased in this state and for use upon railroads in another state; it attempts to prevent the transfer and regulate the redemption of tickets sold in another state for use in this state; it attempts to legislate against a business established for the purpose of conducting ticket agencies for the sale of tickets upon railways operated in the different state of the Union. All of which said purposes are interstate commerce, and in so far as this law interferes with or regulates any of the same it contravenes the interstate commerce clause of the constitution.

McCall v. California, 186 U. S. 104, 34 L. ed. 891, 3 Inters. Com. Rep. 181.

Mitchell, J., delivered the opinion of the court:

The defendant was indicted for selling on October 18, 1893, a railroad ticket of the Northern Pacific Railroad Company from St. Paul to Little Falls, in this state, contrary to the provisions of section 2, chapter 66, Laws, 1893, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," approved April 19, 1893. The trial court, having sustained a demurrer to the indictment, has certified the case to this court, pursuant to Gen. Stat., 1878, chap. 117, § 11. We think the statute contemplates that the report and certificate of the trial judge should indicate the particular questions of law which he deems so important and doubtful as to require the decision of this court. In the present case the "memorandum" of the judge, which is incorporated in his report, is the only thing which points out the questions of law upon which he desires our opinion, and it is apparent from this that the only question which he considered or passed upon in sustaining the demurrer was the constitutionality of the statute under which the indictment was found. We shall, therefore, confine ourselves to the consideration of the objections raised to the validity of that statute. These objections may be all summed up as follows: (1) It is "class" legislation, in that it gives to persons named by the carriers the exclusive

privilege of conducting the business of dealing in transportation tickets. (2) It delegates to the carriers the police power of licensing persons to conduct the business of dealing in such tickets. (8) It deprives the citizen of his property in such tickets without due process of law. (4) It is an unlawful interference with interstate commerce. (5) It discriminates between incorporated and non-incorporated carriers of passengers, because section 7 imposes a penalty on the former, and not on the latter, for refusing to redeem unused tickets.

Before examining the provisions of the act, or entering upon the consideration of these objections, it may be well to refer briefly to a few elementary principles applicable to such cases. That the transportation of passengers by common carriers is a proper subject of police regulation by the state is unquestioned; and, if a business itself is the subject of police regulation, then so are all its incidents and accessories. That the matter of the issue and transfer of tickets, as evidences of the contracts of the carriers, is an incident and accessory of the business, needs no argument. And, where a business is a proper subject of the police power, the legislature may, in the exercise of that power, adopt any measures, not in conflict with some provision of the constitution, that it sees fit, provided, only they are such as have some relation to, and some tendency to accomplish, the desired end; and, if the measures adopted have such relation or tendency, the courts will never assume to determine whether they are wise, or the best that might have been adopted. *State v. Donaldson*, 41 Minn. 74; *Rippe v. Becker* (Minn.) 22 L. R. A. 857. Furthermore, courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the constitution; or because it is opposed to a spirit supposed to pervade the constitution, but not expressed in words, or because it is thought to be unjust or oppressive, or to violate some natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are protected by the constitution. Except where the constitution has imposed limitations upon the legislative power, it must be considered as practically absolute; and to warrant the judiciary in declaring a statute invalid they must be able to point out some constitutional limitation which the act clearly transcends.

With these elementary propositions in mind, we proceed to consider the evils, or supposed evils, which the legislature designed to remedy, and the measures which they have adopted to accomplish that end. It was commonly asserted and believed (to what extent correctly is not important) that spurious and stolen tickets, and tickets which had expired by limitation, or that were not transferable, were often put on the market to such an extent as to work great frauds upon both the public and the carriers; that frequently those selling such tickets were irresponsible, so that the party defrauded had

no redress; that the business of trafficking in such tickets often furnished an inducement to railway employes to steal tickets, or issue spurious ones, and put them on the market. It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with "scalpers," ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear. Do they transcend any constitutional limitation upon legislative power? It seems to us that most of the objections to the act—certainly the first two—are based upon a radical misconception of its provisions, and of the character of transportation tickets as property. Counsel for the defendant seems to assume—First, that such tickets are vendible chattel property, which are the legitimate subject of barter and sale, the same as any other chattels, and, second, that this statute is designed to be a "license law," in the ordinary sense of that term. With these two premises assumed, the task of successfully assailing the validity of the act is a very easy one. While a "railroad ticket" is, in one sense, "property," yet it is not merchandise or a chattel. It is merely the evidence of the contract of the carrier to transport the holder between the points, and on the condition, therein named. Treating it as the contract itself, it is in the nature of a chose in action. No one with whom a carrier makes such a contract has any inherent constitutional right to insist that it should be assignable. At common law, all choses in action were nonassignable, and if the legislature had deemed it necessary, in order to prevent the supposed evils, to provide that all transportation tickets should be nontransferable, or even to prohibit the issue of tickets altogether, and require carriers of passengers to collect fare in cash, we fail to see why they had not the power to do so.

Again, the act has not the first element of a "license law" in the common meaning of the term. It must be borne in mind that these tickets are the contracts, or evidences of the contracts, of the carriers, and hence, in the nature of things, can in the first instance be issued or sold only by the carriers themselves, who, as a matter of course, have the exclusive right to appoint their own agents for that purpose. Now, what the act provides is that the carriers shall only issue or sell their tickets through agents appointed in a particular manner, and the evidence of whose appointment has been authenticated by certain formalities. While the certificate of a compliance with these requirements, issued by the state, is called a "license," yet it is merely the evidence of the appointment of the agent, its purpose being to secure and preserve public written evidence of that fact, so as to prevent evasions of the law, and to enable every one who buys a ticket to ascertain whether the person with whom he is dealing actually represents, and has authority to bind, the carrier. The agent is given no

authority to sell or deal in tickets of other carriers, but only authority to sell the ticket of the carrier appointing him, and providing him the certificate of such authority. So far from granting any special privileges to the carrier, it imposes a burden upon him—First, by limiting his right to issue or sell tickets to agents provided with a certificate from the state of their authority; and, second, by requiring him to repurchase or redeem unused tickets. And then, in order to prevent the frauds already referred to, the act prohibits entirely the sale, barter, or transfer, within the state, of the whole or any part of any ticket, or other evidence of the holder's right to travel on any railroad or steamboat, whether situated or operated within or without the state, except by the agent of the carrier possessing the certificate of authority provided for in the first section of the act.

The fact that the purchaser of a ticket is prohibited from selling it to whom he pleases does not "deprive him of his property without due process of law." The disposition of property may always be limited or regulated where public interests so require. The ticket is not destroyed or taken from the holder, nor is his right to ride on it at all limited. The only limitation is upon his right to transfer it. If he wishes to ride on it, which is the purpose for which a ticket is presumably bought, he can do so; but, if he does not use it, his only course is to require the carrier who issued it to redeem it. As already suggested, a man has no constitutional right to insist that these contracts for transportation shall be transferable; and if the legislature had seen fit to declare that they should not be, and that they could only be used by the party to whom they were originally issued, they might have done so, even without making any provision at all for their redemption by the carrier if not used. This might not be true as to tickets, by their expressed or implied terms transferable, purchased before the passage of the act; but as to the tickets issued and purchased after that it is unquestionably true, for the statute becomes a part of the contract expressed in the ticket, and is inherent in the property in it. *Ogden v. Saunders*, 25 U. S. 12 Wheat. 218, 6 L. ed. 606.

The indictment in this case charges defendant with selling the ticket nearly six months after the passage of the act, and, if the law should be regarded as invalid as to tickets issued and purchased before it was passed, it was for the defendant to plead and prove that he comes within the class of persons as to which the law is invalid, and that this ticket was one as to which the statute does not operate. A law may be entirely valid as to some persons and some acts, and invalid as to others, and its invalidity can be raised and taken advantage of only by those who show that they have a right to question the act. They must show that their rights are taken away by the law, and that as to them, in the particular case, there is a higher law in the constitution which supersedes the statute. In Indiana and Illinois the courts have upheld statutes similar to the one under consideration in all material respects, except that

they provide that the acts shall not prohibit any person who has purchased a ticket from any agent authorized as by the act provided, with the bona fide intention of traveling upon the same, from selling it to any other person. *Fry v. State*, 68 Ind. 552, 80 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, ante, 152.

In these cases the courts lay some stress upon this provision. But we are unable to see how the absence of it affects the validity of the act, or how, at least as to tickets issued after its passage, it deprives a person of his property "without due process of law." The law may in that respect be more drastic; but if the legislature thought that such an exception would open the door to evasions of the law, and that the evil aimed at could be effectually remedied only by absolutely prohibiting any sale of tickets within the state except by the carrier himself, through his agents authorized in the manner provided, we think it was competent for them to so declare.

Neither is there anything in the objection that, while the act prohibits the sale of any tickets except in the manner prescribed, it only provides for the redemption of unused tickets of railroads or steamboats situated or operated, in whole or in part, within the state. This limitation of the provisions as to redemption may have been because of the supposed inability of the state to compel redemption by foreign or nonresident steamboats or railway companies; but, as the sale of all tickets might have been prohibited without any provision for their redemption, the act does not deprive the holder of a ticket of a nonresident carrier simply because it leaves him, in case he does not use it, to such remedies, if any, as may be given him by the law of the domicile of the carrier. It is hardly necessary to suggest that it is just as necessary, in order to prevent frauds on the public, to regulate the sale, within the state, of tickets of "nonresident" carriers as of "resident" ones. We may add, in passing, that section 5 of the Act makes it the duty of a carrier within the state to redeem tickets sold by it in "any manner," no matter whether sold within or without the state; also, that the word "owners" is evidently used in a comprehensive sense, so as to include all who are operating a railroad or steamboat, whether as owners of the property, or as leasees, receivers, or the like. What has been said fully covers the first three objections to the statute.

There is clearly nothing in the objection that the act unlawfully interferes with interstate commerce. In the first place, the question is not in this case, because the ticket is not for an interstate ride. But, even if it was, there would be nothing in the point. The law is not a revenue law, and is not designed to, and does not, regulate interstate commerce at all. It is a mere police regulation of the sale and transfer of tickets, designed to protect the public from frauds, and its interference, if any, with interstate commerce, is purely incidental and accidental. The grant of power to congress to regulate interstate commerce was never designed to, and does not, at all interfere with

police power of the states to promote domestic order, to prevent crime, and to protect the lives and property of its citizens, although such regulations may indirectly operate upon and affect interstate commerce. Such regulations are valid in spite of their operation on commerce, and the right to pass them does not originate from any power in the state to regulate commerce. The books are so full of cases to this effect that the citation of authorities in support of the proposition is unnecessary.

Neither is there anything in the last objection. If defendant is correct in his construction of section 7,—that it only imposes a penalty, in favor of the state, upon incorporated carriers for a refusal to redeem unused tickets,—this is not an objection which he is in position to raise, as it does not affect him. If any owner of a railroad or steamboat situated or operated, in whole or in part, within the state, refuses to redeem his ticket, as provided in section 5, the purchaser has his civil remedy, wholly independently of section 7. Even if the latter section should be declared wholly invalid, on the objection of an incorporated carrier, it would not affect the validity of the balance of the act.

We have endeavored to give this case the consideration which its importance deserves, and are not able to see that any of the objections urged against the validity of the act are well founded. With the policy or wisdom of it we have nothing to do.

Order sustaining the demurrer is reversed, and the cause remanded.

Buck and Canty, JJ., absent.

STATE of Minnesota, *Resp't.*,

v.

M. L. GLADSON, *Appt.*

(.....Minn.....)

*1. Held, chapter 60, Laws 1893, requiring railroad companies to stop all regular passenger trains at county seats, is not unconstitutional or void, either as being an unreasonable regulation or as interfering with interstate commerce.

2. Held, further, said statute is not void as to a train carrying United States mail, which also carries passengers between points within this state.

(June 1, 1894.)

APPEAL by defendant from a judgment of the District Court for Pine County convicting him of failure to stop a train on which he was engineer at a county seat, as required by the state statutes. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. J. D. Armstrong and Bunn & Hadley*, for appellant:

The legislature cannot own and operate the railroads.

*Headnotes by CANTY, J.

NOTE.—See in connection with the above case the leading case of *Illinois Cent. R. Co. v. People* cited therein and reported in 19 L. R. A. 119. 24 L. R. A.

See also 20 L. R. A. 468.

Ripps v. Becker (Minn.) 23 L. R. A. 357.

This involves the conclusion that they cannot operate or run railroads without owning them.

The province of the legislature is restricted to regulation; and regulation must be reasonable. It must fall under one of the recognized heads of legislative power, as the police power, or the rate-making power, which latter is probably a branch of the police power. Unreasonable, arbitrary and unwarranted regulation ceases to be lawful and becomes a legislative taking of property without "due process of law."

There are fundamental rights, the rights of liberty and property, which the legislature cannot disregard.

State v. Billings (Minn.) Jan. 25, 1894.

The right of property includes the right of the owner to sell and to use it in customary and harmless ways.

Evison v. Chicago, St. P. M. & O. R. Co. 11 L. R. A. 484, 45 Minn. 378.

The legislative power to fix rates must be limited by the courts to the fixing of reasonable rates.

Chicago, M. & St. P. R. Co. v. Minnesota, 184 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209.

This law if good involves the power to confiscate and destroy.

Every train must stop at every county seat. If at county seats, the legislature may add, "at every side track," or in the country, "at intervals of one mile." No reason or necessity underlies the duty to stop, for the law says all trains must, and whether there is a passenger or not. The regulation is purely arbitrary and unreasonable; invented by some statesman who wished to score a point against corporations.

This statute is a regulation of interstate commerce not within the power of the state.

The carriage of passengers and express by this train from St. Paul to West Superior was interstate commerce, though there was a transfer at West Duluth to another connecting train running to Superior.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 572, 30 L. ed. 249, 1 Inters. Com. Rep. 81; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 894, 3 Inters. Com. Rep. 178; *The "Daniel Ball"*, 77 U. S. 10 Wall. 557, 19 L. ed. 999.

Except as to necessary and reasonable police regulations resting on the rule in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, the states have no power to burden interstate commerce.

Non-action by congress is equivalent to a declaration that commerce between states shall be free.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 357; *Welton v. Missouri*, 91 U. S. 275, 28 L. ed. 847; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547.

The police power in its broadest sense is founded on the maxim, "*Sic utere tuo ut alienum non laedas.*"

Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 63 Am. Dec. 625; *Butler v. Chambers*, 36 Minn. 69; *Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. ed. 993.

Therefore, every legitimate police law must be an enactment in the line of compelling the use of one's own rights so as not to injure others.

It is in the discretion of the postmaster general to determine at what hours the mail shall arrive at and depart from postoffices. Upon this point his decision is absolute and cannot be controlled by the states.

Neil v. Ohio, 44 U. S. 8 How. 720, 11 L. ed. 300.

The road in question is a post-road, and the postal service thereon is committed to the United States by the constitution.

U. S. Rev. Stat. § 8964.

If the legislature can pass this law it can cripple and impede the United States mail service.

The Statute (U. S. Rev. Stat. § 8995) makes it unlawful to willfully hinder, delay, or obstruct the passage of the mail, or any person, or vehicle carrying the same.

This statute prevents the levy of a civil writ on a train or carriage so engaged.

United States v. Barney, 8 Hughes, C. C. 545; *United States v. DeMott*, 8 Fed. Rep. 478.

Messrs. H. W. Childs and George B. Edgerton, for respondent:

The same question has been raised before in another action brought in Pine county against the same appellant, who is one of the engineers in the employ of the St. Paul & Duluth Railroad Company. The appellant was convicted and after his conviction applied to the United States Supreme Court for the District of Minnesota for a writ of habeas corpus.

The court remanded the prisoner.

The position taken by Judge Williams in that case has been fully sustained by a number of well considered cases.

Chicago & A. R. Co. v. People, 105 Ill. 659; *Illinois Cent. R. Co. v. People*, 19 L. R. A. 119, 143 Ill. 434.

Messrs. R. C. Saunders and S. G. L. Roberts, also for respondent:

Nothing in the constitution was designed to interfere with the state in the exercise of its police power.

Barbier v. Connolly, 118 U. S. 27, 28 L. ed. 923.

No court has yet been bold enough to attempt to define with exactness the limits to the exercise of this power.

Com. v. Alger, 7 Cush. 85.

The courts, however, agree in giving it a wide scope, so as to include all regulations having relation to what is variously termed the "public welfare," "public prosperity," "common good," and "public well being."

Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 63 Am. Dec. 625; *State v. New Haven & N. Co.* 43 Conn. 351; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Davidson v. State*, 4 Tex. App. 545, 80 Am. Rep. 166; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Barbier v. Connolly*, *supra*; *Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Mugler v. Kansas*, 123 U. S. 660, 31 L. ed. 209; *Powell v. Pennsylvania*, 127 U. S. 685, 33 L. ed. 256; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 23 Am. Rep. 71; *Wood, Railway Law*, p. 465; *Butler v. Chambers*, 36 Minn. 69.

This act is one affecting the public welfare.

24 L. R. A.

Chicago & A. R. Co. v. People, 105 Ill. 657.

The argument that "if public necessities require trains the railroads may be compelled to run and stop them," might have some force if the act applied to ordinary way stations.

But see *Pennsylvania Co. v. Wentz*, 37 Ohio, St. 333; *Com. v. Eastern R. Co.* 108 Mass. 254, 4 Am. Rep. 555; *State v. New Haven & N. Co. supra*.

It is not, however, the amount of business transacted at the county seats through the county officials, alone, that distinguishes these places from the ordinary railroad station, but its close relation to the general welfare, as well.

If the law has some relation to the public welfare, then the legislature had the power to pass it, and with the legislature was lodged the power to determine the necessity for the law.

Mugler v. Kansas and *Munn v. Illinois*, *supra*; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Sinking Fund Cases*, 99 U. S. 718, 25 L. ed. 501; *Powell v. Pennsylvania*, *supra*; *Cooley*, Const. Lim. 6th ed. pp. 220, 221.

For protection against abuses by legislatures, the people must resort to the polls, not to the courts.

Butler v. Chambers, *supra*; *Wisconsin v. Chicago, St. P. M. & O. R. Co.* 11 L. R. A. 434, 45 Minn. 873; *Rippe v. Becker* (Minn.) 22 L. R. A. 857. See also *Metropolitan Board of Excise v. Barrie*, 84 N. Y. 657; *Orwig v. First Presby. Church of Pittsburgh*, 88 Pa. 46, 32 Am. Rep. 417; *Cooley*, Const. Lim. 6th ed. p. 158.

If every police regulation which incidentally affects commerce is for that reason obnoxious to the constitution, the term "police power" means nothing, and the state is denied the power which even counsel for appellant concedes belongs to it.

Illinois Cent. R. Co. v. People, 19 L. R. A. 119, 143 Ill. 434; *Chicago & A. R. Co. v. People*, *supra*; *State v. Baltimore & O. R. Co.* 24 W. Va. 753.

Canty, J., delivered the opinion of the court:

Pine City is a village of 800 inhabitants, the county seat of Pine county, and a station on the St. Paul & Duluth Railroad. The defendant was an engineer on a passenger train on said railroad, and was arrested, tried, convicted, and sentenced in justice court for failing to stop his train at Pine City. He appealed to the district court, and was there again convicted and sentenced, and appeals to this court. The statute under which he was convicted is chapter 60, Laws of 1893, which reads as follows: "All regular passenger trains, run by any common carrier operating a railway in this state, or by any receiver, agent, lessee or trustee of said common carrier, shall stop a sufficient length of time at its stations at all county seats within this state to take on and discharge passengers from such trains with safety, and any engineer, conductor or other agent, servant or employé of, or any person acting for such common carrier or for any receiver, agent, lessee, or trustee of such common carrier, who violates any provision of this act is guilty of a misdemeanor and punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by an

than ten days nor more than three months; provided, however, that this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad." This train was a fast express, running from St. Paul and Minneapolis to Duluth, stopping only at railroad crossings and junctions, but not at stations on the way. Besides this train, there were two other passenger trains and one accommodation train run each way every day, which stopped at Pine City.

1. It is contended by appellant that this law is so unreasonable and oppressive as against the railroad company that it is unconstitutional and void. We are not of that opinion. While it seems to us that it is rather drastic legislation to compel this train, which is designed only for through traffic, and stops at no other stations *en route* to stop at this one station while there are so many other trains to do the local business, still we cannot substitute our judgment for that of the legislature. There are reasons in support of the law on which the legislature had a right to come to the conclusion at which they arrived. Besides, this law does not apply alone to this train, this county seat, and this railroad, but to all railroads, all county seats, and, with a few exceptions, to all trains; and there are not the same reasons for assailing such a general law merely because it works hardship or inconvenience in exceptional cases as if it worked such hardship or inconvenience in all cases to

mon carriers which the legislature has the power to impose, and it is certainly not so unjust and unreasonable that the courts should declare it void. See *Chicago & A. R. Co. v. People*, 105 Ill. 687, and *Illinois Cent. R. Co. v. People*, 148 Ill. 484, 19 L. R. A. 119, where a similar law is held valid.

2. The evidence showed that, while the train in question ran only to Duluth, one third of the passengers it carried were carried on through tickets to Superior, Wis., and were transferred at Duluth to another train, which connected with this one, and carried these passengers to Superior. The train being used to some extent in the business of interstate commerce, it is contended for this reason that the legislature had no right to impose this regulation on it. We do not agree with counsel for appellant. While it is not necessary to put it on so narrow a ground, we will say that this is not a regulation of interstate traffic, but most distinctively a regulation of local traffic, for the purposes of which the train was required to be stopped.

3. The evidence showed that the train in question carried the United States mail and it is contended that for this reason the regulation was void. The point is without merit.

The judgment appealed from should be affirmed.

So ordered.

Buck, J., absent, sick, took no part.

Affirmed 166 U. S. 427, 41 L. ed. 1064.

TEXAS SUPREME COURT.

UNION CENTRAL LIFE INSURANCE CO., *Appt.*,

Sallie L. CHOWNING.

(36 Tex. 654)

1. A statute making a life or health insurance company liable for damages and attorney's fees in case of failure to pay a loss within the time specified in the policy does not deny such companies the equal protection of the laws.
2. A constitutional guaranty of equal rights and privileges to all free men does not apply to corporations.
3. A constitutional provision against special laws regulating practice in the courts does not apply to a statute making insurance companies liable to damages and attorneys' fees in case of default in payment of policies.
4. Requiring an insurance company to pay a penalty and attorneys' fees if compelled to pay a loss which it fails to pay within the time specified in the contract does not tend to prevent a resort to the courts in contravention of a constitutional requirement that all courts shall be open.

NOTE.—As to denying one of equal protection of the laws by the imposition upon him of attorney's fees which are not generally allowed, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 379.

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See also 32 L. R. A. 520; 42 L. R. A. 363.

5. A law constitutionally enacted, which affords a hearing before it condemns, and provides for judgment after trial, does not deprive of property, privileges, or immunities without due course of the law of the land.

6. A statute providing penalties for breach of contract cannot be held unconstitutional merely on the ground that it is against the genius, nature, and spirit of the government and general principles of law and reason.

7. An assignment of error embracing three distinct propositions without specifying the error complained of is insufficient.

8. The very question of law is not certified within the meaning of the Texas Act of May 2, 1893, by presenting a petition of plaintiff covering a number of pages with exceptions thereto.

(May 10, 1894.)

QUESTIONS CERTIFIED by the Court of Civil Appeals for the Fifth Supreme Judicial District for the opinion of the Supreme Court in an action brought to recover the statutory penalty for failure to promptly pay the amount due under an insurance policy in which a judgment has been entered in favor of plaintiff. *Opinion in plaintiff's favor returned.*

The facts sufficiently appear in the opinion. *Messrs. Bassett, Seay & Muse and Ramsey, Maxwell & Ramsey* for appellant.

Brown, J., delivered the opinion of the court:

The court of civil appeals for the fifth supreme judicial district has certified to this court the following questions and statement: "In the above-entitled cause the following issues of law arise, which this court deems advisable to present to the supreme court of the state of Texas for adjudication, to wit: Question 1. Article 2953, Rev. Stat. provides as follows: 'Penalty for Failure to Pay Loss. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss.' Is this statute, in providing for recovery of damages or attorney's fees, violative of the constitution of this state or the Constitution of the United States, or is it valid and legitimate legislation? Question 2. The first, second, and third assignments of error in this case are as follows: 'First assignment of error: The court erred in its several rulings upon the issue of alleged waiver by the defendant of the forfeiture of the policy sued on: (1) In overruling the defendant's exceptions to the plaintiff's first supplemental petition, alleging such waiver, and setting up defendant's alleged custom of dealing with its policy holders; (2) in refusing the several special charges requested by the defendant numbered 1, 2, 4, 5, 7, 8, and 10, relating to that issue, and in submitting the same to the jury, as was done in the general charge, and in the second special charge given at the plaintiff's request; (8) in overruling the defendant's motion for a new trial, based on the insufficiency of the evidence to support the verdict in that respect. Second assignment of error: The court erred in its several rulings touching the alleged agreement between the defendant and Reeves & Chowning and A. O. Reeves, by which they were to act as agents of the defendant in making loans and soliciting insurance, and the alleged services rendered by them under said agreement. (1) in overruling the defendant's exceptions to the plaintiff's supplemental petition alleging said agreement and services; and (2) in admitting evidence, over defendant's objections, relating thereto, as shown by defendant's bill of exceptions in that behalf. Third assignment of error: The court erred in refusing to instruct the jury, as requested by the defendant in its fourteenth special charge, relating to the effect of Chowning's alleged agreement to surrender the policy, and his alleged determination not to pay the premium notes, and its fifteenth and sixteenth special charges, relating to the alleged tender of the premium by the witness Williams, and instructing the jury as was done in the court's charge in chief and in the special charges

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given at plaintiff's request in relation to said several matters."

For appellant it is claimed that article 2953, Rev. Stat., denies to the class of corporations embraced in its provisions the equal protection of the law, contrary to the prohibition contained in section 1 of the 14th Amendment to the Constitution of the United States, and is therefore void. The reason assigned in support of this contention is that all corporations engaged in the business of insurance are not embraced in the terms of the law; but is not claimed that all corporations embraced in the classes named are not affected alike by its provisions. In 1891 the legislature of this state enacted a law defining who are and who are not fellow servants, which related only to employees of railroad companies. In *Campbell v. Cook* (decided by this court at its present term), 86 Tex. 686, that law was under consideration with the same objection made to it, and based upon the same reasons, as are here urged against the article of the statute now in question; and this court held that the act was not liable to the objection, quoting from *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 209, 33 L. ed. 108, as follows: "When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 189, 81 L. ed. 652, 2 Inters. Com. Rep. 24; *Pacific Exp. Co. v. Seibert*, 142 U. S. 853, 85 L. ed. 1040, 8 Inters. Com. Rep. 810; *Charlotte, O. & A. R. Co. v. Gibbs*, 142 U. S. 391, 85 L. ed. 1053; *New York v. Squire*, 145 U. S. 175, 86 L. ed. 666.

This rule is equally applicable to the defendant in this case and to the law under consideration. All persons of its class are treated alike under like conditions. The article of the statutes is not liable to the objection that it denies to appellant the equal protection of the law.

Appellant's counsel assert that the article in question is in conflict with article 1, § 3, of the Constitution of the state of Texas, which is in these words: "All free men when they form a social compact are entitled to equal rights, and no man, nor set of men, is entitled to exclusive, separate public emoluments or privileges but in consideration of public services." It is not shown just how the law violates this section, and, indeed, it would be difficult to imagine how a corporation which has no natural rights could be said to be entitled to such rights and privileges as grow out of the formation of a social compact. It is the creature of law, and entitled to just such rights as the law grants to it. When granted, such rights are protected from invasion the same as the rights of any natural person.

Section 13 reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him in his lands,

goods, person, or reputation shall have remedy by due course of law." The contention is that the exacting of an attorney's fee in case judgment shall be recovered against the insurance company prevents the free resort to the courts. We are referred to *Dillingham v. Putnam* (Tex.) 14 S. W. Rep. 808, as authority for this position, but that case was decided upon a different principle. That statute required receivers in all cases upon appeal to give bond for double the amount of the debt or judgment recovered. It was held that, as the receiver was but a fiduciary, this provision would in many cases prevent appeals altogether, and for that reason was void. In this case the party is not required to pay the fee or the damages as a condition precedent to making a defense, but only in case the defense is not maintained. The 12 per cent is given as damages for a failure to comply with the contract by payment, and the attorney's fees are allowed as compensation for the costs of collecting the debt.

Section 19 is as follows: "No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised except by the due course of law of the land." Mr. Cooley, in his work on Constitutional Limitations, adopts, as the best definition, that given by Mr. Webster in the *Dartmouth College Case*, of the term "due course of the law of the land," which is: "By the 'law of the land' is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." A law which is enacted by the legislature in the exercise of its constitutional powers, and which affords a hearing before it condemns, and renders judgment after trial, is not in violation of this provision of the constitution. The law in question gives to the persons coming within its provisions all of these safeguards, and is valid in that respect. Finally it is said that this act is in violation of article 8, § 56, subdiv. 16, as being a special law regulating practice in the courts. In the first place, it does not regulate the practice except in so far as the awarding of costs may be so considered. It is not a special law, because it applies to all cases that come under the provisions of the statute, and to all persons embraced in its terms. *Dillingham v. Putnam, supra*.

Appellant claims that the 12 per cent which the statute gives as damages for a failure to pay when due, and the attorney's fees, are penalties for the breach of the contract, and that the legislature has no authority to inflict penalties for the breach of private contracts. The attorney's fees are not given for the breach of the contract. They cannot be recovered except upon a failure to maintain the defense. No right to an attorney's fee attaches upon the failure to pay; it is cost given to reimburse the plaintiff for expenses incurred in enforcing the contract. If it be conceded that the 12 per cent is a penalty for a failure to pay when due, then the question arises, By what provision of our constitution is such legislation forbidden, and who will determine as to when the public is so interested in the enforcement of contracts as to

justify the legislature in enforcing their performance by penalties? There is no clause of our state constitution which expressly or by implication prohibits the act. But it is said that "the genius, the nature, and the spirit of our state government amount to a prohibition of such acts, and the general principles of law and reason forbid them." *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 885; *State v. Goodwill*, 28 W. Va. 179, 6 L. R. A. 621. We are also referred to *San Antonio & A. P. R. Co. v. Wilson* (Tex.) 19 S. W. Rep. 910, as sustaining this proposition. That case rests upon a construction of article 10, § 2, of our Constitution, the correctness of which we are not called upon to determine, which was held to prohibit that character of legislation as to contracts between a railroad company and their employes. We do not understand the learned judge who delivered the opinion of the court in that case to assert the doctrine contended for. It is sufficient to say that the case is not in point as authority upon this question. The powers of our state government are divided into three distinct departments, each of which is confined to a separate body of magistracy; the legislative functions to one, the executive to another, and the judicial to a third. Each of these departments is expressly prohibited from exercising a power conferred upon either of the others. State Const. art. 2. Mr. Cooley, in his work on Constitutional Limitations (pages 154, 155), after treating of various limitations on the legislative power, says: "Besides the limitations on legislative authority to which we have referred, others exist which do not call for special remark. Some of these are prescribed by the constitution, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience. The legislature is to make laws for the public good, and not for the benefit of individuals. . . . But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with large discretion, which cannot be controlled by courts, except perhaps where its action is clearly evasive, and when, under the pretense of lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." *State v. McCann*, 21 Ohio St. 198; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483. The justice or injustice, good or bad policy, of the law was for the legislature. The article is not in conflict with the Constitution of the United States or of the state of Texas, and is valid.

The first assignment is subdivided into three propositions, each pointing out a particular ground of error, and, if separated,

would each be sufficient as a distinct assignment of error. The second subdivision specifies seven distinct charges that were refused, of which five appear in the brief of appellant. These are but statements in different forms of one proposition of law, and may be considered together; but as to the other two we cannot tell, as they are not submitted to this court. The second assignment is likewise subdivided as the first, and presents in different forms alleged error of the court upon one proposition,—the alleged agreement between the parties. These assignments are irregular in the manner of presenting the points, but should not be considered as void, the different errors being pointed out by the assignments. The third assignment embraces at least three distinct propositions, and does not separately specify to the court the particular error complained of. It should not

be considered. The third and fourth questions do not submit to this court questions of law to be answered, but present to this court the supplemental petition of plaintiff, covering a number of pages, and the defendant's exceptions thereto, and call upon the court to deduce therefrom the questions of law arising thereon, and to answer the questions thus deduced therefrom. Section 35 of the Act organizing the court of civil appeals, as amended by an act approved May 2, 1893, requires the court of civil appeals to certify the very question of law to be decided. For reasons more fully expressed in the case of *Waco Water & Light Co. v. Waco* (86 Tex. 661), this court declines to answer questions 3 and 4.

Ordered that this opinion be certified to the Court of Civil Appeals.

MISSOURI SUPREME COURT. (In Banc.)

Alma SNODDY, *Appl.*,

v.

A. H. BOLEN *et al.*, *Respts.*

(..... Mo.)

Minerals reserved upon the dedication for street purposes of the soil covering them will pass by the owner's conveyance by number and reference to the plat of the lots bordering on the street, if the conveyance makes no mention of them.

(*Brace and MacFarlane, JJ., dissent.*)

(March 24, 1894.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Vernon County in favor of defendants in an ejectment proceeding to recover the minerals under a certain street. *Affirmed.*

The facts are stated in the opinions.

Messrs. Harrison & Harrison, with *Mr. William Thompson*, for appellant:

It is competent for the owner to convey his mines by a separate and distinct grant so as to create one freehold in the soil and another in the mines.

Wardell v. Watson, 93 Mo. 107; 8 Washb. Real Prop. 5th ed. § 81, p. 416, *625.

No one but the owner of the land in fee can dedicate it or the use of it to the public, and it is moreover essential to a dedication that the owner should intend what he does as a dedication.

3 Washb. Real Prop. 5th ed. § 7, p. 79, *459.

Land is divisible both horizontally and vertically. Therefore one person may be entitled to the surface of the land and another to the minerals under it.

2 Rapalje & Lawrence, Law Dict. p. 723.

The legislature of the state could not au-

NOTE.—The above case is without direct precedent so far as we can find. As to right of city in coal under street the fee of which is in the city, see *Union Coal Co. v. La Salle* (Ill.) 12 L. R. A. 323.

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See also 33 L. R. A. 245.

thorize any other use of the property in question than that specified in the act of dedication.

Cummings v. St. Louis, 90 Mo. 259.

The difference between statutory and common law dedications is that one vests the legal title of the ground set apart for public purposes in the municipal corporation in trust for the public while the other leaves the legal title in the original owner charged with the right and interests in the public which it would have if the fee were in the corporation.

Maywood Co. v. Maywood, 118 Ill. 61; *Mathiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411.

At common law a dedication to public uses in cases where there is no express grant to a grantee upon condition, operates by way of an estoppel in pais of the owner rather than by grant or the transfer of an interest in land.

2 Dill. Mun. Corp. 4th ed. § 628, p. 788, and authorities cited; *Reid v. Edina Board of Education*, 73 Mo. 295.

Although the effect of a statutory dedication may be to grant the fee of the streets to the corporation in trust for the public uses yet unless prohibited by the statute the proprietor in laying out a town or addition may grant the easement simply and reserve the minerals or grant the soil and except the minerals.

2 Dill. Mun. Corp. 4th ed. § 629, p. 740; *Dubuque v. Benson*, 23 Iowa, 248; *Noyes v. Ward*, 19 Conn. 250; *Manly v. Gibson*, 13 Ill. 812; *Peck v. Providence Steam Engine Co.* 8 R. I. 358; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261; 5 Am. & Eng. Encyclop. Law, p. 397, and cases cited; *Rutherford v. Taylor*, 88 Mo. 815; *Price v. Thompson*, 48 Mo. 361.

The fee of one piece of land not mentioned in a deed cannot pass as appurtenant to another.

Jackson v. Hathaway, 15 Johns. 447, 8 Am. Dec. 263; *Benn v. Hatcher*, 81 Va. 25, 59 Am. Rep. 645.

To constitute a common-law dedication there must be an acceptance by the public.

St. Louis v. St. Louis University, 88 Mo.

100; *Washb. Real Prop.* 208; *Briggs v. Connor*, 50 Mo. 164; *Landis v. Hamilton*, 77 Mo. 560; *McShane v. Moberly*, 79 Mo. 45.

But when the dedication takes effect by deed it takes effect as dedicated and prescribed in the deed of dedication or not at all.

Baker v. Vanderburg, 99 Mo. 378; *St. Louis v. Meier*, 77 Mo. 13; *Port Huron v. Chadwick*, 52 Mich. 820; 2 Dill. Mun. Corp. § 629.

An intent on the part of the owner to dedicate is absolutely essential and unless such intention can be found in the facts and circumstances of the particular case, no dedication exists.

2 Dill. Mun. Corp. 4th ed. § 686, pp. 751, 752 and authorities cited; *Pierce v. Chamberlain*, 82 Mo. 618.

In interpreting any deed or other contract resort may always be had to the circumstances under which it was made.

Lakeman v. Hannibal & St. J. R. Co. 36 Mo. App. 363; *Dobbins v. Edmonds*, 18 Mo. App. 307.

The exception in the deed of dedication withdrew from the operation of the conveyance to the mineral estate which, but for the exception, would have passed to the county under the general description, and whether by grant or exception it created a separate and distinct estate of inheritance, subject to the servitude of the public.

Wardell v. Watson, *supra*; *Williams v. Hay*, 120 Pa. 485.

The part excepted was in existence and remained in the grantor and where a part of the land granted is excepted the specific right which is appurtenant thereto, and which is necessary to the reasonable enjoyment of the same, is also excepted.

5 Am. & Eng. Encyclop. Law, pp. 455, 456; *Dand v. Kingscott*, 6 Mees. & W. 174; *Howard v. Wadsworth*, 3 Me. 471.

And where land is dedicated for particular public use only the dedicator retains all rights not inconsistent with the particular public use.

Stevenson v. Chittanooga, 20 Fed. Rep. 586.

A dedication may prescribe terms and limitations upon which he gives it.

Hemphill v. Boston, 8 Cush. 195, 54 Am. Dec. 749.

And the public cannot change the use.

David v. New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586, and *note*, 591; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 60, and *note*, 67; 2 Walt. Act. & Def. 709; *Baker v. St. Louis*, 7 Mo. App. 429; *Matthiessen & H. Zinc Co. v. La Salle*, *supra*.

Where an exception is made in a deed out of the land conveyed no title to the property thus excepted will pass by a subsequent conveyance by the grantee of the whole premises, which contain no exception.

Benn v. Hatcher, *Baker v. St. Louis* and *Dubuque v. Benson*, *supra*.

A reservation of mining rights is an actual grant thereof and the owner of the estate may use the surface so far as is necessary to carry on mining operations.

Wardell v. Watson and *Williams v. Hay*, *supra*.

Where the exception in a deed is as broad as the grant, the proper construction is that which 24 L. R. A.

is made by viewing the subject-matter in the mass of mankind would view it.

Weakland v. Cunningham (Pa.) 5 Cent. Rep. 475; *Foster v. Runk*, 109 Pa. 201.

Where the clause in a deed is strictly an exception, the part excepted remains in the grantor as of his former title.

Bean v. French, 140 Mass. 229; *Lawson, Rights, Rem. & Pr.* § 2293; *Washb. Real Prop.* 2d ed. p. 687; *Greenleaf v. Birth*, 31 U. S. 6 Pet. 802, 810, 8 L. ed. 406, 409; *Kimball v. Withington*, 141 Mass. 876.

The plat and deed of dedication filed in the recorder's office and referred to in all subsequent deeds and mortgages was notice to all and as much a part of the deeds and mortgages as though set out in said deed or mortgages.

Whitehead v. Ragan, 106 Mo. 231; *Dolds v. Vodicka*, 49 Mo. 98; *Digman v. McCollum*, 47 Mo. 372.

When the plat is duly executed, certified, acknowledged, and recorded under the statute, relating to laying out towns it vests fee in streets and so forth in corporation of town or city in trust for the benefit of the public.

Gebhardt v. Reeves, 75 Ill. 801; *Brooklyn v. Smith*, 104 Ill. 429; *Hunter v. Middleton*, 13 Ill. 50.

The purchaser of such lot in such plat acquires no title to the land of the street, but only to the land within the actual limits of the lot.

Illinois & M. Canal Trustees v. Haven, 11 Ill. 554; *Gebhardt v. Reeves*, *supra*; *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411; *Des Moines v. Hall*, 24 Iowa, 234; *Diedrich v. North Western Union R. Co.* 42 Wis. 260, 24 Am. Rep. 399.

The making, recording and permitting sale of lots according to town plat creates an estoppel upon the adjoining owners from claiming a greater interest in the soil of the streets than is indicated by the plat where the purchaser has no actual notice of any further claim.

Weisbrod v. Chicago & N. W. R. Co. 18 Wis. 85, 86 Am. Dec. 743.

The recording of a town plat vests fee simple of all parcels of land therein expressed for public use in county in which town is situated for public use specified and for no other use or purpose whatever.

Van Wert Board of Education v. Edison, 18 Ohio St. 221, 98 Am. Dec. 114; *Moss v. Pittsburgh, Ft. W. & O. R. Co.* 21 Ill. 522; *People v. Kerr*, 27 N. Y. 188; *Ingraham v. Chicago & M. R. Co.* 84 Iowa, 249; *Philadelphia & R. R. Co. v. Philadelphia*, 47 Pa. 825; *Hinchman v. Paterson Hoses R. Co.* 17 N. J. Eq. 75, 86 Am. Dec. 252.

And in New York city where the fee is in municipality for the uses and purposes therein mentioned under Act 1818, providing that the fee shall vest in the city for street purposes, the lot owners have no interest in such streets.

People v. Kerr, *supra*; *Kellinger v. Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 206.

The adjoining proprietor has no interest in the fee of the street and therefore cannot recover for an injury to it.

Stetson v. Chicago & E. R. Co. 75 Ill. 74; *Illinois & M. Canal Trustees v. Haven, supra*; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 429, 16 Am. Rep. 624; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Hughes v. Mississippi & M. R. Co.* Id. 261.

After a statutory dedication the abutter has no more right in the street than a stranger.

Matthiessen & H. Zinc Co. v. La Salle, supra.

Where one is the owner in fee of land used as a highway by the public he may maintain ejectment against one who claims to hold possession in exclusion of the owner or the public.

6 Am. & Eng. Encyclop. Law, p. 283, and authorities cited.

The burden of proof rests on the defendants to show a dedication of the mineral estate.

Hogue v. Albina, 10 L. R. A. 673, 20 Or. 182.

If the dedication was valid and the two estates were thereby created, they could only again be united by merger of the less estate in the greater, which could only take place by the two separate estates, one in the mineral under the streets and the other the public right and the right of the lot owners to use the streets for street purposes becoming vested in the same person.

15 Am. & Eng. Encyclop. Law, title "Merger," pp. 818, 814; 5 Lawson, Rights, Rem. & Pr. § 2293, p. 8849.

On rehearing.

The exception in the deed of dedication is as operative and had the same effect as if the exception had been incorporated into the deed of trust to O'Keef.

Whitehead v. Ragan, 106 Mo. 231.

If the grantor wishes to except anything out of what he may in general terms have granted, it is proper that such exception should follow the description of the thing granted, and it comes therefore under the head of premises in a deed, as an exception in the taking of something out of the thing granted which would otherwise pass by the deed.

8 Washb. Real Prop. 5th ed. § 57, p. 461.

And when thus excepted it was equivalent to an actual grant of a freehold in the mines and becomes a separate distinct estate of inheritance.

Wardell v. Watson, 93 Mo. 107; *Lillisbridge v. Lackawanna Coal Co.* 13 L. R. A. 627, 143 Pa. 298; *Caldwell v. Fulton*, 81 Pa. 475, 73 Am. Dec. 760; *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 538, 14 Am. Rep. 322.

A reference in a deed or will to lots by number as laid down on a map without further description prima facie makes the description contained in the map referred to, the boundary of the lot conveyed or devised.

Finelle v. Sinnott, 125 N. Y. 638.

Furnas became vested with the two distinct and separate estates. One in the thirty-six lots, and the other in all the valuable minerals in and under the streets and alleys intervening and adjacent thereto as clearly and fully as if they had been two different tracts of land.

Wardell v. Watson and Lillisbridge v. Lackawanna Coal Co. supra.

Since one tract of land does not pass as appendant or appurtenant to another tract of land, Furnas could not convey the mineral in 24 L. R. A.

the streets and alleys and the lots in one deed without specifically describing both tracts or estates, or by making two deeds, one for the lots and the other for the mineral in the streets and alleys as he has done in this case.

8 Washb. Real Prop. 5th ed. § 83, p. 418, and authorities cited in *note*; *Harris v. Elliott*, 85 U. S. 10 Pet. 25, 9 L. ed. 833.

When lots are conveyed by number and the addition is referred to, the defendants must be held to a knowledge of what appears in the chain of title through which they claim.

Plumer v. Johnston, 68 Mich. 165.

The authorities all hold that when an estate has once been severed or separated, it requires some express intention or act of the parties to merge them again, that the whole theory of the law is against merger, and will be varied only by the express intention of the parties.

15 Am. & Eng. Encyclop. Law, title "Merger," pp. 818, 814, and authorities cited.

The true test as to whether a thing is an incident or appurtenant seems to be the propriety of the relation between the principal and adjunct, which is to be ascertained by considering whether they agree in value and quality . . . and are directly necessary to the enjoyment of the property.

Barrett v. Bell, 82 Mo. 114, 52 Am. Rep. 861; *Wood, Land. & T.* 213, pp. 810, 811, and *note*, p. 812.

Having excepted the minerals in the streets in the deed of dedication, together with a right to mine the same, we hold that if we had no other means of reaching the minerals, and could not disturb the surface of the streets for that purpose, we could even take enough of the surface of the adjoining lots to get the mineral.

Wardell v. Watson, 93 Mo. 107; *Chartier's Block Coal Co. v. Mellon*, 18 L. R. A. 702, 152 Pa. 286, and cases therein cited.

Where a party holds title to land by deed, duly recorded, this is all the notice he is bound to give, so long as he remains passive.

Bales v. Perry, 51 Mo. 453; 8 Washb. Real Prop. 75, and authorities therein cited; *Harris v. Elliott, supra*.

Me-srs. Robert T. Stickney and Thomas & Hackney for respondents.

Black, J., delivered the opinion of the court:

This is an action of ejectment to recover "all the lead and zinc mines" in that part of Allen street which lies east of lot 16, in Hough & Furnas' addition to Webb City. Lot 16 fronts 50 feet on the west line of the street, and the street is 62 feet wide, so that the surface of the ground in question is 50 by 62 feet. The essential facts are these: A. W. Hough and Isaac Furnas, being the owners of 16 acres of land, laid the same off into lots, streets, and alleys. At the same time they executed the following deed: "We, A. W. Hough and Isaac Furnas, owners of the land described in the annexed plat of Hough and Furnas' addition to Webb City, do hereby release and convey to Jasper county, in the state of Missouri, for public purposes, all the streets and alleys as designated on said plat, except the right to all valuable minerals in said land, which we hereby reserve, together with the right to mine

the same." This deed bears date the 28d May, 1877. It and the plat were recorded on the 16th June, 1877. On the last-mentioned date, Hough conveyed his half interest in lots 1 to 36, both inclusive, to Furnas, "together with all valuable minerals in the streets and alleys of said additions east of the middle of Webb street, as reserved on the recorded plat thereof." Webb street is the first north and south street west of Allen street, and lots 1 to 36 include all the lots east of Webb street. Allen street runs north and south, and is wholly on the 16 acres. The east line of that street is the east line of the addition. Hough & Furnas owned no land adjoining the street on the east. On the 16th June, 1877, Furnas conveyed the 36 lots, describing them by their numbers, and making no mention of the minerals in the streets or alleys, to O'Keef, as trustee, to secure a debt of \$612. He made default in the payment of the debt, and the lots were sold under the terms of the deed of trust; and Pinney became the purchaser, and received a trustee's deed, dated the 8th August, 1887. The defendants hold under Pinney by various mesne conveyances. The plaintiff put in evidence two deeds executed in June, 1889,—one from Furnas to Bell, and the other from Bell to the plaintiff,—conveying the right to all valuable minerals in the streets and alleys in Hough and Furnas' addition to Webb City, east of the center of Webb street, with the right to mine the same. The defendants entered, and removed a large quantity of lead and zinc from beneath the surface of that part of the street in question. They were still in possession when this suit was commenced.

It will be seen from the foregoing statement that Furnas became the sole proprietor of all the lots east of Webb street, and of all the minerals in the streets and alleys east of the center of that street, so that he was the owner of the minerals in Allen street. The question in the case is whether his deed to O'Keef, conveying the lots by their numbers and reference to the recorded plat, but making no mention of the minerals in the streets, conveyed the minerals in the streets and alleys. If it did, then the judgment, which was for the defendants, must be affirmed; but, if it did not, the judgment should be reversed, and the cause remanded.

The rule of law is well settled in this country, and in England, that a conveyance of land bounded upon a public street carries the fee to the center of the street, unless the contrary intent is clearly expressed. The authorities asserting this rule are so numerous that it is deemed sufficient to cite the text-books where the cases are collected. 3 Kent, Com. 18th ed. 433; *Dogan v. Sekright*, 4 Am. Lead. Cas. Real Prop. 378; 2 Devlin, Deeds, § 1024; Elliott, Roads & Streets, 549; 3 Washb. Real Prop. 5th ed. 451; Ang. & D. Highways, 3d ed. § 814; *Devaston v. Payne*, 2 Smith, Lead. Cas. 7th Am. ed. 178. And, where a plat represents the lots to be bounded by a street, a deed referring to the plat, and describing the lots conveyed by their numbers, will pass to the grantee, as against the grantor and his assigns, the fee to the center of the street. *Jarstadi v. Morgan*, 48 Wis. 245; *Gould v. Eastern R. Co.* 142 Mass. 85; *Clark v. Parker*, 106 Mass. 554; *Banks v. Ogden*, 69 U. S. 2 Wall. 57; *Weisbrod v. Chi-*

cago & N. W. R. Co. 18 Wis. 35, 86 Am. Dec. 748; *Cox v. Louisville, N. A. & O. R. Co.* 48 Ind. 178.

It is held in two or three states that the center-line rule does not apply where the plat is made out and recorded in conformity with the statutes of such states upon that subject; but this is because the courts of those states hold that the statutes vest the entire title, beneficial and otherwise, in the corporation, so that the dedicator has no interest left in him, which is the subject of grant. As to the cases asserting this rule, more will be said hereafter. In some cases the rule that the center of the street is to be taken as the boundary will be extended so as to include the whole street, as where one lays out a street entirely on his own land, and on one side thereof, so that the boundary of the land and the boundary of the street coincide. *Henley v. Babbitt*, 14 R. I. 533; *Re Robbins*, 34 Minn. 99, 57 Am. Rep. 40; *Taylor v. Armstrong*, 24 Ark. 102. Such is the case now in hand.

But it is earnestly insisted that the general rule before stated has no proper or just application to this case, because Hough & Furnas had, by the deed of dedication, separated the materials in the streets so as to make them a separate estate in fee. It may be well enough, here, to determine the exact character of the estate retained by Hough & Furnas. An exception in a deed is always a part of a thing in being, and a part of the thing granted, while a reservation is of a thing not in being, and is newly created, as rents and the like. Co. Litt. 476, 477. An exception withdraws from the operation of the conveyance some part of the thing granted, which, but for the exception, would have passed to the grantee under the general description, while a reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted; that is to say, something which did not exist as an independent right. 5 Am. & Eng. Encyclop. Law, 465, and cases cited. The terms are often used without noting the distinction, and this, no doubt, for the reason that that which is called a "reservation" in a deed will be construed to mean an exception, where it is necessary to do so to carry out the object which the parties to the deed had in view. *Winthrop v. Fairbanks*, 41 Me. 307. The language used in the deed must be considered with reference to the subject-matter and the circumstances of the particular case. *Barnes v. Hurt*, 38 Conn. 541; *Stockwell v. Couillard*, 129 Mass. 232; *Whitaker v. Brown*, 46 Pa. 197. There can be no doubt but the qualifying words used in the deed from Hough & Furnas to the county amount to an exception, the thing excepted from the grant being the "valuable minerals" in the streets and alleys. The minerals thus excepted remained in the grantors in the same right as before the grant, and passed to Furnas by the deed to him from Hough. Coal, mineral, and stone under the surface of the earth are subjects of grant and exception, and, when excepted in a deed, become a separate and distinct inheritance. They may be conveyed separately from the surface. *Wordell v. Watson*, 93 Mo. 108; 17 L. ed. 82; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Lilli-bridge v. Lackawanna Coal Co.* 143 Pa. 293, 13

L. R. A. 627; *Chartiers Block Coal Co. v. Mellon*, 153 Pa. 286, 18 L. R. A. 702. Furnas, therefore, had an estate in fee in the mineral in place beneath the surface of the streets reserved by the exception in the deed dedicating the streets to public use. Does this circumstance take the grant made by him to O'Keef out of the general rule before mentioned,—that a conveyance of land bounded on a street carries the entire fee to the center of the street? In answering this question, it is deemed proper to see upon what ground the rule is founded, the reason upon which it is based. Says Kent: "The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road, to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to universal practice. . . . It would require an express declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as the general rule that a grant of land bounded upon a highway or river carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words of specific description to show a contrary intent." 8 Kent, Com. 18th ed. 483. He uses almost the exact language used in the very early—and now leading—case of *Peck v. Smith*, 1 Conn. 108, 6 Am. Dec. 216. Redfield, J., when speaking of the views expressed by Kent, said: "But, if anything whatever is attempted to be made out of the rule, beyond a mere show, the reasoning of the chancellor is the only ground upon which it can stand; that is, to treat it as a rule of policy, merely, and not one of intent, chiefly, to be applied in all cases where there is not a clearly defined intention to the contrary." In *Baker v. St. Louis*, 7 Mo. App. 429, approved by this court in 75 Mo. 671, two persons owning in common a block of ground upon a street conveyed a strip next to the street to the city for the purpose of widening the street so as to give space for a market house, with a clause of reverter in the event the property should not be used for such purposes. Before breach of the condition subsequent, these two persons executed deeds of partition, describing the parcel conveyed to each as bounded on the street. In a controversy commenced after the breach of the condition, it was held that the partition deeds carried the fee to the center of the street, subject to the public easement, as there was no express reservation to the contrary.

Enough has been said to show that the rule stands on the ground of policy, and a presumption raised by the law to carry out the policy. The presumption is that the grantor did not intend to withhold any interest in the street or highway. The presumption may be overcome, but it must be overcome by something stated in the deed, which shows clearly and distinctly an intention to withhold an interest in the street. The rule is of the utmost importance, and is necessary to prevent afterthought strifes and litigation, like the one now in hand, over detached strips and gores of land, generally of no value to any one save the lot owner. In 34 L. R. A.

the vast majority of cases the rule works out the real intention of the parties at the date of the deed. The rule being based upon these grounds, we cannot see how its application can be made to depend upon the extent of the interest which the grantor may have in the street, there being some interest in him. In a common-law dedication, whether by parol or in writing, and where property has been condemned for street purposes alone, the fee from the surface to the center of the earth remains in the owner. In all such cases a conveyance of a lot bounded by a street will pass the fee to the center of the street. Here, Hough & Furnas conveyed the streets to the county for public use,—that is to say, for street purposes,—and then excepted the minerals. If the center of the street rule applies where the grantor owns the fee from the surface to the center of the earth, how can it be said it does not apply because he simply owns the fee to the minerals, or to a stratum of rock or coal? The reason for applying the rule is as strong in the one case as it is in the other. As the deed of trust from Furnas to O'Keef contains no exception or reservation, the minerals in the streets and alleys passed by that deed as a part and parcel of the land granted.

This conclusion, it is believed, finds support in *Columbus & W. R. Co. v. Witherow*, 83 Ala. 198. It is there said: "In the absence of a statute to the contrary, a conveyance of land bounded by a public highway, or of lots in a city, bounded by a public street, carries with it the fee to the center of such road or street, as a part and parcel of the grant; and the grantee has the exclusive right to the soil, subject to the right of way implied from the original dedication, whatever that right may be held to embrace, which varies with the decisions of the different courts;" thus showing, in the opinion of that court, that the application of the rule does not depend on the extent of the right vested in the public. In *Tousley v. Galena Min. & Smelting Co.*, 24 Kan. 828, the mining company filed a plat, and thereby laid off a tract of land into lots; dedicating the streets and alleys to public use, but setting forth in such dedication that it reserved to itself all the mineral under the surface of the streets and alleys. The company then sold two lots to Tousley and Neal without any reservation or condition. The latter mined from these lots under the half of the street next to them, and the mining company brought an action for damages. The court waived the question whether the reservation was void under the statute of that state concerning town plats, but said: "Conceding that the reservation was valid,—that the fee did not pass to the public,—then it seems to us that the warranty deed of the lots conveyed all the grantor's interest in the street up to the center. That such was the rule at common law will not be questioned." There is, in point of principle, no difference between that case and the one now in hand. Indeed, it is directly in point, and the conclusion there expressed is in entire accord with what we have before said in this case.

Counsel for the plaintiff place much reliance upon *Mathiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411. That case, and the prior one of *Illinois & M. Canal Trustees v. Haven*, 11 Ill.

354; and the subsequent case of *Union Coal Co. v. La Salle*, 186 Ill. 119, 12 L. R. A. 326, hold that, where a plat has been executed and filed pursuant to the statute of that state, the lot owners have no right to remove coal from beneath the surface of the streets, and that a conveyance of a lot bounded by a street carries no interest whatever in the street. A like construction is given to a statute in Iowa relating to town plats. *Des Moines v. Hall*, 24 Iowa, 286. See also *Hawesville Trustees v. Hawes*, 6 Bush, 232.

These cases are all based upon the construction given by those courts to the statute of their respective states, and that construction is this: That upon executing and filing a plat, pursuant to the statute, the entire fee in the streets passes to the corporation. The dedicatory and his grantees, it is held, have no interests in the streets, legal or otherwise, except that in common with the public, namely, the right of passage over them. We are at a loss to see how these cases aid or assist the plaintiff. If the principle at the bottom of them be applied to this case, it must follow that Furnas had nothing which he could convey, either to O'Keef or to the plaintiff's grantor, and the plaintiff acquired nothing by the deed to her. But these cases have no application to this one, for it is conceded on all hands that Furnas had an interest which he could convey. It may be observed that an entirely different construction has been given to the statutes of Wisconsin and Minnesota concerning town plats, which statutes are said to be the same as that of Illinois. *Kimball v. Kenosha*, 4 Wis. 321; *Milwaukee v. Milwaukee & B. R. Co.* 7 Wis. 98; *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, 88 Am. Dec. 59. Our statute in force when Hough & Furnas executed the deed of the county provides that such maps and plats, made, acknowledged, certified, and recorded as provided, "shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described, or intended for public use in such city, town, or village, when incorporated, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose. If such city, town, or village shall not be incorporated, then the fee of such lands conveyed as aforesaid, shall be vested in the proper county in like trust, and for the uses and purposes aforesaid, and no other." While this statute vests the fee in the streets in the city, town, village, or county, still it is held in trust for street purposes, and for no other use or purpose. Every other beneficial use is in the lot owners, and this interest of the lot owners will pass by a conveyance of the lot. No other deduction can be made from the cases heretofore decided by this court. *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 584; *Price v. Thompson*, 48 Mo. 361; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437, and cases cited. But it is unnecessary to pursue the inquiry, because the dedication in question was not a statutory one, and because it is conceded on both sides of this contest that Furnas owned the minerals in the streets and alleys; and we have before seen that his title to the minerals in the streets and alleys passed as part and parcel of the grant to O'Keef.

24 T. R. A.

Counsel for plaintiff place much reliance upon *Kincaid v. McGowan*, 88 Ky. 91, 13 L. R. A. 289. We have before said that mineral in place may be made the subject of an exception, or of a separate grant, and therefore agree to all that is said in that case. No question as to the effect to be given to a deed conveying lots bounded by a street or highway was considered or involved in that case. It is therefore not in point on the real issue here.

An effort is made in the briefs filed on behalf of the plaintiff on the reargument of this cause in this court to show that Hough & Furnas, in platting the sixteen acres retained a strip of land along the east side of Allen street. If they did retain such a strip, then it is very clear that the deed of trust from Furnas to O'Keef passed the title in that street only to the center thereof, so that the plaintiff would be the owner of the minerals in the east half of it. But no such question was made, or even intimated, in the trial court, and hence there is no such question before us on this appeal. The monuments placed on the ground when locating the streets and lots must control, and there is nothing in the record to show that the east line of Allen street was not located on the east line of the sixteen acres. As the record stands, there can be no other conclusion than this: That the east line of the sixteen acres and the east line of Allen street are one and the same line. It follows from what has been said that *the judgment should be and is affirmed.*

Gantt, Sherwood, and Burgess, JJ.,
concur, **Barclay, J.,** not sitting.

Brace, J., dissenting:

This is an action in ejectment to recover possession of "all the lead and zinc mineral and mines in and under the ground of a certain described portion of Allen street in Hough and Furnas' addition to Webb City, Missouri." The answer is a general denial. The case was tried by the court without a jury; the defendants admitted possession; the finding and judgment was for the defendants; and the plaintiff appeals.

It was admitted that A. W. Hough and wife and Isaac Furnas are the common source of title. Hough and wife, by warranty deed of date April 18, 1877, conveyed an undivided half of the tract upon which said addition is located to Isaac Furnas. By deed and plat dated May 23, 1877, duly acknowledged and recorded June 16, 1877, Hough and wife and Furnas laid out and dedicated their addition to Webb City. The deed is as follows: "Know all men by these presents, that we, Augustus W. Hough and Martha W. Hough, his wife, and Isaac Furnas, owners of the land described in the annexed plat of Hough and Furnas' addition to Webb City, do hereby release and convey to Jasper county in the state of Missouri, for public purposes, all the streets and alleys as designated on said plat, except the right to all valuable minerals in said land, which we hereby reserve, together with the right to mine the same. In witness whereof we have hereunto set our hands and seals this 23d day of May, A. D. 1877. A. W. Hough. [Seal]. Martha W.

Hough. [Seal.] Isaac Furnas. [Seal.]" Afterwards, the said Hough and wife, by warranty deed dated June 18, 1877, acknowledged and recorded on the same day, conveyed to the said Isaac Furnas the undivided half of lots numbered 1 to 36, inclusive, "together with all valuable minerals in the streets and alleys of said addition to Webb City east of the middle of Webb street, as reserved on the recorded plat thereof." By deed bearing the same date, but acknowledged and recorded on the 18th of June, 1877, the said Isaac Furnas conveyed the same lots by the same numbers to E. O'Keef, party of the second part, "to have and to hold the same, with the appurtenances, to the party of the second part, and to his successor or successors in this trust, and to him and his grantees and assigns, forever." "In trust, however," to secure the payment of a certain promissory note therein set out to "D. S. Thomas, cashier of the First National Bank of Carthage," party of the third part. Allen street is east of Webb street, and, of the lots conveyed, those numbered from 1 to 18, inclusive, front on the west side of Allen street, the east line of which forms the eastern boundary of the addition, and are all the lots in the addition fronting on that street, and those numbered from 19 to 36, inclusive, front on the east side of Webb street. There was a sale under this deed of trust, and a deed executed to the purchaser, and the defendants claim title under this deed of trust. On the 8d of June, 1889, the said Isaac Furnas *et ux.*, by warranty deed of that date duly executed and acknowledged, and recorded on the 5th day of June, 1889, conveyed to Oliver D. Bell "all of the streets and alleys east of the middle of Webb street in Hough and Furnas' addition to Webb City, Missouri, or the right of all valuable minerals therein, together with the right to mine the same, as reserved when said streets and alleys were dedicated, more particularly described as follows," etc. Afterwards, Bell and wife conveyed the same in like manner to plaintiff, and she claims title under this deed from Furnas, so that Furnas is in fact the common grantor under whom both claim, and from whom the plaintiff derains a perfect legal chain of title to the premises claimed, unless those premises were included in the deed of trust previously made by him to O'Keefe, under which the defendants claim. As the answer was simply a general denial, all we have to deal with here is the legal title, and, as the action is ejectment, the plaintiff cannot recover unless she hold the legal title. She has the legal title unless it passed to O'Keef by the deed of trust. If it did so pass, she has not the legal title, and, so far as this inquiry is concerned, it makes no difference whether that title is in the defendants or outstanding, she cannot recover. The only question in the case is solved when it is satisfactorily determined what the deed of trust did actually convey.

It is important to inquire, first, what Furnas owned in respect of these premises when he executed the deed of trust. He certainly owned, in fee simple absolute, all that part of the tract east of the middle of Webb street

to the east boundary of the addition, which included the whole of Allen street except so much thereof as was granted to the county for public purposes in the deed of dedication, just as he and Hough owned it before the execution of that deed. While in this instance a plat was filed with the deed, and as a part thereof, it was not purely a statutory dedication (Gen. Stat. 1865, chap. 44), but a dedication by deed, and its extent must be measured by the terms of the instrument. While the grant to the public was not of a mere easement or right of way over the soil of the streets and alleys as laid down on the plat, neither was it a grant of the whole corpus of the material defined by and contained between the lines of those thoroughfares; but, within those lines, all was granted *usque ad inferos* except the "valuable mineral" therein contained. That was expressly reserved to the grantor, "with the right to mine the same." There can be no question that the grantees had the right to thus divide their property, and to dispose of one part and retain the other. "A man entitled to land may grant leases, may grant exclusive herbage, as right of depasturing, a right of way, or a right of game. He may grant the mines underneath, or the right to get the minerals, and other rights in and over the property, or enjoyment of it." "So, the grantees of mines may regrant, and in all these cases the grantees may maintain action in respect of the rights granted." 8 Washb. Real Prop. 5th ed. p. 361. As was said in *Wardell v. Watson*, 93 Mo. 107, 111: "Coal and minerals in place are land, and may be conveyed as such, and, when thus conveyed, constitute a separate and distinct inheritance. *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760. . . . A reservation of minerals and of mining rights is construed as an actual grant thereof. *Martin v. Brewster Iron Min. Co.* 55 N. Y. 538, 14 Am. Rep. 822." The dedicators, after the grant, retained the same right and title to all the "valuable mineral" beneath Allen and the other streets and alleys of the addition that they held before the grant, and Furnas held by grant all their title to that mineral at the time the deed of trust was executed. Did it pass to O'Keef by that deed? The land conveyed by that deed is described by defined boundaries, the metes and bounds being the lines of each lot as they appear on the plat. There are no reservations in the deed; within those boundaries everything was conveyed, to the center of the earth; and, more than this, every appurtenance thereto was conveyed; besides this, nothing was in terms conveyed. The property in controversy is without those boundaries, and, unless appurtenant thereto, were not conveyed by the terms of the deed. "Appurtenance" is defined to be "a thing used with, and related to or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. The term, as used in conveyances, passes nothing but the land and such things as belong thereto and are part of the realty. Therefore, when a conveyance is of a piece of land defined by boundaries, 'with appurtenances,' other land not included in

the boundaries will not pass as appurtenant to the grant. All that can be claimed as embraced in the word 'appurtenances' are easements and servitudes necessary to the enjoyment of the land conveyed." 1 Am. & Eng. Encyclop. Law, 641, and notes. It is obvious from these definitions that Furnas' title to the "valuable mineral" under Allen street could not, and did not, pass as appurtenant to the lots conveyed in the deed of trust. See also *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 268; *Harris v. Elliott*, 85 U. S. 10 Pet. 54, 9 L. ed. 844; *Buck v. Squiers*, 23 Vt. 484. In fact, counsel for defendants do not so contend. Their contention is based upon two propositions: First, that "by the filing of the plat of Hough and Furnas' addition to Webb City the public acquires only an easement in the streets and alleys, the owners retaining their right in the soil for all purposes not inconsistent with such easement;" second, that "the conveyance of a city lot bounded on a street always carries the fee, subject to the public easement, unless there be an express reservation to the contrary; and the reservation, to be effectual, must be made in the deed itself."

The first of these propositions totally ignores the deed, and treats the dedication as a purely statutory one; and, even if it could be so treated, this proposition cannot be maintained, for the statute provides that plats of additions such as this was, "when made, acknowledged, certified, and filed with the recorder, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described or intended for public uses, in such town, city or village," etc. So that, if this was purely a statutory dedication by plat, the city acquired more than a mere easement or right of way for a highway; it acquired the fee in trust for public uses. But, as before stated, this was not such a dedication. The deed cannot be ignored, and the extent of the dedication must be measured by it. "Although the effect of a statutory dedication may be to grant the fee of the streets to the corporation in trust for the public uses, yet, unless prohibited by statute, the proprietor, in laying out a town or addition, may grant the easement simply, and reserve the minerals therein." Dill. Mun. Corp. 4th ed. p. 740, § 629. Here the grant in the deed, though not going to the extent of a statutory dedication without reservation, was, as we have seen, the grant of more than an easement. It was a grant of the fee; of an estate of inheritance; of the whole soil of the streets, and everything thereunto belonging, except "the valuable mineral therein contained," and the right to mine the same. So that in either case the first proposition must fall, and with it the second, which is predicated upon it, if there were no other faults to be found in it. But the second is faulty in many respects. The real proposition which the learned counsel undertake to cover by these two propositions, and which the authorities cited tend to sustain, is that where an owner in fee of a tract of land lays off thereon an addition to a city into lots and blocks, divided by streets and alleys, and grants to the public by deed or plat a simple

easement or right of way therein, and afterwards conveys one of the lots by its number as designated on such plat, the conveyance, in the absence of any reservation contained in the deed, will vest the fee in the grantee to the middle of the street or alley on which it abuts, and he may enter upon the street, and appropriate the soil thereof to his own use, for all purposes not inconsistent with such easement. It is obvious that the case in hand is not within the terms of this proposition when thus properly stated. In order to bring it within these terms, it is necessary that, at the time the deed of trust was executed, the public should have had only a simple easement or right of way, and that Furnas should have been the owner in fee of the land over which the public had such right. But, as we have seen, he was not the owner in fee of the land over which the public had such easement or right of way, having theretofore conveyed it by his deed to the county, and, instead of the public having a mere easement over it, the fee thereof was held by the county or city in trust for the public use. That the fee thus conveyed was only a conditional fee, liable to be defeated by a discontinuance of the use of the soil for the public purpose for which it was granted, in which event there might be a reverter of the fee, does not change the fact that by the deed of dedication and plat the fee passed; and in such case, under a statute of Iowa of similar import to ours, it was held that "neither the original proprietor nor his grantees have the right to the subterraneous deposits of coal within the limits of such streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same." *Des Moines v. Hall*, 24 Iowa, 285; distinguished from *Dubuque v. Benson*, 23 Iowa, 248, in the opinion in the latter case. Of like purport is the case of *Matthiessen & H. Zinc Co. v. La Salle*, 117 Ill. 411, in which Schofield, J., disposes of the possible distinction suggested between the rights of the lot owner in cases where a fee simple absolute is vested in the municipality and those where a base or determinable fee is so vested, in the following language: "The title vested in the town by the statutory dedication is absolute for the purpose of the statutory trust, until the street shall be subsequently vacated, when it will revert to the dedicator, or, it may be, in cases like the present, to the adjacent lot owner. Possibly at some time in the future there may be a reverter, but this is no reversion. 4 Kent, Com. 8th ed. 872.

"It is too palpable for argument that, until there is a reverter, the lot owner can have no greater right to enter upon and appropriate the soil and minerals of the street to his personal use than a stranger, because his right can only commence in the event, and at the time, the right of the town has ended." Of course, there is not, and never can be, a reverter of the subject-matter of this suit, since there can be a reversion only of that which has been granted, and it was never granted. There may be hereafter a reversion of the soil in which a fee was granted to the city, but such reversion cannot include the

"valuable mineral," which was excepted from the grant. This matter is alluded to simply because of the assumption in defendants' contention, that under the deed in this case, or even under a purely statutory dedication, nothing more passes to the municipality or the public than a mere easement, which seems to have nothing more to rest upon than another assumption that a determinable fee, such as the statute vests, is no more than a mere easement. The fact is, the lot owner's rights under the rule, whatever they may be, grow wholly out of the thing granted by the dedicatory, and the relation which he and the dedicatory sustain to that thing, and not to anything reserved. And the arbitrary common-law rule of construction by which the deed of a grantee of a lot to be extended beyond the limits of the grant to the middle of the street is and ought to be strictly limited, so far as the grantor and those claiming under him are concerned, to the subject-matter of the grant, which in this case was the soil of the street, and not the valuable mineral therein contained; and whatever principle he relied upon to sustain the propriety of the rule, whether presumed intent of the parties or grounds of public policy, there is no difficulty in maintaining the propriety of such limitation. Ancient common-law rules of construction should be applied, in the light of the age in which we live. As was happily remarked by the chief justice of Pennsylvania, in the recent case of *Charliers Coal Co. v. Mellon*, 152 Pa. 286, 18 L. R. A. 702 (decided January 9, 1893), in regard to another rule of the common law: "It is the crowning merit of the common law that it is not composed of ironclad rules, but may be modified, to a reasonable extent, to meet new questions as they arise. This may be called the expansive property of the common law. Mining rights are peculiar, and exist from necessity, and the necessity must be recognized, and the rights of mine and land owners adjusted and protected accordingly. The mining of coal and other minerals is constantly developing new principles. Formerly, a man who owned the surface owned it to the center of the earth; now, the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata. *Lillisbridge v. Lackawanna Coal Co.*, 148 Pa. 293, 18 L. R. A. 627. . . . In the earlier days of the common law the attention of buyers and sellers, and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it, and all that was buried beneath it. His title extended upward to the clouds, and downward to the the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and 24 L. R. A.

with rare exceptions the income derived from it was the result of agriculture." It was upon the surface that the judicial mind, as well as the minds of the owners of real estate, were fixed in early times, when the rule under consideration was adopted and applied to estates, in order that the symmetry of those estates might be maintained, and that strips in use as highways at the time of the grant, and long regarded as the actual boundaries between those estates, might not become, in case of abandonment, the unprofitable heritage of a stranger to those estates, who could subject the owners thereof to insufferable inconvenience by reason of his ownership in case of reverter. The estate which Isaac Furnas held in all the valuable mineral beneath Allen street at the time he executed the deed of trust to O'Keef was exactly the same estate that he and Hough held when they dedicated the streets and alleys of Webb City to the public. By their deed, placed upon the public records, they separated that estate from the streets and alleys, and from all the soil beneath them. By the subsequent deed of Hough to Furnas, in which Hough relinquished to Furnas his undivided half interest in the mineral, the separation of that estate from the soil of the street was again asserted and published upon the public records. In the face of these acts of Furnas, it would be folly to say that he actually intended, when conveying a lot abutting on the street, to convey also a property so carefully reserved and separated from such lot, or that the grantee of the lot could have supposed that was his intention by the terms of the grant, with this distinct and notable separation staring him in the face upon the public records of the title he was about to purchase. The fact is, this property so separated, and afterwards conveyed to the plaintiff's grantor, is neither within the letter nor spirit of the common-law rule by which it is sought to be included within the boundaries of the lots conveyed in the deed of trust. That rule is satisfied when the grantee gets the lots conveyed to him, with all the rights and privileges in the streets that belong to an abutting proprietor who does not own the soil of the streets and alleys, but who, in case of an abandonment, may have a reversionary interest in fee in all of the soil that was actually granted to the public, to the middle line of the street on which his lot abuts, but who merely, as lot owner, can never have any reversionary interest in the valuable mineral therein contained, which was never granted for the purposes of such streets and alleys, but was expressly reserved therefrom. The judgment ought to have been for the plaintiff and is therefore reversed, and the cause remanded.

MacFarlane, J., concurs.

(.....Mo.....)

1. The Missouri doctrine that a city may authorize a railroad track in a street does not extend to the allowance of a practical monopoly of the street by the railroad.
2. A city cannot authorize a steam railroad in a narrow highway devoted to wholesale business, when the operation of the railroad virtually destroys the use of the street for street purposes at least three and one half hours every day between 7 A. M. and 6 P. M., and the city charter declares that no railroad shall be so constructed as to prevent the public from using any street, while the general law prohibits railroads from impairing the usefulness of a street.

(May 24, 1894.)

APPEAL by defendant from a judgment of the St. Louis Circuit Court enjoining it from operating a railway in the street in front of complainant's premises. *Affirmed.*

Statement by *Gantt, P. J.*:

This is a proceeding for an injunction, by plaintiffs, who are abutting property owners on Collins street, in the city of St. Louis, between Franklin avenue and Carr street, to prevent the defendant, a steam railway company, from constructing, maintaining, and operating its railway along Collins street, between Carr street and Franklin avenue, with a prayer for general relief. The petition alleges: That the plaintiffs are the owners of certain described property on Collins street, between Carr street and Franklin avenue. That this property is valuable,—is worth more than \$30,000; and that its access to Collins street is an important element in its value, and that it is covered with permanent buildings. That the defendant, by ordinance of the city of St. Louis, No. 15,816, approved September 3, 1890, was granted permission to construct, maintain, and operate a branch of its road, with a single track, along Collins street, in front of the plaintiff's property, and elsewhere, as specified in the ordinance. The ordinance itself is set out *in hac verba*. That Collins street, between Carr street and Franklin avenue, and in front of the plaintiffs' property, is a narrow street, having a width from building line to building line of 40 feet, and a sidewalk on each side of the street 8 feet in width, leaving a roadway of 24 feet. That the defendant has constructed and laid down on the east half of the roadway of Collins street, in front of plaintiffs' property, a sin-

gle railway track, under the alleged authority of the ordinance aforesaid, but has not, up to the time of the filing of the petition, commenced operating locomotives, cars, and trains thereon, and that it now threatens and purposes so to do, unless restrained by the process of the court. That the defendant is engaged in laying and constructing a second railway track on the west half of the roadway of Collins street, in front of plaintiffs' property, by virtue of a permit given by the mayor of the city of St. Louis, under date May 21, 1891. This permit is set out *in hac verba*. That this permit has no legal force or effect, and is void. That this construction, maintenance, and operation of said railway tracks, or either of them, along Collins street, in front of plaintiffs' property, will hinder and prevent the public from using the street; will exclude travel, passage, and business therefrom; will exclude all vehicles, and will destroy the use of the street as a public thoroughfare. And plaintiffs charge that the character of Collins street, between Carr street and Franklin avenue, is such that the railway tracks thereon, or either of them, cannot be operated without preventing the public from using the street, and that, under the laws, the city of St. Louis cannot, nor can its mayor or municipal assembly, authorize such use of a street as will destroy its use as a public thoroughfare; and that Ordinance 15,816, so far as it attempts to authorize the construction, maintenance, and operation of a steam railway track in Collins street, is absolutely null and void. Plaintiffs state that by reason of the construction, maintenance, and operation of said railway tracks, or either of them, at the points named, their property will be greatly depreciated and damaged in its selling and rental value, and the damages which will accrue to them will differ in degree and kind from those which will accrue to other members of the community, or to the public at large, from the same causes. They pray, therefore, that the defendant may be forever enjoined from constructing, maintaining, and operating the said railway tracks, or either of them, along Collins street, between Carr street and Franklin avenue, and for such other relief as they may be entitled to. To this petition the defendant filed an answer, in which it admits that it is a corporate existence as a railroad company, under the laws of the state of Missouri, and that it is engaged in maintaining and operating a steam railway, as alleged in the petition. Every other matter contained and set forth in the petition is denied. By way of further answer defendant states that the North Missouri Railroad Company was a railway corporation duly organized by special act of the general

NOTE.—The present case adds to the definition of the rights of the public in public streets. Recent cases have developed the law on this subject very materially.

As to lease of portion of street to hucksters, see *Schopp v. St. Louis (Mo.)* 20 L. R. A. 733.

As to allowing private railroad on highway, see *Gustafson v. Hamm (Minn.)* 22 L. R. A. 565.

As to use for area and basement stairways, see *Smith v. McDowell (Ill.)* 22 L. R. A. 303.

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For injury to abutter's easements by railroad in street, see *Egerer v. New York Cent. & H. R. R. Co. (N. Y.)* 14 L. R. A. 381, and *note*; *Spencer v. Metropolitan Street R. Co. (Mo.)* 22 L. R. A. 608; *White v. Northwestern N. C. R. Co. (N. C.)* 22 L. R. A. 627; *Jones v. Erie & W. V. R. Co. (Pa.)* 17 L. R. A. 753; *Rauenstein v. New York, L. & W. R. Co. (N. Y.)* 19 L. R. A. 733.

assembly of the state of Missouri entitled "An act to incorporate the North Missouri Railroad Company," and approved March 8, 1851, and "An act to amend an act entitled 'An act to incorporate the North Missouri Railroad Company,'" which amendatory act was approved January 7, 1853. That under and by virtue of section 11 of said Act of March 8, 1851, the North Missouri Railroad Company was duly empowered to build its railroad along and upon any street or any road or wharf of any town or city, and over a stream or highway, in the state of Missouri; and that under and by virtue of section 9 of the Act of January 7, 1853, said company was authorized to locate, construct, and operate a railroad from the city of St. Charles to the northern boundary line of the state of Missouri, and from the city of St. Charles to any point in the city of St. Louis, and also to construct and operate lateral or branch railroads to any point. The answer alleges that the Wabash Railroad Company is the successor to the North Missouri Railroad Company, and is entitled to all its rights, privileges, and franchises, and the various links in chain of title from the North Missouri Railroad Company to the Wabash Railroad Company are set forth in answer, but, as no question is made in the case with respect to these, they need not be repeated here. The answer also pleads and sets out ordinance of the city of St. Louis No. 15,816, and the permit of the mayor, dated 21st day of May, 1891. It is further set out that, in pursuance of the authority conferred by the special act of the legislature of the state of Missouri, hereinbefore referred to, and by virtue of the general laws of the state and the ordinance of the city of St. Louis, the defendant did construct and now operates a branch of its railroad in the state of Missouri along and upon Collins street in the city of St. Louis. The plaintiffs filed a reply, denying all the allegations and answer, and affirmatively setting up that the special acts of the legislature pleaded in the answer constitute no defense to the plaintiffs' cause of action, because the defendant had so constructed its railroad along Collins street, from Carr street to Franklin avenue, that the public are prevented from using the street, and that it was forbidden to do this by the special acts of the legislature referred to. Further, the reply sets up that the defendant is not entitled to construct railroad tracks on the streets of St. Louis without the consent of the city of St. Louis given by ordinance, and that with such consent it cannot construct such tracks in any such streets, if they will prevent the public from using them; and the ordinance and the mayor's permit referred to are invalid, because the railway of Collins street, between Carr street and Franklin avenue, to which wagons and vehicles are restricted and confined to their passage along the street, has a width of only 24 feet, and the effect of the railroad tracks thereon is to prevent the public from using the street, and to destroy the same as a thoroughfare. Judgment is prayed for as in the petition. This action was commenced in the circuit court of the city of St. Louis on June 24 L. R. A.

1, 1891. No preliminary injunction was asked or obtained. The cause was heard in December, 1891, and on March 8, 1892, a decree was rendered, perpetually enjoining the defendant from operating with cars and locomotives the said railway tracks on Collins street in the city of St. Louis, between Carr street and Franklin avenue. From that decree this appeal is taken.

Messrs. F. W. Lehmann and George S. Grover, for appellant:

The charter of the North Missouri Railroad Company, and also the ordinance of the city of St. Louis, authorized the construction of the main track and siding in Collins street.

Black v. Philadelphia & R. R. Co. 58 Pa. 249; *New Orleans & O. R. Co. v. Municipality No. 2 of New Orleans*, 1 La. Ann. 128.

The charter and ordinance in question were valid acts of legislative authority, and the use of streets authorized by them is a public use, consistent with the purposes for which streets are dedicated or established.

Morris & E. R. Co. v. Newark, 10 N. J. Eq. 352; *Philadelphia & T. R. Co's Case*, 6 Whart. 25; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 898; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121; *St. Louis Transfer R. Co. v. St. Louis Merchants Bridge Terminal R. Co.* 111 Mo. 666; *Com. v. Erie & N. E. R. Co.* 27 Pa. 357, 57 Am. Dec. 471.

The obstruction to the use of the streets by the general public, forbidden by the law to the railroad company, is that resulting from structures which present permanent physical obstacles to free passage along the street, and is not the interference or impediment to free general use resulting from railway travel and transportation over the street.

Lackland v. North Missouri R. Co. 31 Mo. 180; *Porter v. North Missouri R. Co.* 38 Mo. 128; *Lackland v. North Missouri R. Co.* 84 Mo. 259; *Randle v. Pacific Railway*, 65 Mo. 825; *Cross v. St. Louis, K. C. & N. R. Co.* 77 Mo. 318; *Smith v. Kansas City, St. J. & O. B. R. Co.* 98 Mo. 20; *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 18 L. R. A. 339, 118 Mo. 308.

Whether a particular street may properly be used for railway purposes, is an administrative rather than a judicial question.

St. Louis, I. M. & S. R. Co. v. St. Louis, 92 Mo. 160.

Under the pleadings in this case the plaintiffs were not entitled to relief, because of the manner in which the defendant used or operated its tracks.

Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co. supra.

If the mode of the use made of the street by defendant was wrongful, that would not authorize an injunction preventing any and all use of the street by it.

The construction of the railroad in question having been authorized by the state and municipal authorities, an injunction against such construction will not be issued at the suit of private individuals, and particularly so where they have no special interest in the matter.

Penn. Mut. L. Ins. Co. v. Hans, 141 Ill. 85;
Buda v. St. Louis, 98 Mo. 408.

Mr. Leverett Bell, for respondents:

Section 2548 of the General Statutes provides that corporations formed under article 2 are not authorized to construct a railroad upon or across any street in a city without the assent of the corporate authorities of the city.

1 Rev. Stat. 639.

The appellant is a corporation, created in 1889, under the general laws of the state. It is amenable to the above provision and cannot claim exemption on the ground that it has purchased the privileges and franchises of the North Missouri Railroad Company contained in its charter of March 3, 1851.

Owen v. St. Louis & S. F. R. Co. 88 Mo. 454; *St. Louis v. Missouri Pac. R. Co.* 114 Mo. 285.

Ordinance 15,816 by its terms purports to authorize a single track on Collins street, between Carr street and Franklin avenue, and the appellant has constructed two tracks and two switches on the street and is making use of the street as a car-yard and passenger station in violation of law.

Dubach v. Hannibal & St. J. R. Co. 89 Mo. 438.

In *Com. v. Frankfort*, 92 Ky. 149, it was held that a railroad company could not acquire the right to operate a track through an alley sixteen feet wide, the space required to run the cars on the track being from nine to nine and one half feet in width.

See *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294, 83 Am. Dec. 497; *Cosby v. Owensboro & R. R. Co.* 10 Bush, 288; *Ruttles v. Covington*, 10 Ky. L. Rep. 766.

In no event is the appellant authorized to use Collins street as a car-yard for switching cars, or as a passenger station.

Lackland v. North Missouri R. Co. 81 Mo. 180; *Glick v. Baltimore & O. R. Co.* 8 Mackey, 412; *Fitzgerald v. Baltimore & P. R. Co.* Id. 518.

Gantt, P. J., delivered the opinion of the court:

The uncontroverted facts are that the plaintiffs own property in St. Louis on the east side of Collins street, between Franklin avenue and Carr street, extending eastwardly to Second street, of the value of about \$30,000, covered by permanent structures, and rented for business purposes. Collins street, between Franklin avenue and Carr street, has a width of 40 feet between the building lines, with sidewalk 8 feet wide on each side, with a roadway only 24 feet in width. The Wash Railway Company is a railroad corporation organized under the general railroad law of this state in 1889, and is the grantee of the North Missouri Railroad Company, which was chartered by special act of the general assembly March 3, 1851. Between the institution of this action and the trial in the circuit court, the defendant laid its railroad tracks in Collins street, and employed the street to receive and discharge passengers from its passenger trains. It claimed the right to do this under the charter of the North Missouri Railroad, its predecessor, and under an ordinance of the municipal as-

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ssembly of St. Louis (No. 15,816), approved September 3, 1890, and under the permit of the mayor of St. Louis, of date May 21, 1891. In front of the plaintiffs' property the defendant laid a double track for its railway along Collins street. The distance between the east rail and the curbstone in front of respondents' property is three feet and six inches as to one lot of ground and three feet eight inches as to the other. The tracks are seven feet apart, and on the west side of the street the western rail is three feet and four inches from the curb line. From Carr street southwardly 125 feet the track is a single track in the center of the street to a switch, and thence southwardly with a double track 484 feet to a switch, and thence 265 feet southwardly with a single track to Franklin avenue, the southern terminus of the road. There are seven trains a day, operated over this line, namely, at 7 o'clock, 8, 8:45, and 10:45 in the forenoon, and at 4, 5:45 and 6 o'clock in the afternoon. Each train occupies the street for twenty or thirty minutes, and is switched as it comes in, making use of the two tracks for the purpose. There is a night train at 11 o'clock on two evenings of the week, on which occasions the train stands in the street from 8 to 11 o'clock. The testimony is uncontradicted and convincing to the effect that traffic is excluded from the street during the occupation of the same by the cars, and that the business of the railroad company and of the public cannot be carried on there at the same time. When the railroad company makes use of the street, the public traffic by all others is excluded, and this covers a period of three and one half hours every day between 7 A. M. and 6 P. M. The two cannot exist and be carried on at the same time. Where the single track exists, the space between it and the sidewalk is nine feet and a fraction, and freight wagons cannot pass a train on this single track with safety. It also appears that respondents' property is damaged in its rental and salable value by the presence of the cars on the street. The tracks are laid to the grade of the street, and constitute no material obstruction, save when occupied by trains. There is nothing in the ordinance limiting the company's right to run trains at any and all times of day or night. The ordinance No. 15,816 authorizes the company to construct, maintain, and operate a branch of its railroad with single track and necessary sidings and turnouts over the following route: "Along Second street, crossing North Market, Monroe, Exchange, Madison, Chambers, Tyler, La Beaume, Bogy, Mound, Howard, and Mullanphy streets, across city block 264, across Florida street, thence down Collins street, across Cass avenue, Bates, O'Fallon, Ashley, Biddle, Car and Cherry streets, through the alley in block 68, across Morgan, through the alley in block 67, across Christy avenue, and across block 66, and all intervening alleys, to a proper connection with the tracks of the St. Louis Bridge & Tunnel Railway Company. The construction of the aforesaid tracks shall be subject to the approval of the street commissioner, and said tracks shall be laid to conform to

nopoly in defendant in the use of this street. No restriction is placed upon the number of trains or the time within which they may be operated. The roadway is only 24 feet. In this narrow space defendant has been permitted, under this ordinance, to lay two tracks, each 4 feet 8 inches wide. The distance between the east rail and the curbstone in front of plaintiff's property, is 3 feet and 6 inches as to one lot, and 3 feet 8 inches as to the other. The tracks are 7 feet apart, and on the west side of the street the western rail is 3 feet and 4 inches from the curb line. These double tracks extend a distance of 484 feet, with switches at either end. The company has stopped at Franklin avenue, and receives and discharges its passengers in the street at this point. At the time of the trial it was operating four trains in the forenoon, to wit, at 7 o'clock, 8 o'clock, 8:45, and 10:45 o'clock respectively. That the defendant regards its right in that street as paramount to the plaintiffs' and the public is very evident from the testimony of Mr. Blake, the president of the Sligo Iron Stone Company, which occupies Nos. 945 and 953 Second street, extending back to Collins street. He testifies that the operation of the road had caused a serious damage to his company; that on one occasion they had a load of angle iron which was so long that they were compelled to use an extra set of wheels to keep it from dragging. The team had driven up to their doors on Collins street, and they were unloading it. A train of defendant came in, and the train men directed the iron company to move its wagon, and were told they could not do it, and the railroad company's agents procured a policeman, who compelled them to move the wagon. They could not turn around. The street was too narrow, and were compelled to pull the load around the block. In many cases it has been said that the railroad company occupied the street along with the public, but it is perfectly plain that in this case no wagon of ordinary width can pass on this street with safety when the trains of defendant are on it, even where it had only a single track. On one occasion it seems that the steps of the cars were torn off in attempting to pass a wagon. The business on Collins street is wholesale from Carr to Franklin avenue. The wagons used are 7 feet 8½ inches from "point of hub to point of hub."

Now, while it is true that the public must submit to all reasonable inconveniences in the highways, the highways are created for the public and abutting owners, and they have an unquestionable right to require a reasonable use by all who are entitled to use them. As was said by this court in *Schopp v. St. Louis*, 117 Mo. 181, 20 L. R. A. 783. "The public highways belong 'from side to side and end to end' to the public, and the 'public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,' and the abutting property owner has the right to the free and unobstructed passage to and from his property." Said Lord Ellenborough in 24 L. R.

a route wait an unreasonable time in the public street, and obstruct the transit of his majesty's subjects who might wish to pass, it in carriages or on foot, the persons who cause or permit such coaches to so wait are guilty of a nuisance?" Every time the defendant uses this street with its trains it absolutely deprives all teamsters of ordinary freight wagons access to this street, and, as the ordinance gives defendant the privilege of using it with its trains as often as it pleases, such use is utterly incompatible with the purposes for which this street was created, and is unreasonable. The municipal assembly had no right to appropriate this street to defendant's use in this way. The learned counsel made the distinction that the mere unlawful use by it of its franchise would not justify this action. We agree with him that we do not think the assembly anticipated that the company would, under this ordinance, use the streets as a depot ground for the reception and discharge of passengers, and we are clear that the ordinance is no justification for such a use. *Lackland v. North Missouri R. Co.* 81 Mo. 183. And this use of itself was good ground for an injunction by an abutting owner. But we are satisfied that the maintenance of this steam railroad in this narrow highway, devoted, as it has been, to wholesale business requiring heavy, broad trucks and wagons, must necessarily result in denying the public and the abutting owners the right to use this street as they are entitled to under the laws of this state, and that the ordinance virtually destroys it for street purposes, and therefore the assembly had no power to enact it. It was an attempt to convert it to a use different from that for which the city acquired it, and is in contravention of its charter, which declares that "no railroad shall be so constructed as to prevent the public from using any road, street, or highway along or across which it may pass," and the general law of the state that prohibits a railroad from impairing the usefulness of any street.

The learned counsel urges with great force and plausibility that this railroad is a public use of the street, but it seems to us he ignores the fact that, while the railroad is a public carrier, it has no right to the exclusive use of a public street, and such, for all practical purposes, is the effect of this ordinance and its use of this street. No case in this state is authority for such exclusive use of a highway, and, if it was, we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not the exclusive right to monopolize a public street, and shut out the public and other carriers. Holding, as we do, that this ordinance, in view of the facts developed, amounts to a practical condemnation of this portion of Collins street to the private, and almost exclusive, use of defendant, we think the injunction was properly granted by the circuit court, and plaintiffs had such an interest as would enable them to maintain the action. *Schopp v. St. Louis*, *supra*.

The judgment is affirmed.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Elizabeth S. WEBSTER, Admr., etc., of
William Webster, Deceased,
v.

FITCHBURG R. CO.

(.....Mass.....)

A person does not become a passenger because he has previously obtained a ticket and is on the premises of a railroad company designated for the use of passengers and is about to take a train, where he is running from the direction of a public street across the premises outside the station to catch a train about to start, and is struck while crossing a track by an incoming train.

(May 17, 1894.)

NOTE.—When person who has started for a train becomes a passenger.

A very interesting as well as important question is presented in the above case as to the time when a person, who has started to take passage on a train, becomes a passenger. Many cases in which the question might not improperly have been considered have without considering it or discussing the relation of carrier and passenger been decided on the single question of negligence, or contributory negligence.

For numerous cases of this kind, involving injuries received in getting on or off railroad trains, see *note* to Carr v. Bel River & Eureka R. Co. (Cal.) 21 L. R. A. 354.

Other cases of this kind are in respect to the safety of platforms and approaches. As to the duty to maintain these beyond the carrier's own premises, see *note* to Skottowe v. Oregon Short Line & U. N. R. Co. (Or.) 16 L. R. A. 593.

And as to the measure of care which a carrier must exercise to keep platforms and approaches safe, see *note* to Johns v. Charlotte, C. & A. R. Co. (S. C.) 20 L. R. A. 520.

As to the persons to whom railroads owe the duty of keeping platforms safe, see *note* to Dowd v. Chicago, M. & St. P. R. Co. (Wis.) 20 L. R. A. 537.

But while the cases presented in the notes above mentioned are many of them concerned with injuries to persons about to take trains, only those of them which are presented in this note discuss or turn upon the question of the existence of the relation of carrier and passenger.

The doctrine that a person may become a passenger before he has actually entered the carrier's vehicle or bought a ticket, or otherwise paid for transportation was first presented, so far as we have been able to find, in Brien v. Bennett, 3 Car. & P. 724.

This was a case in which a person, who had signaled to an omnibus driver by holding up his finger, attempted, when the omnibus had stopped, to get on but was thrown down by the starting of the vehicle, and he was held to be at that time a passenger. Lord Abinger, in pronouncing the opinion, said that he thought the stopping of the omnibus implied consent to take the person as a passenger, and it was held to be evidence of that fact for the jury.

This doctrine is quite generally established, but the exact statement of the rule for determining the commencement of the relation has not been attempted in many cases. The present case, WEBSTER V. FITCHBURG R. CO., is perhaps the clearest and fullest in its statement of the rule and its limitations.

One who hailed a street car was held to be a passenger while attempting carefully to get upon the car after it had stopped. Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550.

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for the alleged negligent killing by defendant of plaintiff's intestate, which resulted in a verdict in favor of defendant. *Exceptions overruled.*

The facts sufficiently appear in the opinion.

Messrs. George W. Morse, Samuel J. Elder and Stephen H. Tyng, for plaintiff: Deceased was a "passenger" within the meaning of Pub. Stat., chap. 112, § 212.

See *McKimble v. Boston & M. Railroad*, 139 Mass. 542.

When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be

senger while attempting carefully to get upon the car after it had stopped. Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550.

See also cases *infra* as to getting onto car in motion.

One who, in good faith, goes to a depot at a reasonable hour to take a train is a passenger entitled to protection against unsafe platforms, as in case of the absence of a light, although he has not yet purchased a ticket. Grimes v. Pennsylvania Co. 36 Fed. Rep. 72.

A person intending to take a train if he found a friend on board was also held entitled to have the premises safe while going along the platform to see if his friend was on board. Texas & P. R. Co. v. Best, 66 Tex. 116.

So a person who has gone to the station and purchased a ticket is held to have a right to remain there a reasonable time to await the train (and the court declares that this is true even if he has not purchased a ticket), and that what is a reasonable time depends upon the circumstances, such, among other things, as the distance of his residence from the station; and that the existence of this right depends upon his intent to go as a passenger. Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 387.

And in a case in which it is held to be a question for the jury as to the negligence of a person getting on a train in falling between cars which were not coupled, the court declared the doctrine that the relation of passenger and carrier commenced when the traveler went into the carrier's premises and purchased a ticket for the purpose of taking a train, and that the carrier assumed the duty of reasonable care for the protection of such person while proceeding to take the train. Lent v. New York Cent. & H. R. R. Co. 120 N. Y. 467.

One who fell between the cars after getting on and while the train was being made up, or an additional car being put on, was also held a passenger, in Hannibal & St. J. R. Co. v. Martin, 11 Ill. App. 386.

A person was also held a passenger of a railroad company while in a stage (sleigh) going to a depot to take a train, where the stage was run by employment of the railroad company, although he had not yet paid his fare nor purchased a ticket, nor formally announced his purpose to do so. Buffett v. Troy & B. R. Co. 40 N. Y. 168.

The same doctrine appears in a case respecting baggage, which holds that if the railroad company receives a trunk as baggage before the owner has purchased a ticket, it is liable for the trunk both before and after the train arrives or the ticket is bought. Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 819.

So where baggage was accepted from a prospect-

transferred, his right to care and protection begins.

Dodge v. Boston & B. S. & Co. 2 L. R. A. 83, 148 Mass. 207.

So long as railroad companies so arrange their depot and train accommodations as to invite and receive belated or negligent passengers, they cannot escape the liability imposed by this section.

Com. v. Boston & L. R. Corp. 184 Mass. 211; *McKimble v. Boston & M. Railroad*, 141 Mass. 463; *Keefe v. Boston & A. R. Co.* 142 Mass. 251.

The only objection which the road could have urged to the reception of this intestate as a passenger was that he was running "apparently as fast as a man could run," but this they did not urge until the time of the trial of this action, about four years after they had killed him; nor would it affect his status as a "passenger."

Warren v. Fitchburg R. Co. 8 Allen, 227, 85

Am. Dec. 700; *Com. v. Boston & M. Railroad*, 129 Mass. 500, 87 Am. Rep. 382.

Even though one be "drunk and disorderly," he may still be a "passenger."

Sullivan v. Old Colony R. Co. 1 L. R. A. 513, 148 Mass. 119.

Mr. George A. Torrey, for defendant:

Literally speaking, it will not be claimed that the plaintiff's intestate was such a passenger of the defendant; but it will be claimed by the other side that a person who enters upon the premises of a railroad company at the time when a train is about to leave, intending to take such train, thereupon becomes a passenger within the meaning of the statute in question. Such is not the law of this Commonwealth. The cases which pass upon this question furnish a test to be applied to this case. By such test, it is clear that the plaintiff's intestate was not a passenger at the time of his death.

ive passenger before any ticket was purchased and put in the baggage room for the night. *Green v. Milwaukee & St. P. R. Co.* 41 Iowa, 410.

And the same doctrine seems to be implied in the decision that a railroad company is responsible for the safety of the regulation, where it has allowed a custom to receive passengers on both sides of the track, where there is no station platform. *Phillips v. Besselaer & S. R. Co.* 57 Barb. 844.

The same implication appears in the decision that declarations of a person on leaving home as to his intention to go to a certain place on the line of a railroad are admissible to show his intent to take the train as affecting his character as a passenger, where he was struck by a train at the station before entering the cars. *Lake Shore & M. S. R. Co. v. Herrick*, 49 Ohio St. 25.

One of the leading cases on the subject is that of *Allender v. Chicago, R. I. & P. R. Co.* 37 Iowa, 264, holding that a person who has not purchased any ticket because told by the ticket agent to pay on the train is nevertheless a passenger while going across the track, as directed by the agent, to get on a caboose, and struck while passing between some cars.

An earlier Iowa decision had also held that the liability as common carrier existed where a person in good faith and with reasonable care was seeking to find and enter a car for passage and was injured by unsafe conditions of the platform or approach, where a person might naturally or ordinarily be likely to go. *McDonald v. Chicago & N. W. R. Co.* 25 Iowa, 124, 96 Am. Dec. 114.

The relation of passenger and carrier commences at least as soon as a ticket is purchased with the immediate purpose of taking the cars as soon as they are ready. *Johns v. Charlotte, C. & A. R. Co.* 20 L. R. A. 520, 39 S. C. 632.

The court said in this case in respect to the requirement as to the purchase of tickets, and the claim that the persons were passengers, "I think this extraordinary care would be required of the railroad authorities as to any person who was going in the proper way by any proper approach to take the cars or to purchase a ticket, or to get his baggage checked." *Ibid.*

So one who offers to buy a ticket of the agent at a depot is entitled to the courtesy and protection which is due to a passenger from the moment of entering the premises, and the railroad company is liable for an assault upon and false imprisonment of such person by the company's employes, after refusal to sell the ticket. *Norfolk & W. R. Co. v. Galliher*, 89 Va. 630.

So in *Gordon v. Grand Street & N. R. Co.* 40 Barb. 24 L. R. A.

546, a person is held to be a passenger while waiting for the cars in a waiting room and going thence to a train.

And while a person in a waiting room was invited by a ticket agent to sit in an empty car while the room was being cleaned and was injured by the moving of the car, the relation of the passenger and carrier was held to exist. *Shannon v. Boston & A. R. Co.* 78 Me. 52.

Again, the ordinary doctrine was shown in *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700, where a person who had bought a ticket and had been waiting in the station for a train was struck while following the station agent at his suggestion across the track, was held a passenger.

So a boy five or six years old standing by a caboose while the family were getting on, who was injured by the sudden backing of the train, was held to be a passenger, although no ticket had been purchased for him. *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 267.

One who safely enters a passenger car at a place which has not a station, and where no invitation is held out to take the train, but where people are permitted to get on, becomes a passenger when safely on the train. *Dewire v. Boston & M. Railroad*, 2 L. R. A. 166, 148 Mass. 343.

The fact that a person is getting on a train in motion has not been sufficient in several cases to defeat his claim to be regarded as a passenger. Thus in *Central R. & Bkg. Co. v. Perry*, 58 Ga. 461, a person having a ticket, who ran after a train which he had neglected to enter while it was standing because as he claimed the signals were not given, and while chasing it was struck by another train was held to be a passenger; but it was also held that the extraordinary precautions for the safety of passengers required of a carrier did not extend to precautions against leaving them, if they were unnecessarily late in getting on, and the question of the railroad company's liability was left to the jury.

And a boy attempting to get on a train which was running very slowly, after he had signaled it to stop at a flag station, and was told by the conductor to hurry up and get on, was held to be a passenger. *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342.

And one who had bought a ticket was held to be a passenger while trying to get on a train in motion from a station platform. *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296.

The fact that a person is violating the rules of the carrier in getting on a street-car in motion will not prevent his being considered a passenger, if he

Warren v. Fitchburg R. Co. 8 Allen, 227, 85 Am. Dec. 700; *Com. v. Boston & M. Railroad*, 129 Mass. 500; *Merrill v. Eastern R. Co.* 189 Mass. 238, 52 Am. Rep. 705; *Dodge v. Boston & B. S. R. Co.* 2 L. R. 83, 148 Mass. 207; *June v. Boston & A. R. Co.* 158 Mass. 79.

In order to entitle a person to the rights of a passenger, or, in other words, in order to entitle him to become a passenger, he must enter upon the station premises in a reasonable and proper manner, and present himself for transportation in such a way and in such a condition that he must be held to be there upon an implied invitation of the carrier, and consequently that the carrier is obliged to receive him as such passenger. Such is not the case at bar.

The deceased at the time of his death was upon our road contrary to the rules and regulations of the defendant; not an express printed rule, but an implied rule which the defendant must have known, that no person can present himself for transportation except in a proper and reasonable manner, in proper possession

of his faculties, and under proper self-control. *Boyd v. Wabash Western R. Co.* 105 Mo. 371; *Allender v. Chicago, R. I. & P. R. Co.* 87 Iowa, 264.

In regard to persons who present themselves for passage in the way in which the plaintiff's intestate did in the case at bar, there is no invitation held out on the part of the carrier, and no legal duty imposed upon it to receive them.

Baltimore Traction Co. v. State (Md.) Jan. 12, 1894.

Knowlton, J., delivered the opinion of the court:

At the trial the plaintiff relied solely on her count under Pub. Stat., chap. 73, § 6, in which she alleged that her intestate was a passenger on the defendant's railroad, and the only question in the case is whether there was evidence to warrant the jury in finding that he was a passenger. He had in his pocket a ten-trip ticket, which entitled him to ride over the defendant's railroad between Boston and the

is in fact invited by the conductor to get on,—especially if the car is going slowly; or at least such violation will not prevent his being regarded as a passenger after he gets on. *North Chicago Street R. Co. v. Williams*, 40 Ill. App. 590.

So in respect to a person attempting to get on a street-car in motion, the court said: "It does not seem reasonable to assume as a matter of law that a person who, in an orderly way, attempts to enter a street-car as a passenger is to be regarded as a trespasser until a special contract has been made by the conductor, based upon the payment of the required fare." *Butler v. Glens Falls, S. H. & Ft. R. Street R. Co.* 121 N. Y. 112.

Quite out of harmony with the general doctrine was the decision in *Indiana Cent. R. Co. v. Hudson*, 18 Ind. 225, 74 Am. Dec. 254, to the effect that a person who went to the ticket office but was unable to get a ticket in time for the train because the office was not lighted, and who started for the main track to get the train, going across an intervening side track, was not a passenger, because no contract had been entered into between him and the carrier, although the court did not regard him as either a trespasser or a wrongdoer. This case stands practically alone.

Other cases which have denied that a person was a passenger while attempting to get on a train have based the decision, like the main case, on the improper manner in which the approach to the train was made, or on some circumstance other than the mere fact that a ticket had not been produced. §

Thus in *Spannagle v. Chicago & A. R. Co.*, 31 Ill. App. 460, a person having a round-trip ticket, who, instead of going into the waiting room while waiting for his train, went to a saloon from 200 to 300 feet away from the depot platform, was held not to be a passenger while running to get onto the train, which had stopped long enough for a passenger in the waiting room to get on.

So in *Merrill v. Eastern R. Co.*, 139 Mass. 238, 53 Am. Rep. 705, where a person first gets on the engine, and then at another place ran to get on the front platform of a car while in motion and fell off the platform, he was held not to be a passenger.

It has been held also that merely walking towards a railroad station with the intention of buying a ticket does not make one a passenger before he reaches the station. *June v. Boston & A. R. Co.* 153 Mass. 79.

But this was a case in which a person was on the 24 L. R. A

railroad premises at a place not intended for the public, and was on his way to the station from car shops where he had been without invitation on his own business.

Similar to these cases is that of *Baltimore Traction Co. v. State* (Md.) Jan. 12, 1894, which holds that one attempting to board a street-car going six miles an hour, although he had signalled it to stop, is not a passenger. This case lays down the rule substantially like that of the main case which seems to be reasonable, and which will harmonize most of the cases on the subject, to the effect that one who intends to take passage cannot be regarded as a passenger while in the act of getting on, unless he does so with a proper degree of care and prudence.

One waiting on a crosswalk to take a street-car, although lawfully there, was held not to be a passenger when struck by another car; but the street railway company was held liable for negligence in causing the injury. *Mitchell v. Rochester R. Co.* 4 Misc. 575.

In *Denver, South Park & P. R. Co. v. Pickard*, 8 Colo. 163, the decision was placed on the ground that the plaintiff had failed to exercise ordinary prudence in attempting to get on a swiftly moving train without any ticket, at a place where there was only a platform, without any station-house, ticket office, or waiting room. He attempted to show a custom to slack up for passengers, but the proof was held insufficient; and while the question as to the relation of passenger and carrier was raised, it does not seem to have been directly decided, but the plaintiff was defeated by his own negligence.

Considering all the decisions on the subject which establish quite clearly that a person may sometimes be a passenger when attempting to take a train although he has not yet got upon the cars or even procured a ticket, there seems to be no other limitation of the rule so satisfactory as that he must in order to be regarded as a passenger present himself in a proper place and in a proper manner because he cannot be presumed to have an invitation to present himself in any other way. Nevertheless this rule would not prevent liability in many cases to persons presenting themselves otherwise and therefore not to be regarded as passengers. But to such persons liability would evidently depend on the rule as to negligence toward mere licensees or trespassers.

B. A. R.

station in Somerville where the accident happened; and, immediately before he was struck and killed he was running very rapidly, from the direction of the public street, across the defendant's premises, outside of the passenger station, to a track on which was an incoming train, apparently with a view to take another train, which was about to start for Boston, on the track beyond. It is contended in behalf of the plaintiff that, inasmuch as he had previously obtained a ticket, and was on the defendant's premises, in a place designed for the use of passengers, outside of the station, and was about to take a train he had become a passenger.

One becomes a passenger on a railroad when he puts himself into the care of the railroad company, to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this the question is whether the person has presented himself, in readiness to be carried, under such circumstances, in reference to time, place, manner, and condition, that the railroad company must be deemed to have accepted him as a passenger. Was his conduct such as to bring him within the invitation of the railroad company? In

Dodge v. Boston & B. S. S. Co., 148 Mass. 209, 2 L. R. A. 88, it was said that "when one has made a contract for passage upon the vehicle of a common carrier, and has presented himself at a proper place, to be transported, his right to care and protection begins." In this statement it was assumed that he would be in a proper condition, and present himself in a proper manner. If his condition should render him unfit to be in the presence of passengers on the train, or if he should present himself while doing something which would expose himself or others to great danger from the cars or engines of the carrier, he would not be within the invitation of the railroad company, and it would not be expected to accept him as a passenger. In the present case, after the arrival of the plaintiff's intestate on the defendant's premises, there was no time when he presented himself in a proper manner to be carried. He was all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train. He did not put himself in readiness to be taken as a passenger, and present himself in a proper way. If we treat his approach as a request for passage, and if we conceive of the railroad company as being present, and speaking by a representative who saw him, there was no instant when the answer to his request would not have been: "We will not accept you as a passenger while you are exposing yourself to such peril. We do not invite persons to become passengers while they are rushing into danger in such a way." The law will not imply a contract by a railroad company to assume responsibilities for one as a passenger from such facts as appear in this case. *Dodge v. Boston & B. S. S. Co. supra*; *Merrill v. Eastern R. Co.* 189 Mass. 238, 52 Am. Rep. 705; *Com. v. Boston & M. Railroad*, 129 Mass. 500; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Baltimore Traction Co. v. State* (Md.) 28 Atl. Rep. 397.

Exceptions overruled.

SOUTH DAKOTA SUPREME COURT.

SANDWICH MANUFACTURING CO. *et al.*, *Appts.*,
v.

Charles MAX *et al.*, *Respts.*

(.....S. Dak.)

*1. At common law a debtor may use any or all his property to pay one or more creditors in preference to others, and in this state the same right is expressly declared by statute. Comp. Laws, § 4654.

2. The right of a debtor to pay one or more creditors in preference to others and the right to make a general assignment for

*Headnotes by KELLAM, J.

the benefit of all his creditors ratably, are distinct and independent rights.

3. The statute regulating and permitting voluntary assignments by insolvent debtors for the benefit of creditors was not intended to and does not affect or qualify the right of such debtors to make preferences among their creditors.

4. When a conveyance of property is made in good faith directly to a creditor in absolute executed payment of a debt, the transaction lacks the essential element of a trust, and cannot be brought within the range of such assignment law.

5. An insolvent debtor may use his

NOTE.—The question whether a preferential transfer to particular creditors constitutes an assignment for creditors regulated by statute is one of so much practical importance that the above case rejecting the earlier doctrine of the same jurisdiction is of much interest. See on this subject the note to *Akers v. Rowan* (S. C.) 10 L. R. A. 705; also *Farwell v. Cohen* (Ill.) 18 L. R. A. 231; *Pendery v. Allen* (Ohio) 19 L. R. A. 337.

24 L. R. A.

See also 25 L. R. A. 377.

- property to pay preferred creditors, or he may make a general assignment, as he chooses.
6. If, however, he attempt to use the law permitting and regulating general assignments for the benefit of all creditors, he must in good faith do what such law contemplates, and what he professes to do, and in such case he can make no preferences.
7. It is only when a debtor indicates his intention of taking advantage of the law permitting and regulating general assignments, and putting his property under its protection, that he is denied the right to make preferences among his creditors.
8. The doctrine of the opinion in *Straw v. Jenks*, 6 Dak. 414, disapproved.

(March 3, 1894.)

APPEAL by complainants from a judgment of the Circuit Court for Bonhomie County in favor of defendants in an action brought to have a deed and bill of sale declared to be an assignment for benefit of creditors. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. D. Elliott, D. C. Shull, and F. D. Wicks, for appellants:

Section 4660 of the Compiled Laws says: "Such assignment shall not be valid if it be upon, or contain, any trust or condition by which any creditor is to receive a preference or priority over any other creditor."

The transfer of the property with intent to abandon their business while insolvent, to some of their creditors to the exclusion of the others, created a trust under the above statute for the benefit of the plaintiffs and all other creditors of the firm of Max & Balsch.

The plaintiffs were beneficiaries of that trust, and as such can enforce the same in equity, although only simple contract creditors, without first exhausting their remedy at law or reducing their claims to judgment.

Day v. Washburn, 65 U. S. 24 How. 552, 16 L. ed. 713; *Clapp v. Dittman*, 21 Fed. Rep. 15; *Cass v. Beauregard*, 101 U. S. 688, 25 L. ed. 1004; *Briay v. Hogan*, 58 Me. 554; *Goncelier v. Foret*, 4 Minn. 18; *Miller v. Davidson*, 8 Ill. 518, 40 Am. Dec. 715.

As soon as a debtor attempts to create a trust with a preference for any of his creditors, by surrendering all of his property the statute steps in and declares it a trust for all; and when he puts his property beyond his power for such purpose, the law deprives him of all ability to direct or control its distribution.

Straw v. Jenks, 6 Dak. 414; *Field v. Geogegan*, 125 Ill. 70.

The instrument or instruments whether in form assignments, chattel mortgages, deeds of trust, or confessions of judgments, by which such transfer is made, constitute an assignment under the South Dakota statute, the benefits of which may be claimed by any creditors unpreferred who will take the necessary steps in a court of equity to enforce the equality contemplated by the statute.

Wyman v. Mathews, 58 Fed. Rep. 678; *White v. Cotzhausen*, 129 U. S. 829, 32 L. ed. 477; *Clapp v. Dittman*, 21 Fed. Rep. 15; *Perry v. Corby*, 21 Fed. Rep. 787; *Kerbs v. Ewing*, 22 Fed. Rep. 693.

The transfer to the respondents Wenzlaffs, 24 L. R. A.

by Max & Balsch, created a trust for the benefit of all the creditors.

This is a direct transfer of all the property to the creditors preferred.

Burrill, Assignm. § 162; *Van Patten v. Burr*, 53 Iowa, 518; *Riggs v. Murray*, 2 Johns. Ch. 565. 1 L. ed. 493.

Whenever a man becomes insolvent the law regards his property as of right belonging to his creditors.

Gare v. Murray, 6 Minn. 305; *Albert v. Winn*, 7 Gill, 446; Bump, Fraud. Conv. p. 392.

Messrs. French & Orvis, for respondents: Section 4654, Compiled Laws, expressly gives a debtor the right to prefer one creditor to another and in the absence of fraud the payment of a bona fide debt to one creditor is not a fraud against other creditors.

First Nat. Bank v. North (S. Dak.) Feb. 8, 1892; *Preston v. Spaulding*, 120 Ill. 208; *Farwell v. Nilsson*, 133 Ill. 45.

Voluntary assignments for the benefit of creditors are transfers without compulsion of law, by debtors of some or all of their property to an assignee or assignees in trust, to apply the same or the proceeds thereof to the payment of some or all their debts, and to return the surplus if any, to the debtor.

Burrill, Assignm. § 2; *Wiener v. Davis*, 18 Pa. 388.

There must be a trust, a trustee, creditors, and *cestui que trust*, who can compel an enforcement of the trust, in order to constitute an assignment for the benefit of or in trust for creditors.

Bishop, Insolvent Debtors, § 180; *Dickson v. Rawson*, 5 Ohio St. 323.

Where the assignment is to a single creditor or to a few selected creditors, and is made absolutely and by way of full payment or satisfaction, it is, of course, wholly divested of the character of a trust, and is in the nature of an ordinary conveyance or sale for a valuable consideration.

Burrill, Assignm. § 3; *Ingram v. Osborn*, 70 Wis. 184.

The test is this: Can other creditors call the grantee or person stipulated for by the grantor to account for the proceeds of the property? If they can it is an assignment, otherwise not.

Fecheim v. Robertson, 58 Ark. 101.

Since *Winn v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257, the supreme court of Wisconsin has clearly recognized the right of insolvent debtors to prefer creditors by sales and by mortgages of their property in payment of, or in securing bona fide debts to the exclusion of other creditors.

Cribb v. Hibbard, 77 Wis. 199; *Hoy v. Pierron*, 67 Wis. 262; *Ingram v. Osborn*, *supra*; *Greene v. Remington*, 72 Wis. 648; *Landauer v. Victor*, 69 Wis. 434; *Meneeshimer v. Kennedy*, 75 Wis. 411; *Stevens v. Breen*, 75 Wis. 595; *Michelsletter v. Weiner*, 82 Wis. 298.

The true rule seems to be that courts will declare any instrument or two or more instruments, whatever their form, an assignment whenever their legal effect is to transfer all or substantially all of the debtor's property to one or more trustees, in trust for the benefit of some one or more of the creditors of the debtor, other than the trustee.

Harkrader v. Leiby, 4 Ohio St. 602; *Weber v.*

Mick, 181 Ill. 520; *Schroeder v. Walsh*, 120 Ill. 408; *Sheldon v. Mann*, 85 Mich. 265; *Bresson v. Musselman*, 86 Mich. 186.

As long as no assignment for the benefit of creditors is made or the transaction does not amount in law to such an assignment, the debtor is at liberty to pay or secure any of his creditors at the expense of the others.

Sheldon v. Mann, *supra*; *Rollins v. Van Baalen*, 56 Mich. 610; *Neumann v. Calumet & H. Min. Co.* 57 Mich. 97; *Farwell v. Nilsson*, 133 Ill. 45; *Dwight v. Scranton & W. Lumber Co.* 82 Mich. 624; *Lampson v. Arnold*, 19 Iowa, 485; *Farwell v. Cunningham* (Iowa) Oct. 4, 1892; *Farwell v. Jones*, 63 Iowa, 816; *Perry v. Vesina*, 63 Iowa, 26; *Cadwell's Bank v. Oritenden*, 66 Iowa, 287; *H. A. Kohn Bros. v. Clement* (Iowa) June 8, 1882; *Gage v. Parry*, 69 Iowa, 605; *Hamilton v. Isaacs*, 34 Neb. 709; *Davis v. Scott*, 22 Neb. 154; *Hershiser v. Higman*, 31 Neb. 531; *Brown v. Williams*, 34 Neb. 376; *Costello v. Chamberlain*, 86 Neb. 45.

White v. Cotalhausen, 129 U. S. 329, 32 L. ed. 677, depended upon the construction of an Illinois statute.

The court intended to follow *Preston v. Spaulding*, 120 Ill. 208, but a careful reading of the opinion in that case and the opinion in *Schroeder v. Walsh*, 120 Ill. 408, proves conclusively that *Justice Harlan* was misled as to what was decided by the Illinois court in *Preston v. Spaulding*.

Section 4660 is intended to provide for the voluntary assignment of insolvent creditors, and is in no respect intended to compel insolvent creditors to make an assignment.

Union Bank of Chicago v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341; *May v. Tenney*, 148 U. S. 60, 37 L. ed. 368; *Hargadine v. Henderson*, 97 Mo. 875.

Kellam, J., delivered the opinion of the court:

We think the following statement at the head of appellants' brief is a fair presentation of the facts in this case, and we adopt it as the basis of this opinion: "On or about April 15, A. D. 1892, defendants Max & Baisch were a copartnership engaged in the retail hardware business and the selling of farm machinery at Scotland, this state. Their stock of goods, book accounts, and all their other property in which they had a valuable interest or any substantial equity as a partnership or individuals were of the nominal value of ten (\$10,000) thousand dollars, the cash value of which was \$7,000 to \$8,000. Their indebtedness exceeded fifteen thousand (\$15,000) dollars. Among their creditors were the respondents Solomon and J. C. Wenzlaff, of Yankton, this state, to whom they owed seven thousand (\$7,000) dollars. The said Wenzlaffs knew that Max & Baisch were hopelessly insolvent on or about said last named date. The said Max & Baisch, knowing that they could not continue their business longer, and that they must abandon the same, executed a bill of sale and deed of their said stock and book accounts, and all their other property in which they had any substantial interest or equity, either as a partnership or individuals, to the respondents Wenzlaff, in payment of their indebtedness

of seven thousand (\$7,000) dollars. Immediately on the delivery of said bill of sale and deed the said Wenzlaffs took possession of all of said property so transferred, and have continued to operate the store and run the same in their own names since. Said transfer of Max & Baisch left them without any property or means with which to satisfy or pay their indebtedness to any of their other creditors. This action was instituted by the plaintiffs, for themselves and all other creditors of Max & Baisch, for the purpose of having said deed and bill of sale and transfer declared an assignment with intent to give said Wenzlaffs preference in the collection of their debts over the other creditors of Max & Baisch, and that it created a trust for the benefit of all the creditors of said Max & Baisch, under the provisions of section 4660 of the Compiled Laws of the state of South Dakota. No appearance was entered for Max & Baisch, but their codefendants, vendees of said property, filed a general demurrer to the complaint herein, setting up that the complaint does not state facts sufficient to constitute a cause of action against them. The demurrer was submitted to the court, and the same sustained." The plaintiffs appealed.

From this statement we draw the following facts: Max & Baisch were justly indebted to the Wenzlaffs in the sum of \$7,000. In payment of such indebtedness they conveyed to them property whose cash value was \$7,000 to \$8,000. The property so conveyed constituted substantially their entire means, and resulted, as they knew it would, in the dissolution and discontinuance of their business. The Wenzlaffs knew that such conveyance and payment to them took and absorbed substantially all the property of Max & Baisch, and that it would necessitate the abandonment of their business. Max & Baisch were at the time largely indebted to other creditors, including the plaintiffs in this action, who were left, by such conveyance and payment to Wenzlaffs, entirely unprovided for. The question to be determined is directly this: Is it the legal effect of these facts to make such conveyance to the Wenzlaffs an assignment by Max & Baisch for the benefit of their creditors? At common law, a debtor in failing circumstances may use any or all of his property to pay one or more creditors in preference to others. 2 Kent, Com. 532; Burrill, Assignm. § 160. In this state this right of the debtor is expressly declared by statute. "A debtor may pay one creditor in preference to another, or may give one creditor security for the payment of his demand in preference to another." Comp. Laws, § 4654. This provision simply codifies the common law, and, unless qualified by other statutory provisions, the right of a debtor to select and prefer one creditor to another remains as at common law. And it is very clear that Max & Baisch, in making such payment to the Wenzlaffs, were exercising a right recognized and assured to them both by the common and statutory laws, unless such right has been limited or restrained by other provisions of the statute; and this is what is claimed by appellants is done by the statute regulating assignments in trust by insolvent

debtors for the benefit of their creditors. Section 4660, Comp. Laws, is as follows: "An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust towards the satisfaction of his creditors, in conformity to the provisions of this title; subject, however, to the provisions of this code relative to trusts and to fraudulent transfers, and the restrictions imposed by law upon an assignment by special partnerships, by corporations or by other specified classes of persons; provided, moreover, that such assignment shall not be valid if it be upon, or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent shall become a trust fund to be administered in equity, in the district court, and shall inure to the benefit of all the creditors in proportion to their respective claims or demands." Unenlightened and uninfluenced by several judicial decisions, some of which it will be necessary to notice hereafter, I think I should understand these provisions—the one declaring the right of a debtor to prefer particular creditors, and the other regulating the making and declaring the effect of a general assignment in trust for the benefit of all creditors—to be distinct and independent provisions, either of which was available to a debtor. That two different courses were open to every debtor: he might, as provided in said section 4664, use any or all his property to pay or secure any creditor in preference to others, or he might, as provided in said section 4660, turn over all his property to a trustee for the benefit of all his creditors ratably. If he chooses to adopt the former course of paying or securing a preferred creditor, he must keep himself and the transaction within the rules of honesty and good faith, as defined by the law; if he adopts the latter course of making a general assignment, he must follow the requirements of the statute authorizing and regulating such assignment and, if in or by such assignment he undertakes to prefer one creditor to another, the consequence prescribed by such statute will follow. That the question is not one of morals, to be measured by the conscience of the court, but of law, to be tested by the enactments of the legislature.

These views, thus generally expressed, are plainly opposed by the opinion of the territorial supreme court, in *Straw v. Jenks*, 6 Dak. 414. It is quite probable that the opinion of the learned judge, which was elaborate and instructive, laid down some propositions not necessary to a decision of that case upon the facts presented, and that the law which might perhaps have properly decided that case does not necessarily decide this. In that case the mortgagors made several chattel mortgages, at practically the same time, to as many different creditors. They were all immediately placed in the hands of an agent or trustee for enforcement. These acts were all so nearly simultaneous, and so closely related to each other, as to suggest the deliberate intention of the mortgagor to thus create a trust in such agent or trustee for the benefit of such preferred creditors. In the case be-

fore us there can be no such element of trust, unless the law itself directly creates it, and that, too, against the express intention of the parties. But the opinion without doubt plainly teaches the doctrine upon which the appellants base their present contention in this case. It is thus stated in the opinion: "Under this statute [4660], whenever an insolvent debtor makes a general disposition of all his property and effects, whether to all or only a part of his creditors, thereby abandoning his business, or putting himself in such situation that it is impossible for him to continue in it, he has made a voluntary assignment." And again: "So long as the instrument employed by the debtor, whatever it may be called, works an absolute transfer of substantially all the property and effects of the insolvent from him to another or others, with a design on his part that it shall do so, and that his connection with the business shall cease, it is a voluntary assignment on his part under the statute in question." It is reasonably plain that if these propositions are adopted and followed as the law by this court, the decision of the circuit court must be reversed; for all the conditions exist which, ruled by such law, would make this conveyance an assignment with preferences. The opinion finds the efficient factor, which turns what would otherwise be a simple transfer of property to one creditor in payment of his debt into an assignment for the benefit of all creditors, in the circumstance that such transfer embraces substantially all the debtor's property,—that is, that a debtor may convey nearly all his property to pay his debt to one of his creditors; and it is a proper exercise of his right to prefer such creditor. But if he convey a little more, so as to make substantially all his property, it becomes, instead of a payment as designed, a general assignment for the benefit of all creditors; thus making the character and effect of the transaction to depend—not on the intention of the parties to it, nor the perversion from such intent—upon the injustice of allowing one creditor to obtain more than his just proportion of the debtor's property; for the apparent injustice of paying a preferred creditor in full with three quarters of the debtor's property is not relieved by the fact that the remaining one quarter will pay other creditors an insignificant portion of their claims. I say, the "apparent" injustice of so preferring one creditor to others, for the law recognizes the fact that in the forum of conscience all debts do not stand upon the same level. A man may properly and honestly prefer and pay a friend, who, from pure friendship and a desire to assist, has indorsed for him, rather than one who, for profit, has assumed the business risk of dealing with him. Or he may rightly prefer and pay a poor creditor, who would be distressed by the loss of his debt, to a rich one, to whom the loss would be insignificant. In the exercise of the right to prefer creditors, the law has left it with the debtor to determine for himself which he ought to and will prefer. The right so to do being secured by a broad and positive statute, I am unable to see the authority of the court to say that, beyond the

use of such a proportion of his property as the court approves, he cannot exercise such right. But for the assignment already noticed (sec. 4660 *et seq.*), it would not be claimed but that the debtor might use all his property to satisfy one creditor to the exclusion of all others. It is not necessary to go to the books for this learning. In *Clarke v. White*, 37 U. S. 12 Pet. 200, 9 L. ed. 1055, the court says: "The debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious." See also *Wickman v. Grover*, 4 Paige, 23, 3 L. ed. 325; *Cowanhoven v. Hart*, 21 Pa. 495, 60 Am. Dec. 57; *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329; *Giddings v. Sears*, 115 Mass. 505; *Cason v. Murray*, 15 Mo. 878.

I am equally unable to perceive what seems to me any sufficient reason for allowing the circumstance that such payment necessitated the discontinuance of the debtor's business to determine or assist in determining that what was intended to be an absolute conveyance in payment of a particular debt is instead a voluntary assignment in trust to secure the payment, as far as possible, of all debts. There is nothing in the opinion in *Straw v. Jenks* which would prevent a merchant from turning over a considerable portion of his property to pay a bona fide preferred debt, but this would very often, perhaps generally, compel an abandonment of his business. How little of his property he could retain without such consequences would nearly always depend upon circumstances, such as the disposition of his creditors, the reputation, and often the nerve, of the debtor. The result would be that, under conditions and circumstances favorable to the debtor, his conveyance would stand in law as a payment, while, under unfavorable conditions, neither growing out of nor having any connection with the transaction itself nor its necessary effect upon creditors, the same conveyance precisely would stand in law as a general assignment. But how would the same rule—or principle, if it should be so called—apply to the multitude of cases when the debtor is in no business. A debtor has \$1,000 in money, or a single piece of property of that value. He owes the same amount to A., \$500 to B., and \$500 to C. He gives A. all he has in payment of his debt, and continues to work by the day, or on a salary, just as he did before the transaction. Is the transaction a payment to A., or an assignment for the benefit of A., B., and C.? It seems to me, as I have already said, that the two rights of the debtor to use any or all his property to pay preferred creditors, or to turn it all over to a trustee for ratable distribution among all his creditors, are distinct and independent, and that the statute regulating voluntary assignments for the benefit of all creditors did not profess, nor was it intended, to break in upon the long-established doctrine of the common law, made statutory in this state, that a debtor may prefer one creditor to another; but was only intended to direct the manner in which an insolvent debtor might, if he so desired to treat all alike, convey all his property to a trustee for a

ratable payment to all. The supreme court of Missouri, recognizing that the right of a debtor to prefer creditors might be legally used to avoid the ratable distribution among all creditors contemplated by the general assignment law, used this significant language: "If the legislature wish to strike at the root of the evil, they must go back to an old principle of the common law, which permits a debtor to prefer one creditor to another." *Shapleigh v. Baird*, 26 Mo. 326. I find nothing in our assignment law which I think was intended to repeal, affect, or qualify section 4654, giving a debtor the absolute right to prefer creditors, and nothing which restricts the exercise of such right to a portion of his property; nor can I find anything in the law which seems to me to authorize or justify a court in holding that a payment so made is not a payment, but a voluntary assignment of the debtor's property for the benefit, not of the creditor whom he has attempted to pay, but of all his creditors. The very definition of an assignment by our statute is a conveyance "of property to one or more assignees in trust." It is then provided "that such an assignment shall not be valid" if it contain any preference among the creditors. Where a conveyance of property is made directly to a creditor in absolute executed payment of a debt, the transaction lacks the essential character of a trust. *Burrill, Assignm. § 3; Ingram v. Osborn*, 70 Wis. 184, 304; *Dias v. Boucheaud*, 10 Paige, 445, 4 L. ed. 1044.

It is undeniable that cases may be found which support the opinion in *Straw v. Jenks*, some of which, and those principally relied upon by appellants, will be noticed. The one nearest home is that of *Wyman v. Mathews*, in the circuit court, and reported in 53 Fed. Rep. 678. The case was from this state, and Judge Sanborn, who decided it, was bound to follow the decision of the highest court of the jurisdiction from which it came. The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question upon which the decisions of the highest court of the state establishing a rule of property are of controlling authority in the courts of the United States. *Brashear v. West*, 32 U. S. 7 Pet. 615, 8 L. ed. 804; *Allen v. Massey*, 84 U. S. 17 Wall. 351, 21 L. ed. 542; *Lloyd v. Fulton*, 91 U. S. 485, 23 L. ed. 365; *Union Bank of Chicago v. Bank of Kansas City*, 136 U. S. 235, 34 L. ed. 345. Judge Sanborn followed *Straw v. Jenks*. If that case had been decided otherwise, it is fair to suppose he would have felt bound by it. It may be observed, however, that the *Wyman Case* was not one where the property involved had been transferred as payment, but, as in the *Straw-Jenks Case*, it was mortgaged to the bank, not only to secure its own indebtedness, but as a trustee for other creditors. The mortgage thus expressly created a trust, with the bank as trustee. In the *Straw-Jenks Case* the court cites and quotes from *Preston v. Spaulding*, 120 Ill. 208, as though supporting its decision. In that case there was a formal assignment for the benefit of creditors, and the whole argument of the opinion rests upon that fact. The preferences were made under

them as a part of the transaction to assignment, "the same as though incorporated in the deed of assignment itself." In respect to the insolvent debtor, the opinion says: "He may now, as heretofore, in good faith sell his property, mortgage or pledge it to secure a bona fide debt. . . . But when he reaches the point where he is ready and determined to yield the dominion of his property, and makes an assignment for the benefit of his creditors under the statute, this act declares that the effect of such assignment shall be the surrender and conveyance of all his estate not exempt by law to his assignee, rendering void all preferences, and bringing about the distribution of his whole estate equally among his bona fide creditors." And again, the opinion, referring to the voluntary assignment law, says: "No insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment and any other shift or artifice under the forms of law." Concerning this opinion, the later case of *Farwell v. Nilsson*, 133 Ill. 45, says: "Aside from the rule that the language of an opinion is to be confined by the facts of the case which the court is considering, it will be found that the learned and discriminating judge who wrote in that case carefully avoided the implication that preferential transfers by an insolvent debtor, not connected in act and intent with an assignment, were forbidden by the law." And further on the opinion says the judge "had clearly in mind the distinction between an assignment and a transfer of some other form, and clearly recognized the difficulty of treating judgments and conveyances as an assignment, or part of an assignment, and void if preferential, when no assignment was even executed or contemplated by the debtor who gave such preferences." Entirely consistent with these expressions, but not, as it seems to me, with those in the *Strain-Jenks Case*, is the opinion in *Schroeder v. Walsh*, 120 Ill. 403. Referring to the statute relating to assignments by debtors for the benefit of their creditors, and prohibiting preferences in such assignments, the court says: "Notwithstanding that statute, a debtor may pay one creditor in full, either in money or by the sale of his property. That act applies only to conveyances of property to an assignee or trustee in trust, to convert the same into money for the benefit of creditors of the assignor, which can now only be made under that law." The effect of the decision as to the question of preferences is thus stated in the headnote: "In the absence of any bankrupt law or statute to the contrary, the law is well settled that a debtor in failing circumstances, not seeking the benefit of the general assignment law, may prefer one creditor to another equally meritorious, if done in good faith. The statute regulating assignments by insolvents has no application to such a case." Again, in *Weber v. Mick*, another Illinois case, reported in 131 Ill. 520, in which an attempt was made to have certain chattel mortgages securing preferred creditors declared an assignment for the ben-

J., said in reference to an instruction refused by the trial court: "This instruction was doubtless drafted upon the theory that giving a preference to a creditor by means of a chattel mortgage, when the mortgage covers the debtor's entire property, contravenes the provisions of the thirteenth section of the statute in relation to voluntary assignments for the benefit of creditors. To this view we are unable to assent. . . . It must be held that every attempt to apply the act or any of its provisions, by construction, to any subject other than voluntary assignments, must be wholly unavailing." He then proceeds to show that neither chattel mortgages nor transfer of property in payment of debts can be considered as such assignments. Referring to the mortgages, he says: "It is clear, upon the principles established by the authorities above cited, that they were mere chattel mortgages, executed for the sole benefit of the mortgagees, and creating no trust in favor of any of the creditors of the mortgagor. It is clear, then, that they did not constitute voluntary assignments for the benefit of creditors within the meaning of the statute."

We have thus referred to these Illinois decisions later than *Preston v. Spaulding*, in order to more safely and intelligently determine what force should be given to *White v. Cotzhausen*, 129 U. S. 829, 32 L. ed. 677, strongly relied upon both by Judge Spencer in his opinion in the *Strain-Jenks Case* and by the appellants in this case. In *White v. Cotzhausen*, which went up from Illinois, it was the evident intention of the United States Supreme Court to follow the decision in *Preston v. Spaulding*, as an authoritative construction of the Illinois statute and its effect by the highest court of that state. That the opinion of the federal court does not correctly reflect that of the Illinois court is evident. In *Union Bank of Chicago v. Kansas City Bank*, *supra*, Judge Gray, who wrote the opinion, says they followed the Illinois court as they understood it. In *Farwell v. Nilsson*, *supra*, the supreme court of Illinois expressly repudiates the opinion in *White v. Cotzhausen*, as a correct statement of the law in that state. In *Clapp v. Dittman*, 21 Fed. Rep. 15, and *Perry v. Corby*, 31 Fed. Rep. 737, —cases cited by appellants, —Judge Brewer did hold that a transfer of all a debtor's property to a single creditor was an assignment for the benefit of the debtor's creditors, under the statutes of Missouri. He did this, he says in the opinion, against his individual judgment, and in deference to prior decisions of the federal circuit courts assuming to follow the state decisions. Substantially the same rulings will be found in *Dahlman v. Jacobs*, 16 Fed. Rep. 614; *Kellog v. Richardson*, 19 Fed. Rep. 70; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Freund v. Yaegerman*, 26 Fed. Rep. 812, rehearing refused in 27 Fed. Rep. 248; *State v. Morse*, 27 Fed. Rep. 261. Later the question went up from that state to the United States Supreme Court, and that court, in *Union Bank of Chicago v. Kansas City Bank*, *supra*, reversed and disapproved these cases, and held that the law of that state as declared by the highest court was quite different from that

announced by the federal circuit courts; and quoted with approval, as the established law of that state, the following from the opinion in *Hargadins v. Henderson*, 97 Mo. 375. "The assignment law of Missouri is not, in letter or spirit, a bankrupt or insolvent debtor's act. A debtor, whether solvent or insolvent, may in good faith sell, deliver in payment, mortgage, or pledge the whole or any part of his property for the benefit of one or more of his creditors, to the exclusion of others, even though such transfer may have the effect of delaying them in the collection of their debts. Its terms in no way qualify the rule by which the character of the instrument is to be determined." The court accordingly held that the deed of trust should be considered as a mortgage to secure the creditors named, and not as an assignment for the benefit of creditors generally. The same cases were again referred to and disapproved in the later case of *May v. Tenney* (decided in March, 1893), 148 U. S. 60, 37 L. ed. 188. This case when up from Colorado. The circuit court had held, upon the theory contended for by appellants in this case, that an instrument in the form of a chattel mortgage should be construed to be a general assignment for the benefit of creditors. The decision of the circuit court was reversed, Judge Brewer writing: "This statute [referring to the Colorado assignment law], so far as we are advised, has not been before the supreme court of Colorado for construction; at least not for any question involved in this case. The first section, it will be perceived, gives permission to make a general assignment. There is no compulsion. There is neither in terms nor by implication any duty cast upon an insolvent to dispose of his property by a general assignment, or anything that prevents him from paying or securing one creditor in preference to others;" and he concluded that a "statute which simply permits a debtor to make a certain disposition of his property works no destruction of his otherwise unrestrained dominion over it."

Similar views were expressed in *Manning v. Beck*, 129 N. Y. 1, 14 L. R. A. 198. This was an action to set aside a bill of sale made by an insolvent debtor as payment to a preferred creditor, and a general assignment executed the next day, on the general ground that they were parts of the same transaction, and, as such, violated the statute by giving such preference. The court held that such a result could not follow, unless the creditor so receiving payment knew at the time that the debtor was about to make a general assignment; and that the bill of sale to him was a part of such transaction, and one of the instrumentalities for the accomplishment of this general surrender of his property; in other words, that such preference is forbidden only when it is made as a part and parcel of an assignment under the statute. The court says: "If the preference were contained in the general assignment itself, we would have no trouble in concluding that it would be unlawful; . . . but it is an entirely different matter where a preference is given by reason of an instrument which the debtor has ordinarily full power to execute and de-

liver for the very purpose of thereby giving a preference, and which a creditor has like full power to receive for the purpose of thereby receiving such preference." Following this case is the very recent one of *Thompkins v. Hunter*, 24 N. Y. Supp. 8, in which the facts are hardly distinguishable from those in the case now before us for decision. We quote from the opinion in that case: "But it is urged on the part of the plaintiffs that no purpose to make a general assignment, or its accomplishment, is essential to bring the case within the operation of the statute, where the insolvent debtor has by a single transaction disposed of all his property to one or a portion only of his creditors, in payment of his debt or debts owing to him or them, to whom the sale or transfer is so made. The support of that proposition would require the conclusion that such a transfer of his property for that purpose is, in legal effect, a general assignment for the benefit of creditors, within the statute. There is apparently no warrant for such construction of the statute in the language employed to express the legislative intent. Nor is it seen how its purpose, so manifested, can be extended to defeat the right of such debtor to make, and one, or some only, of his creditors to take, transfer of his entire property as payment of valid debt or debts owing by him to such creditor or creditors to whom it is made, and to hold it for that purpose, as against other creditors of the debtor." In both of these New York cases *White v. Cotehausen* is referred to, but not followed. *Oross v. Carstens*, decided by the supreme court of Ohio on June 28, 1892, and reported in 49 Ohio St. 543, contains a very vigorous discussion of this question by Spear, *Ch. J.*, and holds that the assignment law cannot be so construed as to deprive a debtor of the independent right to prefer some creditors to others. Referring to such law, he says: "The language does not include all transfers nor all conveyances made in contemplation of insolvency, but assignments; and it is assignments by the failing debtor in trust to a trustee which the legislature had declared must inure to the benefit of all creditors. . . . Upon no accepted theory of construction, therefore, are we authorized, in view of the acknowledged rule of the common law, to enlarge the class, and say that it must, by judicial construction, be held to include other instruments not described, instruments which, since our earliest adjudications, have been held to be valid, and entitled to enforcement in accordance with their terms." The length of this opinion forbids further notice of authorities. The following late cases, however, may be cited as entirely consistent with, and generally affirmatively supporting the doctrine of, this opinion: *Costello v. Chamberlain*, 36 Neb. 45; *Clement v. Johnson*, 85 Iowa, 566; *First Nat. Bank of Chicago v. North Wisconsin Lumber Co.* 41 Ill. App. 883; *Warner v. Littlefield*, 89 Mich. 829; *Bank of Montreal v. J. E. Potts Salt & Lumber Co.* 90 Mich. 345; *Gilbert v. McCorkle*, 110 Ind. 215, followed in *Carnahan v. Schwab*, 127 Ind. 507. I believe these later cases, and others that might be cited, as well as many older ones, such as *Sampson v.*

Arnold, 19 Iowa, 479; *National Bank of the Metropolis v. Sprague*, 20 N. J. Eq. 18; *Farwell v. Howard*, 26 Iowa, 881; *Bates v. Coe*, 10 Conn. 295; *Doremus v. O'Harra*, 1 Ohio St. 45; *Atkinson v. Tomlinson*, Id. 287; *Lord v. Fisher*, 19 Ind. 7,—teach the only doctrine logically consistent with the several rights and privileges expressly guaranteed by statute to a debtor; and that the vital error in the opinion in *Straw v. Jenks* was in the assumed premise that the design of the statute regulating voluntary assignments was “to prevent preferences among creditors.” If such were the design of the legislature, it is inexplicable that they should have left standing upon the statute book the affirmative declaration of the absolute right of any debtor to make such preferences. The assignment law was not intended to affect or touch the general right of a debtor to prefer creditors, but was designed for cases where the debtor professedly did not desire or intend to make preferences, and offers to every debtor who does not wish to handle or distribute his property himself and make preferences, but desires to convey it all to a trustee for a ratable payment to all, a simple and convenient means to effectuate such purpose; and then provides that a debtor so professing to turn over all his property for the benefit, proportionately, of all his creditors cannot use such assignment to accomplish an inconsistent purpose. He cannot professedly use the law and the assignment for one purpose, but actually use it for another; not because he has no right to prefer particular creditors, but because to do so under such circumstances would be a fraud on the law. He may make a general assignment or not, as he chooses; but if he uses the law at all he must do it in good faith, and

conform to its terms and requirements. He must “use as not abusing” it. Of course, it is not indispensable that in making such assignment the debtor use the very terms of the statute, but it is indispensable that his acts be such as to indicate his intention to take advantage of, and put himself and his property under the protection of, the statute permitting and regulating a general assignment by a debtor for the benefit of his creditors; and, in my opinion, any judicial construction which, against the debtor's will and design, forces his property within the range of the general assignment law, and compels its disposition thereunder, would reverse the policy of the law, and make the assignment an involuntary, instead of a voluntary, one. It would be an attempt upon the part of the court to repeal a statute giving a definite right to a debtor, and to make a new law in the place of that duly enacted by the legislature.

Notwithstanding our great respect for the learning of the late territorial court, and of the able judge who wrote the opinion in *Straw v. Jenks*, we believe the doctrines of that opinion are wrong, consistent neither with a fair interpretation of the statutes of the state nor with the later and best-considered decisions of the courts generally; and, as an attempted rule of property, unsubstantial, and difficult, if not practicably impossible, of execution. We therefore decline to follow it. Applying the principles of this opinion to the facts in this case, we have no doubt that the Wenzlaffs took a good title to the property conveyed to them.

This was the judgment of the trial court, and such judgment is affirmed.

NEW JERSEY SUPREME COURT.

PENNSYLVANIA R. CO., *Appt.*

Owen HAMMILL.

(.....N. J.....)

- *1. When the facts are undisputed, the character of a way used by the public, whether it be a way by dedication, prescription, or one which the public has been expressly or impliedly invited or allured to use, is a matter of law, and can be determined as such by the court, upon the trial of the question whether the owner of the premises on which the way exists is bound to abstain from any fact or act which will make entry thereon, or the use thereof, dangerous.
2. Whoever does a wrongful act is answerable for all the consequences that may ensue, in the ordinary and natural course of events, though such consequences be

immediately and directly brought about by intervening causes if such intervening causes were set in motion by the original wrongdoer.

3. Where a railroad company permits a well-defined footway to be established by such use as the public desires or chooses to make of it, as a convenient footway over their property, and alongside a railroad bridge of such company, to and from a passenger station, and had separated such way by a fence from the tracks, so that it was not subject to the risks and incidental dangers of the railroad,—*Held*, that the railroad company, by such conduct, had exhibited an intention that the footway should be used by the public, and, by such manifestation, had induced and allured the public to its use, and that any one using the way within the purpose manifested was entitled to be protected from dangers to the way resulting from want of ordinary care by the railroad company.

(May 5, 1894.)

NOTE.—An implied license or invitation to walk on railroad property has been considered chiefly with respect to crossing the track, in a note to *Central R. & Bkg. Co. v. Rylee* (Ga.) 18 L. R. A. 634, also in *Chenery v. Fitchburg R. Co.* (Mass.) 23 L. R. A. 575.

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Such an implied license or invitation to walk on the track as a pathway was also considered in *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 23 L. R. A. 208, and *Ward v. Southern Pac. R. Co.* (Or.) 23 L. R. A. 714.

RULE upon plaintiff to show cause why a verdict in his favor in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence should not have been set aside. *Discharged.*

The facts are stated in the opinion.

Mr. Cortlandt Parker, Jr., for plaintiff:

The right of the public accrues by such acquiescence as carries with it the intention of the owner to subject his fee to the public use; and mere acquiescence for twenty years unaccompanied by any act which repels the presumption of such intention (to dedicate) is conclusive evidence of abandonment to the public.

Wood v. Hurd, 84 N. J. L. 91; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; Dill. Mun. Corp. 4th ed. § 639; *Smith v. State*, 28 N. J. L. 712; *Prudden v. Lindley*, 29 N. J. Eq. 615.

The common law knows three kinds of public highways: (1) footways; (2) horse and footway; (3) wagonways.

Co. Litt. 56 a.

Hammill was "invited" to be at the place when he was injured.

The fencing of the pathway both in Newark and East Newark the maintenance of a convenient footpath across the bridge, the acquiescence of the company for forty years in thousands of people crossing them daily, amount to invitation.

A railroad company impliedly invites all persons to come to their station. Thus a person meeting a friend is so invited.

Texas & P. R. Co. v. Best, 66 Tex. 116; *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, 53 Am. Rep. 756.

A man meeting his wife and seeking convenience which has not been provided.

McKone v. Michigan Cent. R. Co. 51 Mich. 601, 47 Am. Rep. 596.

Even if Hammill was a mere licensee, it did not absolve the defendant from liability for active negligence.

Gallagher v. Humphrey, 6 L. T. N. S. 684; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 867; *Patterson, Railway Accident Law*, § 187.

Mr. James B. Vredenburg, for defendant:

The plaintiff was a mere licensee.

Although a way may not have been dedicated to the public or otherwise legally established for the use of the public, yet if the owner of premises over which it passes has exhibited an intention that it shall be used by the public, either as a means of access to his property or over it, and, by the manifestation of that intention, has induced or allured the public to its use, then those using it within the scope of the purpose manifested are entitled to be protected from dangers to the way, by reason of obstructions or interferences created during its existence, and resulting from the want of ordinary care on the part of the owner or those acting within his authority.

Vanderbeck v. Hendry, 34 N. J. L. 467; *Corby v. Hill*, 4 C. B. N. S. 556; *Shoeny v. Old Colony & N. R. Co.* 10 Allen, 869, 87 Am. Dec. 644. See *New Jersey R. & Transp. Co. v. West*, 32 N. J. L. 91.

This principle, however, must be distinguished from that of a mere permission to pass over lands.

Hounsell v. Smyth, 7 C. B. N. S. 781; *Binks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 244; *Gautret v. Egerton*, L. R. 2 C. P. 370; *Stone v. Jackson*, 16 C. B. 199. *Bolch v. Smith*, 7 Hurlst. & N. 786; *Nicholson v. Erie R. Co.* 41 N. Y. 525, are cases to the same effect elsewhere.

There was in this case no invitation, no inducement or allurement on the part of the defendant.

Lippincott, J., delivered the opinion of the court:

This was an action by the plaintiff against the defendant to recover damages for injuries occasioned by the alleged negligence of the defendant. The plaintiff contended that the proximate cause of the accident and consequent injuries to him was the neglect of the defendant, the railroad company, to give the statutory signal of the approach of its train towards the crossing over the railroad tracks at First street, in the town of Harrison, in the county of Hudson. The plaintiff, at the time of the accident to him, was standing on a much-used path on the property of the defendant, close to, and running parallel with, the railroad track of the defendant, extending from the railroad crossing of First street, in the town of Harrison, connecting with a footwalk at the railroad bridge over the Passaic river into Newark, then again by a path alongside, and about parallel with, the railroad tracks, into Centre street, to the Centre Street station of the defendant's railway. It was alleged in the evidence—and this was a subject of some considerable dispute—that no signal, either by blowing the whistle or ringing the bell, was given by the defendant of the approach of the train to the crossing at First street, and that another man, by the name of Barry, carrying a box of tools on his shoulder, negligently and carelessly went upon the crossing at First street, and was struck by the locomotive, and killed, and some of the tools, by the force of the collision, were thrown with much violence against the plaintiff, injuring him severely. These, with other undisputed facts, show that First street, in the town of Harrison, running in a northerly and southerly direction, crosses the railroad of the defendant at grade. From First street the grade of the natural surface of the land descends to the Passaic river, and over this space the railroad, which is a single track, is laid upon an embankment. Along the north side of this embankment there is a paved street but this street connects with no bridge over the river. On the south side of the railroad bridge across the river, the defendant had constructed a footway leading from Newark over the river, and into the town of Harrison, and separated by railings, etc., from the other portions of the bridge. This footway had been for over twenty years used, with the knowledge of the defendant company, openly and notoriously, by all persons desirous of crossing over the Passaic river, either way, at that point. From the Harrison end of this footway on the bridge to First street, on the

railway embankment, on the south side thereof, either the defendant had constructed a well-marked path leading to First street, or else the public using the same had trodden a footpath there. Between this path and the other portion of the railroad embankment the defendant had erected a picket fence extending from the bridge to First street, thus completely separating this path from the railroad track. At the Newark end of the footway of the bridge there existed another path, either constructed by the defendant, or made from use by the public, leading from the footway of the bridge to Centre street, in the city of Newark, and from thence, along the sidewalk of Centre street, to the Centre Street station,—a regular passenger station of the defendant railway. The evidence is undisputed that this way, throughout its entire extent, from First street, in the town of Harrison, to the Centre Street station, in Newark, has been in constant public use for over twenty years. In fact, it is shown that it has been in constant public use ever since the railroad bridge was erected, over forty years ago, and that such use has been with the full knowledge, acquiescence, and consent of the railroad company. The evidence shows that thousands pass along it, and over the footway, every day, on their way between the town of Harrison and the city of Newark, and on their way to and from the Centre Street station of the defendant railroad. In fact, there appears to be no dispute that these footpaths, and a footpath over the bridge, connect the town of Harrison with the Centre Street depot of defendant company, and that this way is used to reach this depot from the town of Harrison, as well as a regular way connecting the town of Harrison with the city of Newark. The accident which caused the injuries complained of to the plaintiff was occasioned by a train of the defendant approaching from an easterly direction towards the crossing at First street. As it approached the crossing the plaintiff was with a companion, passing along the path from First street to the footway on the bridge, to cross over into Newark. He stopped a moment, and was, with his friend, watching the approaching train. As the train approached First street, Barry, who had a box of tools on his shoulder, went hurriedly upon the crossing at First street, in front of the train, and was killed. The box of tools was struck by the engine. Some of the tools were propelled over the picket fence along this path, and struck the plaintiff, and thus he received his injuries. These facts all appeared in the evidence of the plaintiff, and appear to be the undisputed facts in the case. The evidence on the part of the plaintiff was that neither the bell on the engine was rung, nor was the whistle sounded, on the approach of the train to this crossing. A motion to nonsuit was refused, and the evidence upon the part of the defendant was directed entirely to prove that the proper statutory signals were given, and to the question of damages; and at the close of the evidence a motion to direct a verdict was made upon the same grounds that nonsuit was requested, and refused.

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From the conceded facts in the case, the character of this way became a conclusion of law; and both upon the motion to nonsuit, and to direct a verdict for the defendant, the learned trial judge held that the defendant had separated this footway across the bridge, and the path approaching it from First street, from the other portions of its roadway, by the erection of the rails and fence, so as to render it impracticable for the defendant to use it in connection with its general business, and that, under all the facts, the defendant had notified such of the public as used this way that it was not subject to the risks and incidental dangers of the traffic of the railroad, and had made a designation of these portions of the bridge and path to the use of the public, and that there was exhibited an intention and purpose on the part of the defendant that it should or could be used by the public either as an access to its station, or over its property, and that by that manifestation it induced the public to its use, and that, within the scope of the purposes so manifested, the use of it was to be protected from dangers arising by reason of the want of ordinary care on the part of the railway company. The trial judge, so holding, refused to nonsuit, or to direct a verdict for the defendant, leaving the question of negligence to the jury. The conclusion reached as to the character of this way, as presented by this case, renders unnecessary the consideration whether it was subject to public use by dedication or prescription,—two questions much discussed in briefs of counsel.

It is clear that the defendant maintained this way as a convenient and accessible footpath across the bridge and along its embankment, for the purpose of communication between its station at Centre street, in the city of Newark, and the town of Harrison. There is no denial of this conclusion anywhere in the evidence. There is no evidence that this footway was devoted exclusively to the use of its workmen. It may be that in the beginning the public, at either end of the footway across the bridge, took such path as they chose, in order to reach First street, in the town of Harrison, or to reach Centre Street station or the streets in the city of Newark; but in a very little time the footpath at either end became well defined by public use, and became so well recognized that the defendant separated it from its tracks, as shown in the evidence, devoting it to such use as the public desired to make of it, to such of the public as chose to use it, in going to and from this station in Centre street, or to such of the public as chose to use it as a convenient footway to cross the river. It is in proof, undisputed, that on the Newark side of the river, at this point, there is a dense population, and that at the other end of this path, in the town of Harrison, there is quite a settlement, with the principal part of the town but a short distance away, and that this was by far the most convenient method reaching the town of Harrison from this station. This way was a distinct advantage to the defendant, and it is apparent that the public were distinctly invited to use it, and that such invitation

was general in its character. Therefore, there existed no necessity, in order to fix liability for want of ordinary care, to conclude that this was a public way, either by dedication or by prescription. The trial judge concluded that, although there may not have existed a public way by prescription or dedication, yet the defendant, as the owner of the premises over which the way passed, had exhibited an intention that it should be used by the public, and by that manifestation had invited, induced, or allured the public to its use, and that the plaintiff, using it within the scope of the purpose manifested was entitled to be protected from dangers of the way resulting from want of ordinary care. This principle is now firmly established in this state. It was indicated in *New Jersey R. & Transp. Co. v. West*, 32 N. J. L. 91, and distinctly held in *Vanderbeck v. Hendry*, 84 N. J. L. 467; and the liability is based "on a purpose manifested on the part of the owner that a way shall be used by the public, and the same is held out as a means of access to a house, store, or other passage through lands, and the public, or such as have occasion, are expressly or impliedly invited to use it according to the purpose intended." 1 Thomp. Neg. 307-309. This whole subject has recently undergone extensive treatment in the court of errors and appeals of this state in *Phillips v. Burlington Library Co.* 55 N. J. L. 307. In that case the leading authorities are reviewed; and the doctrine stated by *Mr. Justice Depue* is that mere permission to pass over dangerous lands, or acquiescence in such passage, for the benefit and convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts willfully injurious. But the owner or occupier of lands, who, by intention, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or the use of the premises dangerous. The gist of the liability, in such cases, consists in the fact that the person injured did not act merely on motion of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner to believe that the premises were intended to be used in the manner in which he used them, and that such use was not only acquiesced in, but was in accordance with the intention or design for which the way or place was adapted, and prepared or allowed to be used. The conclusion reached is that the trial judge committed no error at all in withholding from the jury the determination of the character of the way on which the plaintiff was at the time of the accident, and instructing the jury, upon the undisputed facts, that the plaintiff was not guilty of contributory negligence because of his presence there, nor because of his standing in the way, at the time of the accident.

The question whether the defendant company neglected the statutory signals upon approaching the crossing at First street, where
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Barry was struck, was a disputed one, as a matter of evidence. Some of the witnesses affirmed that no signal whatever was given, others said they did not hear it, while the engineer and fireman testify that the bell was rung the required legal distance from the crossing, and kept ringing until the crossing was passed. This question was properly submitted to the jury, and the jury instructed that, if they found the bell was rung as required by the statute, then no negligence on the part of the defendant company was proven, and no recovery could be had. Upon the evidence, as presented in this case, it is not competent here to determine that the finding of the jury on this subject was not fully justified. This being a pure question of fact, especially within the province of the jury to determine, a mere difference of conclusion on the part of the court would not be sufficient to nullify the verdict of the jury.

But it is contended that this negligent conduct of the defendant, conceding it to exist, was not the proximate cause of the injury. The contention is that the negligence of Barry, in placing himself carelessly in front of the locomotive, with the box of tools on his shoulder, was the independent and proximate cause of the injury. It is true that Barry's negligence contributed to his own death, and the trial judge instructed the jury that his negligence tended to the production of the injury received by the plaintiff, and that if Barry's negligence stood alone, as an independent cause of the injury, there could exist no right of recovery on the part of the plaintiff; but it was submitted to the jury whether the statutory signal was given or not, and, if not given, that was negligence on the part of the defendant, and, if it co-operated with the negligence of Barry in producing the injury of the plaintiff, a right of recovery existed, but, if it did not co-operate with the negligence of Barry in producing the injury to the plaintiff, then no right of recovery in the plaintiff existed. If the injury was the result of the joint negligence of the defendant and Barry, a liability on the part of the defendant ensued. It is premised that this was a proper submission to the jury, upon the evidence in the cause, and that the law, as applicable, was properly stated to the jury. It was not within the province of the court to assume that statutory signals were given, nor, upon the assumption that they were not given, to say that this negligence did not co-operate with the negligence of Barry, and thus produce the injury to the plaintiff. The result might have been, if the signal had been given, that the accident might not have happened to the plaintiff. It would perhaps be unprofitable, to any very great extent, to enter upon any examination as to the almost infinite number of cases upon this subject of causal connection, proximate cause, combined and concurrent causes, or intervening efficient causes. If there could be deduced from them the very best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon very nice discriminations. The

1. New shares of preferred stock issued in twice the amount of the old shares but at one half the rate of interest in settlement or compromise of claims of the holders on account of back and unpaid dividends constitute capital and not income, as between a life tenant and remainderman.

2. The refusal of a creditor of an insolvent estate to surrender to an administrator *de bonis non* certificates of stock standing in the name of a deceased administratrix is not a conversion, where the creditor claims no interest in them except as creditor of the estate and there is pending a claim of the administrator *de bonis* against commissioners of the estate for a conversion by the deceased administratrix.

(*Carpenter, J., dissents from proposition 2.*)

(February 8, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of forty-two shares of stock of the Housatonic Railroad Company. *Affirmed in part; reversed in part.*

The facts are stated in the opinion.

Messrs. J. Henry Work and Adolph L. Pincoffs, with Mr. Donald T. Warner, for appellant:

The twenty additional shares of four per cent stock, for the conversion of which Mr. Britton, the defendant, is sought to be held liable in this action, were issued by the Housatonic Railroad Company in payment of claims based on the non-payment of dividends on the old stock, which claims belonged to Mrs. Almira L. Perry, and the title in this stock therefore vested in Mrs. Perry individually.

In considering the rights between life tenant and remainderman, the intention of the corporation in making the settlement is to be controlling in the absence of fraud or collusion.

Gibbons v. Mahon, 136 U. S. 568, 34 L. ed. 580; *Daland v. Williams*, 101 Mass. 571; *Rand v. Hubbell*, 115 Mass. 464, 15 Am. Rep. 121; *Ellis v. Barfield*, 54 L. T. 625.

The issue of the additional preferred stock to any but Mrs. Perry would have been invalid and in violation of the law.

Even if the company could not, against the objection of the remainderman, have issued the stock to Mrs. Perry, the plaintiff cannot succeed in the recovery of the twenty shares of stock.

The defendant cannot be affected by any equities existing between Mrs. Perry and the plaintiff.

NOTE.—As to the division as dividends between life tenant and remainderman, see *Spooner v. Phillips* (Conn.) 16 L. R. A. 461, and *note*; and *Hite v. Hite* (Ky.) 19 L. B. A. 173.
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The new shares of 4 per cent preferred new stock were all part of the principal of the fund, and belong to the remainderman and not to the tenant for life.

It is a general and practically uniform rule that cash dividends go to the life tenant, and stock dividends to the capital of the fund.

Spooner v. Phillips, 16 L. R. A. 461, 62 Conn. 62; *Hotchkiss v. Brainerd Quarry Co.* 58 Conn. 120; *Brinley v. Grou*, 50 Conn. 66, 47 Am. Rep. 618; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Daland v. Williams*, 101 Mass. 571; *Gibbons v. Mahon*, 136 U. S. 568, 34 L. ed. 525; *Re Barton's Trust*, L. R. 5 Eq. 238-248.

A cash dividend is a distribution by the corporation of so much money with which the corporation parts, and which becomes the property of the stockholder.

A stock dividend is different. The corporation parts with nothing, but rather confirms its policy of capitalizing its earnings. It gives nothing to the stockholder except that it changes the form of his investment by increasing his number of shares, thereby diminishing his value of each share, leaving the aggregate of all his stock substantially the same. It is of no special importance whether that value be divided into few or many shares.

Terry v. Eagle Lock Co. 47 Conn. 141.

A stock dividend does not distribute property, but simply dilutes the shares as they existed before.

Williams v. Western U. Teleg. Co. 93 N. Y. 162, quoted by *Judge Gray*; *Gibbons v. Mahon*, 136 U. S. 568, 34 L. ed. 580; *Brinley v. Grou*, *supra*; *Re Barton's Trust*, L. R. 5 Eq. 238; *Sproule v. Bouch*, L. R. 29 Ch. Div. 632; *Bouch v. Sproule*, 12 App. Cas. 885.

There is nothing in the language of the will in favor of the life tenant which signifies more than ordinary dividend payable in money.

The words are I give, etc., "All dividends or interest that may accrue or arise from" said stock.

Gibbons v. Mahon, 136 U. S. 568, 34 L. ed. 580; *Spooner v. Phillips*, 16 L. R. A. 461, 62 Conn. 68.

This is an action in tort, and the liability of the tortfeasors for the conversion alleged is several as well as joint.

The estate of Mrs. Perry is insolvent and unsettled. Nothing has been received upon said claim, and an appeal has been taken from the allowance by the commissioner.

A judgment against one of two trespassers without satisfaction is not a bar to an action against his co-trespassers.

Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674.

Fenn, J., delivered the opinion of the court:

Nathaniel P. Perry, of Kent, in this state, died in 1849, then being the owner of twenty

ember, 1870. No further action appears to have been taken by said company in regard to such resolution, or the matters contained therein, until September 6, 1887. On that day notice was given of a special meeting of the original and preferred stockholders, to be held October 5, 1887, "for the purpose of making a settlement and exchange with the stockholders as and in any manner authorized and contemplated by the act or resolution of the general assembly of the state of Connecticut passed at its May session, 1870;" also for the transaction of certain other specified business. From the minutes of said meeting, duly held, pursuant to such notice, October 5, 1887, it appears that: "The chairman stated generally the purposes of the meeting, explained the long pending claims of the preferred stockholders for back or unpaid dividends, which amounted, by a statement he exhibited, to \$3,777,866.24, and enlarged on the advantage and desirability of adjusting the same, to remove the cloud over the company, avoid litigation, settle a just debt, and place the company's affairs in a definite shape." Thereupon a preamble and resolution were offered. The preamble stated, among other things, that it was necessary to make provision for the payment of a portion of the funded debt of the corporation, soon falling due; that the holders of the preferred or guaranteed stock had and were pressing claims against the company for back or unpaid dividends on such stock, which claims it was for the interest of the company to compromise and settle; that it was also to the interest of the corporation to secure a reduction of the preferred or guaranteed dividends on such stock henceforth from 8 per centum per annum to 4 per centum per annum, and a relinquishment of the cumulative provisions thereof; that the growth of the business of the company, and its enlarged connections, required an increase of the plant, equipments, and transportation facilities; and that it was also desirable for the company to raise funds for its general business and purposes, and to discharge other obligations. And the resolutions provided first for the borrowing of money, and the issuance of consolidated mortgage bonds therefor, to an amount not exceeding \$3,000,000, to be used and sold for the purpose of funding or retiring existing obligations, "paying, settling, or compromising the aforesaid claims of preferred stockholders, as hereinafter agreed, and of carrying out such settlement or compromise," and also for other purposes specified. The resolutions then proceeded as follows: "Resolved, second, that for the purpose of effecting and consummating the settlement or compromise hereinafter agreed upon of the claims of the preferred or guaranteed stockholders for back or unpaid dividends, and of effecting or consummating the exchange hereinafter agreed upon with the common stockholders, and pursuant to powers conferred by the act or resolution aforesaid of July 6, 1870, the preferred capital stock of this company be, and the same hereby is, increased from 11,800 shares to such amount

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30,000 shares, but that the rate of dividends preferred thereby shall be four dollars per share per annum, instead of eight dollars per share as heretofore, and such dividends shall not be cumulative, as heretofore; that the holders of said preferred stock shall be entitled to receive, as aforesaid, dividends of four dollars per share in each calendar year before any dividends for such year shall be paid to the holders of common stock, but, when the holders of such preferred stock shall receive four dollars per share of such stock during any one calendar year, then the holders of the common stock shall be entitled to receive four dollars per share before any further dividends shall be paid in said calendar year on such preferred stock; and when both classes shall each have received four dollars per share during any one calendar year any further dividends declared during such year shall be divided *pro rata* between both such classes of stockholders; and, as above declared, such dividends shall not be cumulative, and there shall be no accumulation of arrears of such dividends, and such preferred stock may be called 'four per cent noncumulative preferred stock.' Resolved, third, that any and all claims, demands, suits, accountings, and liabilities of every kind which the holders of the preferred or guaranteed stock of the Housatonic Railroad Company have or may have against the company to this date for or on account of back or unpaid dividends upon such preferred or guaranteed stock be, and the same are hereby, settled or compromised, adjusted, released, and canceled on the following terms and conditions: (1) The holders of the existing preferred stock shall surrender their certificates of such stock, and shall receive one share of such new four per cent noncumulative preferred stock in exchange for each share of such eight per cent cumulative stock so surrendered, and shall also receive—First, one hundred dollars par value of such bonds authorized by said act and by this meeting, with interest thereon from the date of such surrender; and, second, one additional share of such new four per cent noncumulative stock on the settlement herein made; and all of the same, namely, two shares of such new four per cent noncumulative preferred stock, and one hundred dollars par value of such bonds, with such interest, shall be in full release and settlement of each share of existing eight per cent cumulative preferred stock, and of all claims aforesaid for back or unpaid dividends thereon, and of the larger dividends and cumulative provisions of the existing preferred stock. (2) That the company, through its board of directors, shall have the right to pay one hundred dollars in cash on each share of such preferred stock so surrendered in lieu and instead of said bonds, as above stipulated and provided, if in the judgment of the board it shall be judicious so to do. (3) That all further rights to dividends on the existing preferred stock cease after this day, and the rights and interests of the holders thereof shall be thenceforth such as are conferred or created by such new four per cent noncumu-

lative preferred stock, and no other; that the board of directors are hereby fully authorized and empowered to add (and at will to alter or annul the same) such penalties and conditions to the foregoing provisions as they may deem best in respect of all such stockholders as shall not make such actual surrender within ninety days after notice thereof shall be sent by the secretary by mail to their last post-office address known to him. (4) That the common stockholders of the company, in consideration of assenting to this settlement, shall have the right and privilege contained in resolution fourth upon the conditions therein expressed or referred to. (5) That it is hereby admitted and agreed that such claims are a valid, legal, and subsisting liability and indebtedness of the company to an amount equal at least to the par value of such bonds and additional preferred stock in these resolutions authorized to be issued in consummating any settlement or exchange therein authorized, and that the right of the holders of such preferred stock to vote as heretofore, equally with the holders of common stock, at all elections and meetings of stockholders, is hereby expressly recognized and agreed to. Resolved, fourth, that the holders of the original or common stock of this company shall have the right, and they are hereby declared to be entitled, to exchange and surrender their shares of common stock for the said new four per cent noncumulative preferred stock, upon the basis of one share of said new preferred stock for each three shares of such common or original stock so surrendered and exchanged, and to receive such one share of new four per cent noncumulative preferred stock for each three shares of common stock so surrendered and exchanged: provided, that such exchange and surrender be made within ninety days from this date: and provided, further, that after the expiration of said ninety days the board of directors shall take up and cancel any of such stock, either by purchase or by exchanging the same for bonds or stock authorized by said Act of 1870 and by these resolutions to be issued, only upon such terms and conditions as they may deem best, and as may be agreed to by the owner or owners of such common stock. Resolved, fifth, that the board of directors be, and they are hereby, fully authorized and empowered to issue such four per cent noncumulative preferred stock for the purpose aforesaid, and to make such exchange, and to cause the certificates of such stock to be prepared and executed in such form and manner as they may deem best, and generally to execute all instruments, and do all acts and things, and make all agreements, which, in their absolute judgment and discretion, may be necessary or proper to effectuate the purposes aforesaid, and to carry out the foregoing resolutions, agreements, and acts."

The foregoing resolutions were adopted by a practically unanimous vote of stockholders representing both preferred and common stock; and in accordance with the scheme therein provided Mrs. Perry received the forty-two shares of stock hereinbefore referred to, and in lieu of bonds to that amount in

par value she also received \$2,000 by check of said railroad company, to her order, as executrix, which she appropriated to her own use. No claim to recover this latter amount of the defendant was pressed in the court below, and no evidence was offered to show that it ever came into his possession. It also appears in the agreed statement of facts in the record that at the time of the above settlement and exchange with the Housatonic Railroad Company the market value of said preferred stock, together with all accumulated dividends claimed thereon, was \$145 per share, and that in 1891 the new 4 per cent preferred stock had a market value of \$56 per share.

Upon these facts it is the general claim of the defendant, as we have already seen, that it was the clear intention of the railroad company to issue the twenty shares of additional preferred stock, not as a dividend, but in the payment of an admitted debt; that such intention should govern; and that these shares should be held to belong to Mrs. Perry, the life tenant, as the person entitled to the claim which was intended to be paid by them. With the facts recited before us, let us examine the claim. In the exchange of the old stock it is apparent that no consideration was given by the railroad company to the respective rights and interests of life tenants and reversioners or remaindermen of such stock. Nor was any attempt to define the rights of either in the new stock made or thought of. It is unnecessary to determine whether such company, either by virtue of the resolution or otherwise, had any power or authority to make any such adjustment of such interests, since it is manifest that none was intended. All the new stock issued in lieu of or in addition to stock, both preferred and common, which had belonged to Nathaniel P. Perry was properly issued, and the money paid to his executrix, leaving the rights of respective claimants to be elsewhere determined. But, if it were to be conceded that such determination should be governed by the intention of the company, if it could be ascertained, that the additional stock, with the bonds or money, should be in payment, settlement, or compromise of the admitted debt of the company for unpaid dividends to its preferred stockholders, how can such intention be made to appear? That this was indeed one of the purposes of the increase is manifest from the preamble and resolutions recited; but that it was not the only one is also manifest from such preamble and resolutions. It was also "to the interest of this corporation to secure a reduction of the preferred or guaranteed dividends on such stock henceforth from eight per centum per annum to four per centum per annum, and a relinquishment of the cumulative provisions thereof;" and it was also for the interest of holders of common or original stock, which had never paid any dividends, to exchange it for preferred or guaranteed stock, which would pay dividends. Who shall declare—who can know—the extent to which each of these and other purposes, some of which are expressed in the preamble and resolutions, and some, though not expressed, it is impos-

sible not to comprehend, might have been regarded as valuable, and considerations which actuated the exchange and increase of stock? The meeting had no occasion to specifically pass upon these matters, since it treated with the owners of stock only in bulk. But, if the only object had been what the defendant assumes, what occasion was there to retire the old stock? If we use, for illustration, the example of interest largely in arrears upon a note secured by mortgage upon real estate, the maker of which is irresponsible beyond the security, the surrender of the old note and the substitution of a new one, signed by the same maker, and secured upon the same property, for twice the amount of the old, but bearing half the former rate of interest, would seem a peculiar transaction, if regarded solely as a mode of payment of such accrued interest. It is equally hard to see how, in the case before us, increasing the old preferred stock of the corporation, while at the same time proportionately decreasing its guaranteed earning capacity, adding also to its shares in exchange for common stock, admitted on the same plane of earning capacity, could tend in any measure to the benefit of a life tenant of such stock having a claim for unpaid and undeclared dividends, beyond the extent to which the transaction detracted from the just interest of the remainderman in such corporate stock. The doubling of the shares under such circumstances, and then giving the additional shares to the life tenant, would, in effect, take from the remainderman half his proportionate interest in the capital of the company. If there had been only an increase, and such increase had been based upon earnings which ought to have been declared and paid during the term of the life tenant, it might seem legitimate to do this; but in the present case it nowhere appears that the corporation had any earnings to distribute. On the contrary, it does appear that at the time of this exchange the company was obliged to borrow the money required for the compromise by issuing bonds of the company therefor. There was no increase in capital, either by the paying in of money or from accumulated earnings, but only an increase of the number of shares by which the capital was represented. No new property was put in. No new stock was to be sold. The issue of new stock was a readjustment of the capitalized assets of the company, adding nothing thereto, and taking nothing therefrom, and was not a division of anything as profits or dividends, as interest or income. But suppose there had been profits or net earnings, for which cash dividends should have been declared to the owners of preferred stock in excess of those actually declared and paid, it follows, since even the cash given to the stockholders as part of the exchange had to be borrowed, that these earnings had already been invested. They had been added to the capital, and the effect of the action of the stockholders was to confirm the previous action of the directors, and to retain them as such.

But we return to the real argument of the defendant, and granting, for its sake, the first assumption,—that the railroad company ad-

mitted that the claims of its preferred stockholders against it for undeclared dividends to the extent of 8 per centum per annum constituted a "valid, legal, and subsisting liability and indebtedness of the company to an amount equal at least to the par value of such bonds and additional preferred stock," and that it was the intention of the company that the additional stock, as well as bonds, should be issued only for the payment of such claims, and thus to distinguish between the rights of the holder of the original preferred stock as stockholder and as creditor,—it seems to us that, granting this, though for argument's sake merely, the conclusion is in no wise altered. Calling these claims debts, the fact remains that they are due to stockholders and not to outside parties, and are for undeclared as well as unpaid dividends. If calling them debts implies that the earnings of the company warranted their declaration and payment in cash, and that, not having been paid in cash, it was the purpose of the action taken to pay them partly in bonds, or their avails, and partly by the issue of stock, then, so far forth as such issue of stock is concerned, by whatever name the transaction may be christened, it is, in effect, the declaration of a stock dividend in place of a cash one. It takes nothing out of its corporation, as a cash dividend does, but leaves everything in it capitalized, as a stock dividend does. As between a corporation and its stockholders, it matters little what name may be given to such a transaction, or how it may be considered,—whether a payment of indebtedness or declaration of a dividend. As between the corporation and persons not stockholders, to whom it was indebted, and whose claims are thus to be liquidated, the issue of new stock is in no sense a dividend. It does more than dilute the shares as they existed before. By taking away indebtedness, the transaction adds proportionately to the assets of the corporation. Such an adjustment, if fair, detracts nothing from the value of the original shares, because it returns a just equivalent for the increase. But when a question with which the corporation, as such, is not concerned, arises between the owner of income and that of capital, the case is altered. If the corporation is indebted to the shareholder, plainly the remainderman is not indebted to the life tenant; and if the corporation may pay its debts to such shareholder, as plainly it may not take away from the principal of the fund, which belongs to one, in order that it may be added to the interest of the fund to which another is entitled. Whether it was the intention, therefore, of the railroad company that these additional shares should be issued to the original stockholders as payment for indebtedness or not, it was not, and could not legally have been, the intention that such issue should waste the principal, in order to increase, or even to preserve, the income. Such, however, as we have seen, would be the necessary effect if these new shares were held to be the property of the life tenant.

The defendant says in his brief: "It was for the interest of the stockholder to consent to a change which would give them, in place

of an eight per cent cumulative stock, on which the interest had been paid only at very irregular intervals, a four per cent stock on which it was evidently expected that interest would be paid with regularity." But the defendant, in that connection, does not quite go to the extent of asserting that such speculative interest in an increase would have constituted a controlling consideration in inducing a remainderman to accept one share of 4 per cent which could only be paid provided the net earnings of the road were 8 per cent upon its previous stock, in place of one share of such 8 per cent, which must be paid, if all the earnings would permit, and, if not, would constitute, at least in the eyes of the stockholders passing in their meeting upon their own claims, an indebtedness. It appears to us, however this question may be looked at, the plain principles declared in repeated decisions in reference to the respective rights of remaindermen and life tenant in case of increase of capital shares of corporate stock underlie and control the decision which should be reached. Thus, referring to cases in our own jurisdiction, in *Brinley v. Grou*, *supra*, the words used in creating the life interest were "rents, dividends, increase, and income;" being somewhat broader terms than in Mr. Perry's will. But this court held that an increase of capital from three to four millions, with an apportionment of new shares *pro rata* among the stockholders of a corporation at \$100 per share, bringing the new stock at once to such a large premium that the trustees, who had been entitled to subscribe for eighty-one shares, sold the right to subscribe for thirty-four shares for a sum which enabled them to subscribe and pay for forty-seven shares, gave nothing to the life tenants; but that the right to subscribe for the new shares, the profit on the sale of the right, and the new shares taken, all went to the trustees as a part of the principal of the fund. This court, in answering the questions asked by the trustees, said: "A shareholder has no proprietary interest in the accumulated profits properly retained by a corporation for the protection of its capital. He cannot acquire one by summoning it to make a rest in its business, and take an account of them. He first obtains one when it has either in fact, form, or intent set his proportion thereof to his individual credit. This, of course, is the measure of the right of a life tenant. There is, to him, only a possibility that the profits may be divided, or that the use of them by the corporation may increase its dividend during his term." So also in *Hotchkiss v. Brainerd Quarry Co.*, *supra*, this court quotes with approval the language of Wood, *V. C.*, in *Re Barton's Trust*, L. R. 5 Eq. 288: "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet, and say they will not declare a dividend, but will carry over some portion of the half year's earnings to the capital account, and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain." Again, in the very recent case

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of *Spooner v. Phillips*, *supra*, the subject is exhaustively discussed, with abundant citation of authority, and it is declared as settled: First. That the word "dividends," if unqualified, signifies dividends payable in money; that the word "income:" has a broader meaning, but not broad enough to include anything not separated in some way from the principal; that accumulated surplus, so long as it is retained by the corporation, either as surplus or increased stock, can in no proper sense be called income. Second. That a corporation owns the undivided earnings of the business, rather than the stockholders, and the latter cannot become the separate owners of any part of the common property until set apart by the management for that purpose, by declaring a dividend or otherwise. Among the many cases cited in the opinion is that of *Gibbons v. Mahon*, 136 U. S. 549, 84 L. ed. 525, the original case being reported with extended note in 54 Am. Rep. 262, a most instructive and exceedingly pertinent case, in which the conclusion stated is this: "Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital and not income, of that share, as between tenant for life and the remainderman, legal or equitable, thereof." And again was said: "A dividend is something with which a corporation parts but it parted with nothing in issuing this new stock." See also *Minot v. Puina*, 99 Mass. 101, 96 Am. Dec. 705, with note; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121.

The defendant, however, further contends that the issue of the additional preferred stock to any one but the life tenant would have been invalid, and in violation of law. It is said that the resolution of 1870 is the sole authority for this issue; that by virtue of that enactment stock could only be issued for the purpose of payment of existing claims, and the conversion of the common stock into preferred stock; that, therefore, this action is an attempt to claim for the remainderman stock which was not intended to be issued to him by the company, and which, if issued to him by the company, would have been absolutely void in his hands. In answer to this it is unnecessary to consider whether the Act of 1870 was in existence at all in 1887, or whether, as contended by the plaintiff, it had been repealed by subsequent legislation in 1878. Nor is it necessary to determine whether, if such act was in existence when it provided for the issue of bonds or stock in settlement of claims, it was followed when both bonds and stock were issued in such settlement. It is unnecessary, we say, to decide these matters, since, if the defendant's contention as to both were conceded, the act in no wise authorized any interference with or change of the terms of the 8 per cent guaranteed stock. Nor have those who are entitled to the remainder in this stock in any way assented to its surrender. If, therefore, such issue of new stock is only valid because authorized by the Act of 1870, and only to the extent and for

that the rights of the holders of the old preferred stock to their capital cannot be affected by such issue; and it is only upon the theory that two new shares, yielding 4 per cent each, represent one share of the old, yielding 8 per cent, that it can be held that such capital would not be affected thereby.

It is further said by the defendant that he stands in the position of a bona fide holder for value, and that he cannot be affected by any equities existing between Mrs. Perry and the plaintiff. The record, however, states that the defendant had seen a copy of the will of said Nathaniel P. Perry, and had read the provisions therein contained with respect to the interest of Mrs. Perry in the Housatonic Railroad stock. It also appears that the stock was transferred to him to be applied in part payment of a debt by Mrs. Perry, who was his grandmother, three days before her death. There is nothing whatever in the record to justify the assertion of the defendant that this debt was for the advances made Mrs. Perry upon the faith of her ownership of this stock. It is true that the stock had been transferred from Mrs. Perry's name, as executrix, to her individual name. But the record leaves no room to question the defendant's full knowledge of the source from which this stock was derived, and the trust under which it was held. The defendant therefore stands in the same position, in respect to these shares, as Mrs. Perry stood, and the right of the plaintiff, as administrator *de bonis non*, to maintain this suit against him, rests upon the same foundation as that which supported the recovery by the plaintiff in *Mansfield v. Lynch*, 59 Conn. 320, 12 L. R. A. 285. In each case the party exercising the original administration parted with assets of the estate in a manner which gave the party receiving them no right to retain them against such administrator. They therefore still remained assets of the estate, which it was the duty of the administrator *de bonis non* to administer. The act of Mrs. Perry in causing a transfer of these shares to her individual name, and the subsequent act of transfer to the defendant's firm, for whatever purpose and with whatever intent said acts were done, did not divest the estate of Nathaniel P. Perry of its interest in the stock. Pom. Eq. Jur. 2d ed. §§ 1048, 1052. As against this defendant, who asserts his ownership of such stock although occupying no better position in regard to it than Mrs. Perry did, the plaintiff has the right to consider it unadministered property belonging to the estate which he represents; and, when demand was made by the plaintiff upon the defendant for it, and he refused to surrender it, claiming title, with the ability which the transfer of the certificates to his firm gave, to assert such title, and to use the stock as his own, such refusal constituted conversion. *Hartford Ice Co. v. Greenwoods Co.* 61 Conn. 166. For these reasons there is no error in the judgment of the court below in awarding damages to the plaintiff for the twenty shares of stock in question. But to the extent that such judgment also includes damages for the conversion of the remaining twenty-two

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It appears from the record that at the time of her death Mrs. Perry was largely indebted to the defendant, and that her estate was insolvent. Commissioners were appointed upon her estate, to whom the defendant presented his claim. The plaintiff also presented to such commissioners the same claim set forth in this present action against the defendant for the conversion of the stock. This claim was allowed, but an appeal was taken from the doings of the commissioners, which is still pending, and no payment or dividend has yet been made upon said claim. At the time of the demand by the plaintiff upon the defendant, the defendant understood that his custody of the twenty-two shares of stock was for and in the behalf of the executor of Mrs. Perry, and he did not claim, and has not claimed, any interest therein, except as creditor of her estate. This stock stands in the name of Almira L. Perry, executrix. It does not appear that the certificates have ever been indorsed, so that the defendant could, if he so desired, make any use of the stock for his own benefit. He has never desired to do so, and there is no ground to hold that he has ever converted this stock to his own use, unless, under the circumstances, the demand for and the refusal to deliver the certificates constituted such conversion.

It is the further claim of the defendant that he was a party to the proceedings before the commissioners in which the claim was made against the estate of Mrs. Perry for the conversion of these shares, and that, as against him, the plaintiff elected to consider these shares as a part of her estate; that, this being so, it would be unjust to him to compel him to pay for their value, or to deliver them, in a proceeding in which the executor of Mrs. Perry is not a party. It is the claim of the plaintiff that he has not elected, and that this is not a case in which he is put to any election; that it is an action of tort, in which the liability for the conversion alleged is several as well as joint; that "a judgment against one of two joint trespassers, without satisfaction, is not a bar to an action against his co-trespasser for the same trespass, and does not pass the title of the property to the defendant" (*Sheldon v. Kibbe*, 8 Conn. 215, 8 Am. Dec. 176; *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674); and that the allowance of this claim by commissioners ought to have no higher effect than a judgment. It seems to us that this contention does not meet the precise point of the true issue. The question is not whether the defendant would be severally liable for conversion, but whether he has in fact converted this stock by his refusal to deliver it to the plaintiff on demand, as we have herein previously held that he might be considered to have done with the twenty shares of stock. As bearing upon the question, the further inquiry as to the reason or ground for such refusal is irrelevant. *Hartford Ice Co. v. Greenwoods Co. supra*. The plaintiff's claim for conversion, presented to the commissioners on Mrs. Perry's estate, was allowed, and, though an appeal was taken, he is still pursuing it.

If finally allowed, and a dividend paid upon it, the estate available for the payment of other claims—among them the large one of the defendant—will be thereby so much lessened; and certainly the executor on Mrs. Perry's estate would thereby acquire an interest in this stock for the benefit of the creditors. Upon these circumstances, the refusal of the defendant to deliver the certificates of stock to the plaintiff, while at the same time disclaiming title or interest in the stock himself, except to the extent of his interest as creditor, upon the contingency of such stock becoming assets of the estate of Mrs. Perry, was not such an absolute and unqualified refusal to deliver property to the

owner or party entitled to the possession, on demand made, as constituted a conversion of the property. *Hartford Ice Co. v. Greenwoods Co. supra.*

There is error in the amount of the judgment rendered to the extent of the damage awarded for the value of the twenty-two shares, and to that extent it is reversed, and it is affirmed to the extent of the damages for the conversion of the twenty shares.

The other Judges concurred, except Carpenter, J., who dissented as to that part of the opinion holding there was error in the judgment below respecting the conversion of the twenty-two shares.

ARKANSAS SUPREME COURT.

W. T. FINCHER, *Appt.*,

v.

W. A. HANEGAN.

(.....Ark.....)

A mistake in the initial of the middle name of a mortgagor does not necessarily defeat the effect of record as notice, where there is nothing to show that there is more than one person of the name in question.

(May 19, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Nevada County in

favor of plaintiff in an action brought to recover the proceeds of certain cotton which were claimed by the respective parties under rival chattel mortgages. *Affirmed.*

The appellant was a merchant doing business at Rosston in Nevada County. Appellee was a merchant doing business at Hope in Hempstead County. Henry McMahon Ward was a farmer, who lived in Nevada County. On February 6, 1891, Ward executed a mortgage to Hanegan on his entire crop of cotton for that year, and signed and acknowledged the same as Henry N. Ward. This mortgage was duly recorded. On August 31, 1891, Ward executed a mortgage to Fin-

NOTE—Form of Christian name required by recording acts.

Whether or not the recording acts will require a modification of the common-law rule in respect to what constitutes a name (see note to *Lafin & Rand Powder Co. v. Steytler* (Pa.) 14 L. R. A. 680) is a question which has been considered in comparatively few cases. The recording acts will certainly fall far short of fulfilling their purpose if the courts apply to records the old common-law rule which holds a middle name or initial to be no part of one's legal name. *FINCHER v. HANEGAN* is a good illustration of what may be expected from such holding. But there are cases which go much further in the direction of uncertainty in the records than *FINCHER v. HANEGAN*.

Thus in a California case it was held that the owner of land may convey it by the use of a different name than that appearing in his title deed and the record in his true name will prevail against one who subsequently takes a deed from him by the name found in such title deed, the latter being a nickname. *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 360.

The majority of the cases held, however, that correct Christian names are necessary in an index of judgments. *Ridgway's App.* 15 Pa. 177, 53 Am. Dec. 586; *York Bank's App.* 36 Pa. 458; *Smith's App.* 47 Pa. 123.

A judgment against Jacob B. is not notice if recorded against John B. *Zimmerman v. Briggans*, 5 Watts, 186.

And in a Pennsylvania case it was said that "it is certain that an initial standing with a name of baptism is no part of it in pleading. But it follows not that an omission of it is to be disregarded in an index of notice to purchasers. And if a judgment creditor permits the omission from his record 34 L. R. A.

of the initial which distinguishes his debtor from others of the same name, he must bear the loss." *Wood v. Reynolds*, 7 Watts & S. 406.

And in that state the doctrine is now established that the omission of the middle letter from the index is fatal. *Hutchinson's App.* 23 Pa. 186.

A rule has found considerable favor which holds the record sufficient if it contains enough to lead the inquirer to the information designed to be imparted by it, and for this purpose the inquirer's extraneous knowledge is taken into consideration.

Thus in *Work v. Darby*, 13 Pa. Co. Ct. Rep. 269, one who had received land as Jane T. sold it as Sarah Jane T. to one who knew that she was generally known as Jane T., and who executed to her a purchase money mortgage. Judgment had previously been entered against her as Jane T., and it was held that the record of the judgment was notice to the purchaser but not to a subsequent assignee of the mortgage who did not know that she was known as Jane T.

So the record of a deed from J. N. H. by the name of J. H., by which latter name he was as well known as by the former, is sufficient constructive notice to subsequent purchasers. *Gillespie v. Rogers*, 146 Mass. 612. That case is, however, founded in part on the Massachusetts doctrine that mistakes in the record fall on the purchaser, and that it makes no difference if the constructive notice provided by law proves insufficient.

Property was conveyed to Almira J. Stringham; she executed a deed of trust on the land by the name of J. S. Stringham, which was indexed as A. J. Stringham and the caption of the record read Almira J. Stringham. This was held sufficient to give constructive notice of the true grantor. *Huston v. Seeley*, 27 Iowa, 190.

The principle that the index may be against the

corded. When Fincher took his mortgage, he wrote to the clerk of Nevada County to know if there was any mortgage on record, against Henry M. Ward, and received a response in the negative. Fincher then sold goods to Ward taking the mortgage, and in the fall received two bales of cotton which he applied on payment of his account. Subsequently he received notice from Hanegan that the cotton was covered by the latter's mortgage, and upon his refusal to surrender the proceeds this suit was brought.

Further facts appear in the opinion.

Messrs. Hamby & White, for appellant:

A mortgage to be valid against strangers must describe the property with sufficient definiteness and particularly to distinguish and identify it from all other property. It may be good between the parties, and void against strangers because of the uncertainty of the description of the property or the amount of the debt, either in the original or the record thereof.

Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; *Gurley v. Davis*, 39 Ark. 394; *Dodds v. Neel*, 41 Ark. 70; *Krons v. Phelps*, 43 Ark. 350; *Devey v. Sugg*, 14 L. R. A. 393, 109 N. C. 323.

Is it not equally necessary and equally honest and just to strangers, that the mortgagor shall be described with sufficient definiteness and truthfulness to identify him from all other persons and especially from all others whose names are similar to his own?

The doctrine of the law "that knows of but one Christian name" is founded on the sound and just principle that no man shall be made to suffer loss or punishment on account of any unintentional error or omission in his name, or

"law of notice" and never was intended to have.

If one found the name Henry N. Ward on the index, he perhaps ought to be required as a precaution against being misled by a clerical error of the clerk, to look beyond that and examine the record itself. But if upon doing that he found the name in the body of the mortgage, and in the acknowledgment, and the signature, all written Henry N. Ward, as it was in this case, a decision which required him to inquire further could not be founded either on reason or justice.

Pom. Eq. Jur. §§ 649, 654, 655, and cases there cited.

Upon what authority is it said that "the law knows of but one Christian name?" Is it a fact that the law does not, and will not, know of but one such name? Does any law prohibit a man from bearing more than one Christian name? And if he is not so prohibited, upon what authority can the courts ignore and refuse to recognize more than one of his Christian names especially when he employs them to describe and identify himself from all other persons of similar names, as this court has repeatedly held that chattels in a mortgage shall be described so as to identify and distinguish it from all other chattels of similar character? His name is his own. The middle Christian name is as much a part of it as any other part. Indeed it may be that it has been transmitted to him from a noble ancestor, and that he is prouder of it than any other part. And would not the decision that ignored and refused to recognize it be purely arbitrary, and entirely without reason or law to support it? We think so.

man by the name by which he is generally known was applied in the case where a judgment indexed against F. Z. was held to be a lien on land standing in the name of John Jacob Frederic Z. Jenny v. Zehnder, 101 Pa. 293.

So an index against J. W. H. is sufficient notice to one about to deal with John W. H. Finney v. Russell, 52 Minn. 443.

And the record of a mortgage by S. M. J. is sufficient to impart notice of a mortgage of Samuel M. J. Miltonvale. State Bank v. Kuhnle, 50 Kan. 430.

But a judgment indexed against one by the first name of Ellen is not notice to one who purchases the land of a person using the first name of Helen. Thomas v. Desney, 57 Iowa, 68.

And land conveyed to Mary A. Allely is not, as against subsequent purchasers, bound by a judgment record as against May Alley. Phillips v. McKaig, 36 Neb. 353.

A rule much in harmony with the spirit of the recording acts and which would be simple and of uniform operation in all cases of real estate records has been adopted in Illinois.

In *Grundies v. Reid*, 107 Ill. 304, it was held that the law protected the purchaser of property by the title which appears of record, unless there is notice of something to the contrary. Therefore, one who made a loan in reliance on the record title was protected against a prior judgment against the owner by another name, although he was as well known by the latter as by the former.

The application of that rule would seem to be just and to work no hardship to any one and would 24 L. R. A.

reach by a much more direct method a result reached by other decisions in which there is an appearance of conflict.

Thus the case of *Johnson v. Hess*, 9 L. R. A. 471, 123 Ind. 236, which is well stated in the opinion in *FINCHER v. HANEGAN*, appears to be somewhat in conflict with the next cited case of *Crouse v. Murphy*, 12 L. R. A. 68, 140 Pa. 336, and it undoubtedly is so on the question of name, but the two cases are in harmony upon the question of the right to rely upon the title as it appears of record. In the former case the record title was H. W. Mankedick and the judgment was against William Mankedick. In the latter case the record title stood in the name of Daniel J. Murphy and the judgment was against D. Murphy. In the former case the middle name William was held to be no part of the name, in the latter case the J. was practically held to be a part of the name, but in both cases the record title prevailed as against names by which the owners were commonly known. In the latter case, however, the question of the proper form of the name is not considered, but the case is decided on the ground that the holder of the judgment neglected to avail himself of information which he might have acquired as to the name of his debtor, while the one who purchased the land was negligent in no respect, and therefore, the one not guilty of negligence was protected. If, however, the doctrine is to prevail that the middle letter is no part of the name, it is difficult to see how there is negligence in not taking notice of its possible existence.

H. P. F.

Lafin & Rand Powder Co. v. Steytler, 14 L. R. A. 690, 146 Pa. 434.

It is a matter of public history, of which we presume the court will take cognizance, that one of its illustrious associate judges of the early days—*Mr. Justice William Conway B*—having but one Christian name, found it necessary when he became a man of affairs to adopt the letter “B” as a part of his name by which he could describe himself so as not to be mistaken for a relative of the same name.

Names of the Judges of the supreme court of Arkansas, 7 Ark.

Messrs. William M. Greene and James H. McCollum, for appellee:

The law recognizes but one Christian name, the middle Christian name or initial is held to be immaterial by at least the greater weight of authorities. The middle Christian name or initial has no more significance, and no greater importance is attached thereto, than the affixes “Jr.” and “Sen.” which are often used to distinguish persons of the same name.

Keene v. Meade, 28 U. S. 3 Pet. 1, 7 L. ed. 581; *Games v. Stiles*, 89 U. S. 14 Pet. 823, 10 L. ed. 476; *State v. Smith*, 12 Ark. 623, 56 Am. Dec. 287; 5 Lawson, Rights, Rem. & Pr. § 2268; *Milk v. Christie*, 1 Hill, 103; *Re Snook's Petition*, 2 Hill. 565; *Roosevelt v. Gardinier*, 2 Cow. 463; *McDonald v. Morgan*, 27 Tex. 503; *Banks v. Lee*, 78 Ga. 25; *Reid v. Lord*, 4 Johns. 119; *Franklin v. Talmadge*, 5 Johns. 84; *Choen v. State*, 52 Ind. 847, 21 Am. Rep. 179; *Rooks v. State*, 88 Ala. 79; *Tiedeman, Real Prop.* § 798; *Erskine v. Davis*, 25 Ill. 251; *Allison v. Thomas*, 72 Cal. 563; *Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597; *Myer v. Pegaly*, 39 Pa. 429, 80 Am. Dec. 584; *Fallon v. Kehos*, 38 Cal. 44, 99 Am. Dec. 350, and *note*.

Then should the mortgage under consideration be declared to be no notice because simply the initial of the middle Christian name of the mortgagor was signed erroneously? No greater accuracy in the description of the mortgagor is required than that of the property conveyed, and the law does not require the description of the property to be such as to distinguish it from all other property.

Jones, Chat. Mortg. § 54; *Harkey v. Jones*, 54 Ark. 158; *Alexander v. Graves*, 25 Neb. 453.

Battle, J., delivered the opinion of the court:

Was the mortgage by Henry M. Ward to W. A. Hanegan, under the name of “Henry N. Ward,” after it was acknowledged and filed for record, notice of its existence and contents to W. T. Fincher, the second mortgagee? As between Hanegan and Ward, the mortgage was undoubtedly valid, for the reason that Ward was estopped from saying that “Henry N. Ward” was not his true name. But it could under no circumstances be valid against third persons, who acquired liens on, or purchased, the property thereby mortgaged, until it was filed for record. *Mansf. Dig.* § 4743. If it had been executed and properly acknowledged by the mortgagor, under his true name, and filed for record, it would have been valid against all liens subsequently acquired by third persons from the mortgagor, and against all subsequent purchasers from Ward of the mort-

gaged property. Did the insertion in his name of the letter “N” instead of “M,”—the correct initial of his middle name,—render it invalid as to subsequent lienors and purchasers? Upon similar questions there is a contrariety of opinion.

In *Gillespie v. Rogers*, 146 Mass. 612, it is said: “When deeds or other instruments required to be recorded are given or received by persons or corporations known by different names, the records may fail to furnish exact and literal information; and yet, when the instrument itself is a genuine one, and has been executed in good faith, the record has been held sufficient to furnish constructive notice of the real transaction. A striking illustration of this is found in a former decision of this court. Stat. 1865, chap. 48, § 2, provided that no assignment of future earnings should be valid against a trustee process, unless recorded in the town or city clerk's office before the service of process. A man by the name of Germain Sirous, who was also sometimes called ‘John Keever,’ made an assignment of his future earnings under the name of ‘Joseph Cyr,’ which name he signed by his mark, being unable to read or write. This was duly recorded. There was no intention of misleading anybody by the wrong name affixed to the assignment. It was a mistake, the man being an ignorant foreigner, who could not speak English. Afterwards, a creditor brought a trustee process. It was held that the assignment was good as between the original parties to it, and, being recorded, was good as against attaching creditors. *Ouimet v. Sirois*, 124 Mass. 162. See also, *Gifford v. Rockett*, 121 Mass. 481; *O'Connor v. Cavan*, 126 Mass. 117.”

In *Alexander v. Graves*, 25 Neb. 453, the opinion of the court is succinctly and correctly stated in the syllabus of the case as follows: “A. purchased certain personal property on time, and, for the purpose of securing the purchase price, executed a chattel mortgage on the property purchased. The purchase was made and the chattel mortgage was executed under an assumed and fictitious name. The parties to the transaction being unacquainted, the vendor supposed the name given was the true name of the purchaser. The purchaser stated that his residence was in Webster county, which was correct, and the mortgage was duly filed in the proper office in that county. Subsequent to the filing of the mortgage, A. sold the property to C., under his true name, after C. had examined for chattel mortgages executed by A., and found none. In an action of replevin by B. against C. for the possession of the mortgaged property, it was held that B. should recover judgment.” This decision, it seems to us, was based upon the fact that the mortgage was executed and filed before the second purchase, the court holding that the purchaser from the mortgagor had constructive notice of the existence of the prior chattel mortgage from the record.

In *Johnson v. Hess*, 126 Ind. 298, 9 L. R. A. 471 (an Indiana case), it appears that a judgment was recovered against Henry William Mankedick, and was entered in the re-

ord of the court and upon the judgment docket as recovered against "William Mankedick." He purchased a tract of land after the rendition of the judgment, and it was conveyed to him as "H. W. Mankedick." Thereafter, he sold and conveyed it to James G. La Forte, and described himself in the deed as "H. W. Mankedick." La Forte then sold and conveyed it to William Johnson. Afterwards, an action was instituted by Johnson to enjoin the sale of the land under an execution on the judgment against Mankedick. Upon this state of facts, this question arose: Was the judgment, as recorded, constructive notice to Johnson of its lien? The court held that Johnson was chargeable with notice of the existence of the judgment against William Mankedick, and of the amount and terms and conditions of it, but nothing more; that he was not chargeable with notice that his remote grantor, H. W. Mankedick, and William Mankedick, named in the judgment, were the same person; that "the judgment did not disclose the fact, nor did it suggest an inquiry which 'would have led up to' an ascertainment of the fact;" that, for all legal purposes, the full name of Johnson's grantor was "Henry Mankedick;" and that "the middle initial was unimportant, and suggested nothing."

In *Crouse v. Murphy*, 140 Pa. 335, 12 L. R. A. 58, one Daniel J. Murphy owned a lot in the city of Philadelphia. "His deed for the same was regularly recorded, as was a mortgage given by him for a part of the purchase money. He took and he incumbered the title in his proper name, as Daniel J. Murphy. Roggenmoser desired to buy the lot. He found the title properly recorded, and incumbered by a mortgage. Turning from the recorder's office to that of the prothonotary, he caused search to be made for liens on the judgment index against Daniel J. Murphy, and found none. He then completed his purchase, settled the purchase price, and received and recorded his deed. This was in 1888. In June of that year, Murphy went to Chicago to reside. In 1889 the plaintiff, John Crouse, who had a judgment against Daniel Murphy, issued his writ of *sci. fa.*, and served Roggenmoser, as terretenant." The court said: "Was the judgment against Daniel Murphy a lien on the lot? It is admitted that Daniel Murphy and Daniel J. Murphy are the same person. It is clear, therefore, that real estate in the hands of that person would be bound. Having signed his name in the form in which it appears on the judgment index, he could not object to the enforcement of the judgment against his property. As between him and his creditor, it is a question of personal identity. But the defendant is not objecting. It is a purchaser who bought after a search of the records, and with no actual notice of the existence of this judgment, who claims protection. If he did all the law required of him, he is entitled to protection against the judgment of the plaintiff. If he did not, then he must suffer for his want of care in making the search." And, continuing, the court said: "Murphy's title was on record. Whoever dealt with him on the 24 L. R. A.

credit of his real estate was bound to know what appeared in his recorded title. It was as much the duty of one who was about to trust him with money or goods because of his ownership of land to know how and by what name he held it, as it was the duty of one about to purchase the land to make the same inquiries. If the creditor neglected his duty, he must lose in consequence. If the purchaser neglected his, he must lose. Because the creditor in this case did neglect to examine the record, he has a note signed with only a part of the maker's name, on which judgment has been entered. With no notice of the habit of his vendor to sign notes in several different ways, and with no means of notice of liens but the record, the purchaser examined, exhausted the means of knowledge within his reach, and, finding no lien against Daniel J. Murphy, or D. J. Murphy, settled with his vendor, and took his deed. If one of these parties must lose, in good conscience, it should be he whose neglect to avail himself of the information which the record could have given him made the loss by the one or the other inevitable."

In *Mackey v. Cole*, 79 Wis. 426, the plaintiff claimed certain horses by virtue of a chattel mortgage given to him by one McPherson, who was the owner, but executed the mortgage on them in the name of John Doyle, who had no interest in them. The mortgage was given to secure a loan of \$210, and was taken by an agent who had the money of the plaintiff to lend. When McPherson applied to him for the loan, he gave his name as "John Doyle." The agent, not knowing him, made inquiries about Doyle, but ascertained nothing. Believing McPherson to be the man he represented himself to be, he received the mortgage, filed it in the proper office, and advanced the \$210 on the horses. About ten days after this, McPherson sold the horses to the defendant, who was a bona fide purchaser for value, with no notice of any lien on the property, other than would be implied from the filing of the mortgage. The court held that the filing of the mortgage for record was no notice to the defendant, because it was executed under a fictitious name.

This case is unlike that of *Crouse v. Murphy*, *supra*. The title of Ward to the mortgaged property did not appear of record to Hanegan. It does not appear that Hanegan was chargeable with neglect of duty in failing to examine the record to see in what name Ward held his property. It is unlike the case of *Mackey v. Cole*, *supra*, in which the mortgagor did not execute the mortgage by his surname. In this case, Ward executed the mortgage by his true Christian name and surname.

Was Fincher, the second mortgagee, chargeable with notice of Hanegan's mortgage? It is contended that he was not, because the initial of Ward's middle name does not appear in his signature to the Hanegan mortgage, he having executed it by the name of "Henry N. Ward," when his true name is "Henry M. Ward." But this was immaterial, unless there were more than one person of the same name, and the middle name, or

the initial thereof, was necessary to identify the Henry Ward who had executed it. "The law knows but one Christian name. The entire omission of a middle letter is not a misnomer or a variance. The middle letter is immaterial, and a wrong letter may be stricken out or disregarded." *State v. Smith*, 12 Ark. 622, 56 Am. Dec. 287; *Keene v. Meade*, 28 U. S. 8 Pet. 1, 7 L. ed. 581; *Games v. Stiles*, 39 U. S. 14 Pet. 322, 10 L. ed. 476. To hold, unqualifiedly, that the wrong initial of Ward's middle name in Hanegan's mortgage affected its validity as to third persons would be ignoring this well-established rule of law. There can be no good reason for disregarding it in any case, unless it appear that there be more than one person of the name in question. There is nothing in the spirit or letter of our registration laws which can operate as a repeal of the entire rule. In registration, as in other departments of the law, the exception should prevail in cases where there are more than one person of the same name, and the middle name or initial thereof is necessary to distinguish or identify them. In this case there was no evidence to show that there was more than one Henry Ward in Nevada county, where the Hanegan mortgage was recorded. If there were, the courts cannot take judicial notice of that fact, and the burden was on the second mortgagee to show that there was. Witnesses living in Nevada county testified that they knew of only one "in the country," and the evidence shows that he executed both mortgages. Under the circumstances, sufficient appears to show that Fincher was put on inquiry to ascertain whether the Henry Ward who executed the mortgage to him was not the same person who executed the Hanegan mortgage. He did not make it. The presumption is, if he had, it would have led to the ascertainment of that fact. He was therefore chargeable with notice of the execution of the Hanegan mortgage by Henry M. Ward, and its contents.

Judgment affirmed.

Bunn, Ch. J., dissenting:

In dissenting from the opinion of the majority of the court in this case, I assume, on the one hand, that the appellant, the junior mortgagee, acted in perfect good faith, for it is only the question in its legal aspect that I wish to discuss at all. On the other hand, the appellant must be considered as having examined the record of appellee's mortgage, and known its purport.

In all cases where the question is one between the parties, and is, moreover, one of identity merely, such as all criminal cases, matters of pleadings, and identification of parties so as to show chain of title, the saying that the "law knows but one Christian name," or that the "middle name and its initial letter are immaterial," may go, at least, without comment. So, also, the importance of the middle name may, in many instances, not be apparent in cases of absolute conveyances, especially of real estate. Moreover, in a case where the grantor is known as well by one name as by the other, the middle name may not be so important.

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But in the increasing commerce of the world, and the closer relation into which men are daily being brought, one to another, in their business, and the growing necessity for greater particularity and nicer observances of the strict rules regulating the absolute and relative rights of property, it is altogether a repetition of the language of a past age to say that middle names are immaterial and need not be taken notice of.

Again, while the name of the owner, in case of real estate, may not be of such great importance, yet that rule does not hold good in case of personal property, when the name of the owner is in fact and in truth always an essential element of the description of the property itself.

After all, there could be little excuse of intruding a discussion of this kind upon the public, were it not for the peculiarity of our registration laws. I need not remind any one of the fact that while no one can be an innocent purchaser of property included in an absolute conveyance, of which he has actual notice, whether it be recorded or not, or is in possession of such knowledge of facts as will put him on the inquiry to acquire all essential knowledge on the subject, no such rule applies to the case of mortgages. Actual knowledge of the existence of an unrecorded mortgage binds no one. Neither is any one in possession of any actual knowledge whatever on the subject bound to add thereto by pushing his inquiries.

The law imputes to every one a knowledge of the record of a mortgage on property about which he attempts to deal, it matters not whether the imputation, in itself, be in fact true or false. The condition thus imposed is in some respects a hard one, and is only justified in its imposition by an admitted necessity, and a principle of unyielding public policy. But there is a corresponding relief, in this: that the dealer is only bound to ascertain the language of the record, and to exercise himself to understand correctly its meaning and purport. He is bound to inquire no further than is plainly suggested in the language of the record; otherwise, he would be trespassing upon the domain of actual knowledge, which has no place in matters of this kind.

There is nothing in the description or location of the property in controversy, as contained in Hanegan's mortgage, to suggest any identity with the cotton in Fincher's mortgage, nor is there any identity between other articles of property mentioned in the two. There is nothing in the locality of ownership to suggest identity. Whatever suggestion is made is the suggestion that a recorded mortgage by Henry N. Ward is a mortgage in fact made by Henry M. Ward; a person known to the inquirer by that name, which is his true name. The same rule that would obliterate the distinction between these two initials would also do away with the distinction between the name "Henry Newport Ward" and the name "Henry Monroe Ward," for it is confidently said that middle names are immaterial, if it is that the initials of such names are to be disregarded. Where is the line of demarcation? Some rules, con-

and even when violated only as to the job or title, though they themselves are so extensive in their application as to cover the affairs of the universe; and it is for the reason that it is the fact of the breach, and not its extent or apparent magnitude, that is to be consid-

majority has set a precedent that will live up to plague us hereafter.

I cite no authorities, being content to rest the case on the authorities cited by the majority.

NEW YORK COURT OF APPEALS.

Augustus H. VANDERPOEL, Substituted Assignee, etc., of the North River Lumber Co., *Appt.*,

John J. GORMAN, Sheriff, etc., *Respnt.*

(140 N. Y. 538.)

1. The question of the validity of the attempted transfer of title to an assignee for creditors by a corporation organized in one state and doing business in another, is for the state in which the property is situated.
2. Assignments of personal property valid by the law of the domicile of the assignor are generally recognized as valid by the law of the state where the property is situated, unless they violate its statutory law or its known and settled public policy.
3. At common law an insolvent corporation can make a general assignment in trust to an assignee for the benefit of creditors.
4. The court of one state cannot presume that the common law has been altered in another state in the absence of proof to that effect.
5. The provision of Laws 1890, chap. 584, sec. 48, that no corporation shall make any transfer or assignment to any person whatever in contemplation of its insolvency and declaring every such assignment void, refers solely to domestic corporations.
6. The prohibition of the New York statute against assignments by domestic corporations of property in contemplation of insolvency does not evince any public policy of the state forbidding the exercise by a foreign corporation having property in the state of its inherent common-law right to make such an assignment especially where the assignment is valid in the state of the creation of the corporation and provides for an equal distribution of the property among all of the creditors in conformity with the policy of New York regarding the distribution of the property of insolvent domestic corporations.
7. A foreign corporation carrying on business in New York may there make an assignment for the benefit of its creditors without preference in the absence of any statute of the state of its creation prohibiting such assignment, although the laws of New York prohibit such an act on the part of domestic corporations.
8. An assignment by a corporation for the benefit of creditors is a corporate act which may be performed by the president

NOTE.—As to lawfulness of preferences of creditors by insolvent corporation, see note to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802.

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and secretary under the authority of the board of directors in the absence of any statute or by-law providing that it shall otherwise be done.

(January 16, 1894.)

APPEAL by plaintiff from an order of the General Term of the Court of Common Pleas for the City and County of New York overruling exceptions directed to be heard at General Term in the first instance, and from a judgment affirming a judgment of the trial term dismissing the complaint in an action brought to recover damages for the alleged wrongful conversion by defendant of certain property claimed by plaintiff. *Reversed.*

The facts are stated in the opinion.

Mr. Gibson Putzel, for appellant:

Unless prevented by statute, any corporation, whether foreign or domestic, has the right and power to make an assignment for the benefit of creditors.

De Ruyter v. St. Peter's Church Trustees, 3 N. Y. 242, 3 Barb. Ch. 119, 5 L. ed. 840; *Wait, Insolvent Corp.* p. 133.

Section 4, chapter 18, title 4, of part 1, of the Revised Statutes does not apply to assignments made in this state by foreign corporations.

See *Coats v. Donnell*, 94 N. Y. 168; *Hill v. Knickerbocker Electric Light & P. Co.* 45 N. Y. S. R. 761.

No proof was offered on the trial of this case showing that the North River Lumber Company was prohibited by its by-laws or by the laws of the state of New Jersey from making an assignment for the benefit of creditors. On the contrary the power of an insolvent New Jersey corporation to assign its property in trust for creditors is recognized in the case of *Wilkinson v. Bauerle*, 41 N. J. Eq. 651.

The words of the statute, "any incorporated company," must, in the absence of all definition, be presumed only to refer to domestic corporations.

Re Prime, 18 L. R. A. 718, 136 N. Y. 847; *White v. Howard*, 46 N. Y. 144; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Worthington v. Pfister Bookbinding Co.* 3 Misc. 418.

It is not a legitimate presumption that the statute laws of other states are similar to our laws. On the contrary the presumption is that the common law prevails there.

Abell v. Douglas, 4 Denio, 305; *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 77 N. Y. 331, 38 Am. Rep. 618; *Throop v. Hatch*, 3 Abb. Pr. 27; *People v. Brady*, 56 N. Y. 191; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 53, 38 Am. Rep. 491. See also

See also 42 L. R. A. 140; 47 L. R. A. 495.

Graves v. Cameron, 9 Daly, 152; *Trebilcock v. McAlpine*, 46 Hun, 469; *Keller v. Paine*, 34 Hun, 167.

Mr. S. F. Kneeland, with Mr. William E. Stillings, for respondent:

An insolvent corporation, either domestic or foreign, cannot, under the laws of this state, make a valid assignment.

The Act of 1850, which in terms prohibits any corporation from setting up the defense of usury, though general in its language, has always been held to apply to foreign as well as domestic corporations.

Leavitt v. Curtis, 15 N. Y. 9; *Southern L. Ins. & T. Co. v. Packer*, 17 N. Y. 52; *Rosa v. Butterfield*, 33 N. Y. 665; *Union Nat. Bank of Pittsburgh v. Wheeler*, 60 N. Y. 612.

The principle was also followed in the case of *People v. Formosa*, 131 N. Y. 478, in construing the Statute of 1889, chapter 282 of Laws of 1889, forbidding the rebate of premiums upon life insurance policies by any corporation in this state.

If the prohibition of the statute could be held not to include foreign corporations, then the law of the *status* must govern, and the assignment herein, being in violation of a positive rule of such law, be held void.

2 Kent, Com. 455; Story, Conf. L. § 383; *Hanford v. Paine*, 32 Vt. 442, 78 Am. Dec. 586; *Mumford v. Canty*, 50 Ill. 375, 99 Am. Dec. 525; *Edgerly v. Bush*, 81 N. Y. 199; *Guillander v. Howell*, 35 N. Y. 657; *Smedley v. Smith*, 15 Daly, 421; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Martine v. International L. Ins. Soc. of London*, 53 N. Y. 839, 18 Am. Rep. 529; Story, Conf. L. §§ 242, *et seq.*; *Cole v. Miller Iron Co.* 133 N. Y. 164.

A corporation must close its career in its own domicile.

Oliver v. Walter Heywood Chair Mfg. Co. 32 N. Y. S. R. 542.

Peckham, J., delivered the opinion of the court:

The North River Lumber Company was a company incorporated under the laws of New Jersey, and transacting its business in the city of New York. On the 24th of February, 1891, the corporation made in this state a general assignment to the predecessor of the plaintiff of all its property for the benefit of its creditors, and without any preferences. Subsequent to the assignment, certain of its creditors commenced actions against it to recover the amounts of their debts, respectively, and in those actions attachments were issued and delivered to the defendant, who was the sheriff of New York county; and he subsequently levied, by virtue of such attachments, upon property which was alleged to belong to the corporation. The plaintiff, as its general assignee, has commenced this action to recover from the defendant the value of the property thus levied on by him. The question turns upon the validity of the general assignment of the corporation to the plaintiff. If it were a legal and valid act, it carried the title to the property in question to the plaintiff, and, if not, then the defendant was justified in his levy. The defendant, on the trial, objected to evidence of the assignment, and urged as grounds for 24 L. R. A.

his objection (1) that a foreign corporation cannot, under the laws of this state, while insolvent, or in contemplation of insolvency, make a general assignment for the benefit of creditors; (2) that, if such corporation could make that kind of an assignment, it could not make it in the manner of this instrument, viz. by the signature of an alleged president and secretary; (3) there is no sufficient proof of any authority on the part of the persons executing this assignment to make a general assignment for the benefit of creditors. The trial court sustained the defendant's objections, and upon appeal the judgment entered in defendant's favor was affirmed by the general term of the New York common pleas. The plaintiff has appealed from such judgment of affirmance to this court.

The defendant's first ground of objection must mean that the courts of this state will not recognize as valid, so far as respects property within their jurisdiction, a general assignment of its property, made for the benefit of its creditors, by an insolvent foreign corporation. The law of the domicile of the foreign corporation may, of course, permit it, upon insolvency, to assign all its property to an assignee in trust for its creditors; and it also might permit it to make such an assignment through its agents, who were at the time domiciled in a foreign state. But the state which created the corporation could not exercise jurisdiction in another state, where the corporation might have property; and in such case the question would be one for the state in which the property was situated to determine, as to the validity of the attempted transfer of title to an assignee. Assignments of personal property, which are valid by the law of the domicile of the assignor, are generally recognized as valid by the law of the state where the property may be situated, unless they violate its statutory law, or its known and settled public policy. Cases cited in *Barth v. Backus* (decided by this court in November, 1893), 140 N. Y. 280, 23 L. R. A. 47. In the case just cited, we refused to recognize the validity of the assignment of a foreign corporation to a foreign assignee, as against those who took title to the property of the assignor in this state by virtue of proceedings under our attachment laws. The refusal was based upon our holding that the law under which the general assignee of the Wisconsin corporation claimed title was in effect a bankrupt law enacted by the legislature of Wisconsin, and laws of that nature are within one of the admitted exceptions to the general rule, which recognizes the validity of assignments of personal property, if valid by the law of the domicile of the party making them. Authorities in the case cited. There can be no doubt that an insolvent corporation could, at common law, make a general assignment in trust to an assignee for the benefit of its creditors. *Hartun v. Bishop*, 8 Wend. 18; *DeRuyter v. St. Peter's Church Trustees*, 3 Barb. Ch. 119, 124, 5 L. ed. 840, 842; on appeal 3 N. Y. 288; 2 Morawetz, Priv. Corp. § 802, and *note*. Under the law of New Jersey, in which state the corporation was created, its right to make an assignment of this nature seems to be es-

Jersey prohibiting such an assignment was proved by defendant; and we cannot presume that the common law has been altered in New Jersey, upon this subject, without some proof to that effect. The assignment of property by an insolvent corporation for the purpose of paying its debts is a very different action from so disposing of its property while solvent as to make its continued exercise of its franchises impossible. *People v. Ballard*, 184 N. Y. 269, 294, 17 L. R. A. 737. The *Ballard Case* was subsequently brought to the attention of the court on a motion for a re-argument upon the question whether such a sale or transfer of property as appeared to have been made by the corporation was not valid upon the ground that the corporation could not operate the business except at a loss, and it was not bound to do that. The question was left open for the reason mentioned in the opinion given upon denying the motion. The case is no authority for the proposition that an insolvent corporation cannot make a general assignment for the benefit of creditors. As the common law permits such an assignment, and the state of New Jersey also permits it, and as it does not appear that the charter or by-laws of this particular corporation prohibit it, we are left to the question whether there is any statute or public policy in this state which would be violated if the courts should recognize the validity of an instrument good at common law, and good in the state which created the corporation. The power of the legislature to impose terms upon a foreign corporation as a condition for granting it leave to do business within another state is admitted. *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 10 Wall. 566, 19 L. ed. 1029.

The sole question now is as to what has been the legislative action of this state upon this subject. The defendant alleges that there is a statute of this state which prohibits such act on the part of a foreign corporation. The Statute referred to is chapter 564, § 48, Laws 1890 (Sess. Laws, p. 1075). It is, in substance, the same as section 4, title 4, art. 3, chap. 18, pt. 1, Rev. Stat. (1 Rev. Stat. p. 608, § 4), after its amendment by subdivision 4, § 1, chap. 245, Laws 1890. It provides, among other things, that no corporation shall make any transfer or assignment to any person whatever, in contemplation of its insolvency, and every such assignment is declared to be void. We have no doubt that this section refers solely to domestic corporations. The whole of the chapter from which the section is taken is, in substance, a revision of the law relating to certain classes of corporations, as contained in the revised statutes and their amendments, and it is plain that those statutes generally, if not in every provision, referred to domestic corporations only. This opinion is arrived at by a reference to the whole subject-matter treated of in this portion of the revised statutes, and it becomes apparent, from a perusal of those general provisions, that the statutes were designed for the government

of a particular section is referred to, it becomes still more apparent that it is only applicable to domestic corporations. The legislature declares, as above stated, that certain transfers or assignments made by the corporation shall be void. What power had the legislature to enact any such provision as to a foreign corporation? There is nothing in the section limiting its scope and effect to such property as the foreign corporation might have within this state. It is a broad enactment, affecting every assignment made by a corporation under the circumstances mentioned. Can it be supposed that the legislature had in mind a foreign corporation, and intended to assume a jurisdiction to declare such an act, even when done outside this state, and in respect to property also outside of its boundaries, to be void and of no effect? This cannot be supposed, for we cannot impute to the legislature such ignorance upon the subject of its inability to give extraterritorial effect to its own laws. And if it had foreign corporations in mind, when proposing to legislate upon the subject, and knew it could not affect the validity of such transfers outside this state, and intended to provide that such transfers should not carry the title to property of the corporation held within this state, and subject to our jurisdiction, it must be clear that language somewhat appropriate to express such purpose would have been used. The language actually used was neither apt nor pertinent for this purpose. It is both appropriate and pertinent when applied to domestic corporations only. The language of the section clearly implies full and complete jurisdiction over the whole subject-matter. It implies the right to forbid absolutely. It also implies the right to declare the consequences of a violation of the prohibition, not in regard to some particular property, but generally and absolutely. The legislature has such jurisdiction in the case of domestic corporations, while in the case of foreign corporations it has not. To render the section applicable to foreign corporations would be to discard the plain meaning of the language used. The provisions of the Revised Statutes (1 Rev. Stat. p. 591, § 9) as to transfers by a corporation when insolvent or in contemplation of insolvency, prohibiting them when made with intent to give preferences, etc., were said to apply only to domestic corporations. *Coats v. Donnell*, 94 N. Y. 168. We have no doubt of the correctness of the statement. The same reasons are applicable in both cases, and, if section 9 does not apply to foreign corporations, nothing can be found in the language of section 48 of the Laws of 1890, cited *supra*, which would extend it to other than domestic corporations. As the prohibition is not contained in any statute of the state, we are unable to discover any public policy of the state which would stand in lieu of a positive statute, and prohibit our recognition of the validity of this transfer.

It is urged that such a policy is to be found in this same statute, even though it, in terms, applies only to domestic corpora-

tions. The argument is that, if the state refuses to its own corporations the privilege of making such an assignment, it surely cannot be consistent with its policy to permit the exercise of the same privilege by a foreign corporation. The statute, while only applicable to domestic corporations, is thus used as evidence of the public policy of the state with regard to foreign corporations. If it were a question of the simple grant of a privilege, it may well be that what this state denied to its own corporations it would not grant to those from a foreign state. It is not, however, the mere question of the exercise of a certain privilege, which is to be affirmatively granted in order to exist. The right to make such an assignment exists inherently in all corporations, unless specially forbidden. In regard to domestic corporations, it has been specially forbidden. Does that prohibition furnish any legitimate evidence of the existence of a public policy in this state, which forbids in the case of a foreign corporation the exercise of this inherent right? It seems to us that it does not. The two kinds of corporations, domestic and foreign, stand, with reference to this subject, in very different circumstances and positions towards the state. What might be proper or necessary in one case might be wholly inappropriate or impossible of complete execution in the other. As to domestic corporations, we assume certain responsibilities arising out of the very liberty given by the state for their creation or formation. We provide for their birth, for their regulation and government during life, and for their death. Upon their dissolution, which no other power than the state itself, acting through its legislature or its courts, can pronounce, the whole power of the corporation ceases, and the property which the corporation leaves passes under the dominion of the sovereignty which created it. Responsible for its creation, for its government, and for its death, the state has assumed, in such cases, complete and full jurisdiction over the corporation and its property; and accordingly the state has, in a series of statutory provisions, made certain that the corporate property shall be distributed in accordance with its own ideas of justice. On the other hand, in the case of a foreign corporation, the same kind of responsibility does not obtain. Our courts cannot dissolve it, nor can we, by virtue of our laws, in any way affect its property situated outside of the state, nor call it to any account therefor. Hence, while, as to a domestic corporation, we provide for the distribution of its property equally to all its creditors,—foreigners as well as residents,—we could, as to a foreign corporation, simply affect the property which it had in this state. It is true that, even with regard to a domestic corporation, we cannot give an extraterritorial effect to our laws. Property of a domestic corporation, situated outside of the state, would not be subject to our jurisdiction. In such case, however, the principle of comity operates, and we should expect recognition of the validity of a disposition of the personal property of a domestic corporation situated out-

side the state, provided it was valid by our law, unless it were subject to some of the well-known exceptions to such recognition. As to a foreign corporation with property here, if we refused to recognize as valid the disposition made of its property within this state, it would probably, in that case, remain subject to be seized by the vigilant creditor, resident or nonresident, and a preference be thus obtained which is at war with the policy of our state as to domestic corporations. It is thus seen that there are differences of a marked character between a domestic and a foreign corporation in relation to this subject. The differences are so marked that the statute regarding domestic corporations can furnish no proof as to the existence of a public policy, which, in the case of foreign corporations, should stand in the place of, and be equivalent to, that statute.

Again, this assignment is valid by the law of New Jersey, which is the domicile of the corporation. It provides for an equal distribution of all the property of the corporation among all of its creditors, being in this respect in entire conformity with our own policy regarding the distribution of the property of insolvent domestic corporations. Is not the argument quite strong, under such circumstances, which favors the application of the general rule that an assignment of personal property, valid by the law of the domicile of the owner, will be recognized as valid everywhere? Can it be said, in such a case, that the interests of our own citizens are in any manner neglected by their own state, when they are to share equally in the assets with all the other creditors of the corporation? If it were a domestic corporation, they would get no more than an equal rate of division. Can they be said to be legally harmed when they get the same rate of division under such an assignment? Are we not, in such case, only following the general doctrine which refers the validity of the transfer of personal property to the law of the domicile of its owner? It is true that the assignment in this case was made by the corporation through its officers in New York, where it was doing business, but nevertheless it was a New Jersey corporation, and the assignment was valid by the law of that state. Whether, if the law of New Jersey prohibited such an assignment, and it was then executed under the same circumstances in this state, it would be valid here, is a question not involved in this case, and, therefore neither discussed nor decided.

It is said that our own creditors—that is, I suppose, those who reside in this state—may in this manner be defeated of satisfaction of their debts by the participation of foreign creditors in the only accessible funds of the insolvent company. We have seen that our policy is just such a participation with regard to creditors of a domestic corporation. Why should we find fault with such a result in the other case? The general term of the supreme court in the first department has decided that the statute, in relation to a transfer of any part of its property by a corporation in contemplation of insolvency, and for the purpose of giving preferences, does

not apply to a foreign corporation. *Lane v. Wheelwright*, 69 Hun, 180. The same question is touched upon, although perhaps not necessarily decided, in *Coats v. Donnell*, *supra*. In that case the agreement for the lien was made at the same time, and as part of the agreement to make the advances, and such agreement was held valid. It was added, however, that, if the act were regarded as the giving of a preference by a failing debtor, it was good, because the law against preferences by an insolvent corporation did not apply to a foreign one. Here there is no preference, and hence there is no occasion to examine the *Coats Case* to see if the question of a preference in contemplation of insolvency was involved and decided in it. It may be that there is no difference in principle between an assignment of part of the property of a corporation to a creditor, as a preferred payment of its debt to him, and a general assignment of all its property to an assignee for the benefit of creditors, and giving preferences, and that if the former be valid the latter must also be good. In regard to such a general assignment, it has been urged that it ought to be so held because of the fact that the property of a corporation is a trust fund for the benefit of creditors, and that any creditor ought to have the right to resort to chancery to compel the application of this trust fund *pro rata* for the benefit of all creditors, upon the principle that equality is equity. As the question does not arise in this case, it is unnecessary to further pursue the inquiry.

The counsel for the defendant cites the statute prohibiting a corporation from setting up the defense of usury, and he suggested that it has been held to include foreign corporations. *Southern L. Ins. & T. Co. v. Packer*, 17 N. Y. 52. There is no doubt that it was so intended, and the language is apt and appropriate to express the idea. The legislature had perfect and complete control, in such respect, over the foreign as well as over the domestic corporation; and there was no reason for denying to the statute its natural meaning, which would include a foreign corporation, when suing or being sued in the courts of this state. The case of *Re Prime*, 186 N. Y. 347, 18 L. R. A. 713, is an authority in favor of the view here taken. It is there stated that generally a statute giving powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to do-

mestic corporations. The remark was made in the case that a general law of the state prohibiting corporations from exercising particular powers would operate upon foreign corporations, not because the act, *ex proprio vigore*, would bind such a corporation, but for the reason that the exercise of such a power by the foreign corporation would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations. Considering the question which was under discussion, and the facts which called forth the remark, it is entirely plain that the proposition, as really intended, is perfectly sound. If the exercise of certain powers by a foreign corporation in this state would violate our public policy, there is no doubt that the corporation could not here legally exercise such powers, and the fact that it did violate our public policy might in many cases be proved by our statute in regard to our corporations. But it was not intended to assert that, in all cases where a statute did prohibit corporations from doing certain things, it necessarily included foreign corporations, or that such corporations could not thereafter exercise any power prohibited to a domestic corporation, because in such case its exercise by a foreign corporation would be a violation of a public policy evidenced by the statute. I think I have shown, in the case at bar, that the difference between the two classes of corporations, with reference to the thing prohibited to the domestic corporation, precludes this kind of proof of a public policy in this state upon this subject with regard to a foreign corporation. We think there is no such public policy, and, so far as this ground is concerned, we have no doubt that the assignment is valid.

As to the other grounds of invalidity, we are of the opinion that there is nothing in them. The corporation had the power to make an assignment. It was a corporate act, and neither the statute nor any by-law, so far as the record shows, provided that it should be otherwise done than by the president and secretary or treasurer, under the authority of the board of directors. This sufficiently appears to have been so done, and that is enough. *Beveridge v. New York Elss. R. Co.* 112 N. Y. 1, 2 L. R. A. 648.

The judgment should be reversed and a new trial ordered; costs to abide the event.

All concur, except Bartlett, J., not sitting.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania

v.

James COYLE, Impleaded, etc., *Appt.*

(160 Pa. 38.)

1. Directors of the poor who apprehend a pauper boy with knowledge of

the unfit character of the master, and who, with knowledge that the child is being abused by such master, refused to take any measure to rescue him from the cruelty to which he is subjected, are criminally liable at common law as for a willful neglect or refusal to discharge their duties.

2. Evidence of abuse by his master of

NOTE.—This case is apparently one of first impression, and the decision constitutes a valuable precedent on the subject of the duties of such

public officers. As to the state guardianship of children, see note to *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593.

'one apprenticed by overseers of the poor and of its results is admissible against them, although they had no notice of such specific act, if they had been notified of former ill-treatment and should have known of its probable continuance and its effect.

3. That an officer's term has expired will not prevent his prosecution and punishment for misdemeanor in office.

(February 26, 1894.)

APPEAL by defendant Coyle from a judgment of the Court of Quarter Sessions for Cumberland County convicting him of neglect of duty as a director of the poor. *Affirmed.*

In March, 1891, Joseph N. Diller, a poor boy seven years of age became a charge upon the county of Cumberland. On June 4, 1891, the defendants, who were the duly elected and acting directors of the poor for said county indentured him as an apprentice to John W. Lafferty, a farmer residing in the county of Adams. The boy had been placed with Lafferty in April and had remained with him until the time of the signing of the indenture and continued to remain with him until his death in November. The claim of prosecution, which there was evidence tending to support, was that the boy was compelled to do work far beyond his age and strength; that he was furnished with insufficient clothing and inadequate food, and was roughly handled and inhumanly punished; that shortly after he reached the Laffertys he began to lose flesh, and afterwards became emaciated, dispirited, sick, and finally died. The mother of the boy gave notice to the board on September 8, 1891, that the boy was not being properly treated, and on September 5, Mr. Coyle went to investigate the truth of the charges. He reported to the board that the family was a proper one, and the treatment of the boy was also proper.

Further facts appear in the opinion.

Messrs. W. A. Kramer, J. W. Wetsel, M. C. Herman and John Hays, for appellee:

The second count charged personal maltreatment by the directors between June 4 and November 9, 1891, the period covered by the first count, which charged the binding out of the boy on June 4.

The Act of 1860 having affixed a penalty upon maltreatment of an infant its provisions were to be strictly pursued to the exclusion of any common-law remedy.

Act of 81st of March, 1860, § 188; Purdon's Dig. p. 470, § 359; *Meay v. Edmiston*, 1 Rawle, 457; *Hellings v. Com.* 5 Rawle, 64; *Rees v. Emerick*, 6 Serg. & R. 286; *Com. v. Evans*, 18 Serg. & R. 426.

Neither count in the indictment charged any violation of duty on the part of defendants under the Act of 1868.

The act imposes imperative duties coupled with discretionary power. The terms "respectable family" and "needful inquiries" imply determination by the directors of the poor. They must in their own judgment and in the best way they can determine what is "respectable" and what is "needful." To this extent under the Act of 1868, their duty is not ministerial but discretionary and for an error in judgment they are not indictable.

24 L. R. A.

That the commissioners have a discretion in this matter is too plain to need argument; that they have exercised this discretion is equally clear. If we concede it was not wisely exercised, they cannot be punished for error by indictment and conviction as criminals.

Com. v. Thompson, 126 Pa. 614; *Pennsylvania R. Co's App.* 128 Pa. 509.

A conviction for misbehavior in office requires the removal of the officer convicted, and this must be part of the judgment.

Com. v. Harris, 1 Legal Gaz. 455.

Messrs. J. E. Barnitz, Dist. Atty., Fillmore Maust and W. J. Shearer, for appellee:

The office of director of the poor is a statutory office, and it is clear that when the law imposes on an individual a ministerial office, then not only is disobedience to the requirements of the law in neglect of such office indictable, but an indictment lies for such willful or negligent misconduct in such office as works injury to the public, or to an individual.

2 Whart. Crim. L. 9th ed. § 1568.

Any public officer is indictable for misbehavior in his office.

1 Russell, Crimes, 9th ed. p. 200.

An overseer of the poor is indictable for misfeasance in the execution of his office; as if he misused the poor, as by exacting labor from them when they are unable to work, etc.

1 Russell, Crimes, 9th ed. p. 201.

The court was right in admitting what was told Boyer when on his way to Lafferty's with the children. Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal and may be proved as well in a criminal as in a civil case, in all respects as if the principal were the actor and the speaker.

One Hundred and Twenty-five Baskets of Champagne v. United States, 70 U. S. 8 Wall. 114, 18 L. ed. 116; *Hatch v. Squires*, 11 Mich. 185; *Sencerbox v. McGrade*, 6 Minn. 484; *Sundry Goods, Wares and Merchandises v. United States*, 27 U. S. 2 Pet. 364, 7 L. ed. 453; *United States v. Morrow*, 4 Wash. C. C. 738.

McCollum, J., delivered the opinion of the court:

James Coyle, appellant, Michael Seavers, and John H. Rhoads were jointly indicted and tried for neglect of their duty as directors of the poor and of the house of employment for Cumberland county. A verdict of guilty was rendered by the jury. Sentence was suspended, as to Seavers and Rhoads, on their payment of one fourth of the costs, and Coyle was sentenced to pay a fine of \$100 and three fourths of the costs. The pith of the complaint against them was that they neglected to discharge a duty which, in their official capacity, they owed to Joseph N. Diller, a poor and infirm child, aged seven years, who was a legal charge upon the county of Cumberland, and that in consequence of their neglect he died. In the first count of the indictment, they were charged with having knowingly permitted him to be grossly maltreated by the person to whom he was apprenticed by them, and in the second count thereof with having, while he was in their

charge and under their care, willfully neglected to provide him with reasonable and necessary food and clothing, and otherwise abused and ill-treated him. The evidence produced on the trial was clearly sufficient to warrant the conclusion that the death of the child was hastened by, if it was not solely attributable to, the treatment he received while in the custody of Lafferty, to whom he was bound by them on the 4th of June, 1891, for a term of fourteen years. It was also sufficient to sustain a finding that, before they committed the child to the care of Lafferty, they knew or ought to have known, that the latter was not a proper person to have control of the former. Boyer, who was their representative in the arrangement under which the child was left at Lafferty's six weeks before he was indentured, was advised by persons in the neighborhood that it was an unsafe place for a boy of his years. The testimony of Underwood and Pink on this point showed that they gave him information in respect to the character of Lafferty and his family, and their harsh treatment of a child in their care, which would have prevented any prudent person from committing a boy of tender years to their custody. A parent so informed would not have surrendered his or her child to their possession and control without an investigation which demonstrated that the charges against them were groundless. The care which a parent ought to exercise under such circumstances devolved upon the directors, when young Diller became a charge on their district; and there is reason to believe that, if they had faithfully performed the duty thus cast upon them, he would not have been subjected to the cruel treatment which appears to have been responsible, in some degree at least, for his untimely death. But it is manifest from the testimony that they did not exercise the care enjoined by the law, and that they were negligent in binding him to Lafferty, and in their failure to institute proceedings to cancel the indenture. We need not repeat or discuss the testimony descriptive of the neglect and cruelty to which the child was subjected. It is sufficient to say of it that in our opinion it fully sustained the charges made in the first and second counts of the indictment.

It is contended that the indictment does not charge an offense known to the criminal law; that the directors are not indictable under section 42 of the Act of June 13, 1886, because the office of overseer of the poor is abolished in Cumberland county; and that they cannot be prosecuted under section 90 of the Act of March 31, 1860, because it appears from the indictment and the testimony that the maltreatment complained of was after they left the child with Lafferty, and was inflicted by him and his family. The counsel for the commonwealth agree with the counsel for the defendants that this case is not governed by the statutes referred to; but the former maintain, and the latter deny, that the matters charged in the indictment constitute a common-law misdemeanor. We think the contention of the defendants that the common law does not hold them criminally liable

for a willful neglect or refusal to discharge their duties as directors is unsound. In 19 American & English Encyclopedia of Law, p. 504, the rule on this subject is stated thus: "The neglect or failure of a public officer to perform any duty which by law he is required to perform is an indictable offense, even though no damage was caused by the default, and a mistake as to his powers, or with relation to the facts of the case, is no protection." In Russell on Crimes (vol. 1, p. 80), it is said that: "It is an indictable offense, in the nature of a misdemeanor, to refuse or neglect to provide sufficient food or other necessities for any infant of tender years, unable to provide for and take care of itself (whether such infant be child, apprentice, or servant), whom the party is obliged, by duty or contract, to provide for, so as thereby to injure its health." In Archbold's Criminal Pleading & Practice (vol. 2, p. 1365), it is said that: "An overseer of the poor is indictable for misfeasance in office, as if he relieved the poor where there is no necessity for it, *Tawney's Case*, 16 Vin. Abr. 415, or if he misuse the poor, as by keeping and lodging several poor persons in a filthy and unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather, (*Ree v. Wetherill*, Cald. 482), or by exacting labor from them when they are not able to work, *Ree v. Winslip*, Id. 76. And if overseers conspire to marry a poor woman, big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted. *Ree v. Compton*, Cald. 246. And, for most breaches of their duty, overseers may be punished by indictment or information." In Pennsylvania, overseers of the poor have been indicted, convicted, and sentenced for a misdemeanor in office, in selling the keeping of paupers, by public vendue or outcry, to the lowest bidder. *Milton Overseers v. Williamsport Overseers*, 9 Pa. 48, 49. It is a wise policy which exacts from a public officer intrusted with the care of the poor persons in his district faithful and humane administration of the laws enacted for their relief. In the proper enforcement of such laws, they have considerate and kind treatment, and a comfortable maintenance. Their inability to provide for themselves is not a crime, nor any excuse for neglecting or mistreating them. As charges upon the district, they are entitled to have from it wholesome food and comfortable clothing, and a sufficiency of both. If they are of tender years, or, from any cause, unable to work, it is an act of cruelty to exact from them the performance of tasks which are beyond their strength, and injurious to their health. It is culpable negligence in an officer representing the district charged with their support to bind an infant pauper to service with a person whose parsimony and cruelty in the treatment of poor children committed to his care were well known in the neighborhood in which he lived. Inquiry in respect to the character of the master is a duty, and where he resides in a county outside of the district in which the pauper is

settled, and is personally a stranger to the officer, the nonobservance of it is a misdemeanor. It seems to us, also, that it is his duty, after the child is bound to service, to see that the covenants of the master are substantially complied with, and if these are willfully and persistently violated, to the injury of the child's health, to institute necessary proceedings to set aside the indenture. In the present case the directors, with knowledge of Lafferty's character, bound young Diller to him, and, with knowledge of the abuse the child was receiving from his master, refused to take any measures to rescue him from the cruelty to which he was subjected by their own negligent act. If, as they contend, their conduct is not condemned, in terms, by any of our statutes in relation to the care of the poor, it is gratifying to know, as we have seen, that the common law holds them responsible for it, as a misdemeanor in office.

The several specifications of error which complain of the admission of evidence of deprivation and cruelty after the 5th of September, 1891, and of the denial by the court of the defendants' motion to strike out such evidence, are not sustained. The evidence referred to showed a continuance of the ill usage they approved by their refusal to take any measures to prevent the master's persistence in it, and was descriptive of the consequences of their negligence. With their

knowledge of his character, and of his maltreatment of the helpless boy they committed to his care, they should have anticipated what followed. Having declined, when requested, to intervene in behalf of the suffering child, and thus impliedly sanctioned the master's abuse of him, they had no reason to expect that he would receive better treatment thereafter. In plain violation of their duty to the child and the district they represented, they knowingly bound him to service with a cruel master, and continued him in it when they knew, or ought to have known, that his health was seriously impaired, and his life endangered, by it. It was this breach of duty which constituted their offense, and it was competent for the commonwealth to introduce evidence descriptive of its results, without proving personal notice to them of each specific act of cruelty which contributed to the distress of their victim.

We are not able to discover in the remaining specifications anything which calls for the reversal of the judgment. The contention that the appellant cannot be prosecuted and punished for misdemeanor in office, because his term has expired, is not supported by reason or authority; and certainly he ought not to complain that, while he was liable for all the costs, he was required to pay only three fourths of them.

The specifications of error are overruled, and the judgment is affirmed.

KANSAS SUPREME COURT.

STATE of Kansas

v.

Hugh O'NEIL, *App't.*

(51 Kan. 651.)

- *1. Where a murder may have been committed by different means, and it is doubtful which was employed, its commission by all may be charged in one count of the information, and proof of any one will sustain the allegation, but the means so charged in the same count of the information must not be repugnant.
2. Ill treatment, and previous assaults by husband on wife, are admissible to prove motive in cases of marital homicide.
3. In addressing the jury in a criminal cause counsel may be allowed, in the discretion of the trial court, to read from standard works on matters of science and art, when pertinent, by way of argument or illustration; but it would be an abuse of this privilege to make it the pretense of getting improper matter before the jury as evidence, or to present matters of law conflicting with the instructions of the court.
4. Voluntary intoxication is no justification or excuse for crime.
5. Under a statute establishing degrees of the crime of murder, and providing that

*Headnotes by HORTON, *Ch. J.*

willful, deliberate, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.

6. Where a person at the time of the commission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars; but, if he does not possess this degree of capacity, then he is not so responsible.

(June 10, 1898.)

APPPEAL by defendant from a judgment of the District Court for Marion County convicting him of murder in the second degree. *Affirmed.*

Statement by Horton, *Ch. J.*:

On the 4th day of December, 1891, an information was filed in the district court of Marion county against Hugh O'Neil, charging him with the murder of Mary O'Neil, his wife. On March 1, 1892, an amended information was filed, which, omitting cap-

NOTE.—For a collection of authorities showing that intoxication is no excuse for crime, see note to *Aszman v. State* (Ind.) 8 L. R. A. 33, and for a limitation upon that rule in line with *STATE v. 24 L. R. A.*

O'NEIL, to the effect that intoxication may deprive one of the power to deliberate necessary to render a homicide murder in the first degree, see *Aszman v. State* (Ind.) *supra*.

by the authority of the state of Kansas, I, W. H. Carpenter, county attorney in and for the county of Marion, in the state of Kansas, who prosecutes for and on behalf of said state in the district court of said county, sitting in and for the county of Marion, and duly empowered to inform of offenses committed within said county of Marion, come now here, and give the court to understand and be informed that one Hugh O'Neil, at the county of Marion, in the state of Kansas aforesaid, and within the jurisdiction of this court, on the 18th day of November, A. D. 1891, did then and there feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, make an assault in and upon one Mary O'Neil, with the intent her, the said Mary O'Neil, feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, to kill and murder: and that the said Hugh O'Neil did then and there feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, and with a certain blunt instrument, to said county attorney unknown, and in a manner to said county attorney unknown, feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, and with the intent aforesaid, inflict upon the head, face, and body of her, the said Mary O'Neil, certain mortal wounds, bruises, cuts, and contusions; and that the said Hugh O'Neil did then and there feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, and with the intent aforesaid, strike, kick, beat, and choke her, the said Mary O'Neil, with his hands and feet, in and upon the head, face, neck, legs, arms, and other parts of the body of her, the said Mary O'Neil, thereby inflicting certain other mortal wounds, bruises, cuts, and contusions on her, the said Mary O'Neil; and that the said Hugh O'Neil did then and there feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, and with the intent aforesaid, cast and throw said Mary O'Neil down upon the ground, and against a certain stone wall, with great force and violence, thereby inflicting upon the head, face, legs, arms, and other parts of the body of her, the said Mary O'Neil, certain other mortal wounds, bruises, cuts, and contusions, of which mortal wounds, bruises, cuts, and contusions so received by said Mary O'Neil as aforesaid, and so inflicted upon her, the said Mary O'Neil, by said Hugh O'Neil, as aforesaid, Mary O'Neil did then and there instantly die; wherefore the said county attorney sayeth that said Hugh O'Neil did then and there feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, and with the intent aforesaid, kill and murder the said Mary O'Neil, contrary to the statute in such cases made and provided, and contrary to the peace and dignity of the state of Kansas. W. H. Carpenter, County Attorney of Marion County, Kansas."

The defendant challenged the information by a motion to quash, by a motion to com-

On the 21st of March, 1892, the trial of the cause was commenced, and continued from day to day until the 4th of April, 1892. After hearing the evidence, the instructions of the court, and the argument of counsel, the jury returned a verdict against the defendant of guilty of murder in the second degree. On the 4th of April, 1892, the motion for a new trial, which had been filed by the defendant, was overruled, and thereupon the court sentenced him to confinement in the penitentiary of the state for twenty-five years at hard labor. He appeals.

Messrs. Frank Doster and Madden Bros., for appellant:

The information was bad for duplicity, uncertainty, indefiniteness, and want of precision. The strokes complained of were either inflicted as a part of different transactions or as part of the same transaction. No other ways are possible.

(1) If they were part of different transactions, they would be separate offenses, and could be joined in the same informations, but in different counts.

10 Am. & Eng. Encyclop. Law, p. 699; *State v. Goodwin*, 33 Kan. 588; *State v. Hodges*, 45 Kan. 392.

(2) If the strokes were part of the same transaction, it is proper to charge them in different counts to meet the exigencies of the proof, even if the several counts are repugnant and inconsistent with each other.

10 Am. & Eng. Encyclop. Law, p. 699; 1 Whart. Crim. Pl. & Pr. § 297; Crim. Code, § 123.

(3) If the strokes were part of the same transaction, they may all be set forth as such in one count, alleging that death occurred from the combined effect of all. But the acts must not be inconsistent or repugnant with each other.

1 Bishop, Crim. Proc. § 458.

In the present case the manner of statement distinctly suggests that the informant intended to charge three separate and distinct offenses, which were separate charges of murder, or felonious assaults at least, on which a separate conviction could have been had if properly pleaded in separate counts.

State v. Goodwin, supra. See also Maxwell, Crim. Proc. p. 187; 1 Whart. Precedents of Indictments, 120; 1 Bishop, Crim. Proc. 3d ed. §§ 418, 489; Crim. Code, §§ 131, 132; Bill of Rights, § 10; *State v. Huber*, 8 Kan. 447; *State v. O'Kane*, 23 Kan. 244; *State v. Burwell*, 34 Kan. 312.

Evidence of previous alleged assaults was incompetent, because it was in no way connected with the final act.

2 Bishop, Crim. Proc. §§ 628 *et seq.*; 9 Am. & Eng. Encyclop. Law, p. 906; 1 Whart. Am. Crim. L. §§ 321, 347.

The only theory upon which previous assaults are competent is, that they form a part of one comprehensive transaction, beginning with the first assault and ending with the fatal assault.

9 Am. & Eng. Encyclop. Law, p. 706; *Prund v. State*, 43 Ga. 88; 2 Bishop, Crim. Proc. § 625, and notes.

Habitual intoxication, extending over a period covering all the comprehensive transaction, is relevant to characterize the special assault, and is a more proper method of proof than by particular acts of intoxication.

2 Bishop, Crim. Proc. § 617.

Where everything depended, as in this case, on circumstantial evidence, it was important to lay the whole transaction before the jury.

2 Bishop, Crim. Proc. § 633.

The fact that the deceased was an inebriate would give strength to the theory of suicide or self destruction, which is but another way of stating that it would tend to show defendant's innocence.

Blackburn v. State, 28 Ohio St. 146.

Standard law books and newspaper items were admissible to be read to the jury as part of their argument on the question of insanity and flight.

A part of their argument was a material error.

1 Whart. Ev. § 625; *Harvey v. State*, 40 Ind. 516; Whart. Crim. Ev. § 538, and notes.

The question of voluntary drunkenness was improperly presented to the jury.

There was no single presentation of the subject to the jury. He was entitled to have it singly presented, at least with reference to murder, in each of the degrees.

1 Bishop, Crim. L. §§ 408, 414; *State v. Mowry*, 37 Kan. 369.

A fixed insanity indirectly produced by intoxicating liquors if it fills the law's measure in quantity, is a complete defense to crime, or, better expressed, it relieves from all criminal responsibility.

1 Bishop, Crim. L. § 406, and authorities cited; Browne, Ins. §§ 371-373; 2 Lawson, Defenses to Crime, pp. 677 et seq.

There are recognized phases of insanity that impel the affected to act when he perfectly knows the nature and consequence of the act, and that it is wrong.

1 Bishop, Crim. L. § 387.

The defendant was not required to prove insanity by affirmative proof.

State v. Crawford, 11 Kan. 32.

The outbreaks found in alcoholic insanity are uncontrollable. It may be said that such impulses involve an obliteration of the power to know, as well as irresistibly impel to do. While it may or may not be so as matter of fact, it cannot be so said as matter of law. The defendant is entitled to a jury on that question.

State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193.

Mr. W. H. Carpenter, with Messrs. John T. Little, Atty-Gen., and C. M. Clark, County Atty., for appellee:

If several acts are connected with the same general offense, they may be joined in one general count, if committed by the same person at the same time.

Byrns v. State, 12 Wis. 519; *Russell v. State*, 71 Ala. 348; *United States v. Holmes*, 18 U. S. 5 Wheat. 412, 5 L. ed. 122.

The statement of facts connected with and forming part and parcel of the offense will not render the information bad for duplicity, although such facts are complicated and various.

State v. Edmondson, 43 Tex. 162; Maxwell, 34 L. R. A.

Crim. Proc. 187; Whart. Precedents of Indictments, 145, 147, 148.

That evidence of previous ill treatment and assaults is admissible to prove motive and malice, there can be no question.

See Whart. Crim. Ev. § 786; *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 713; *State v. Green*, 35 Conn. 208; *McCann v. People*, 3 Park Crim. Rep. 273; *Costley v. State*, 48 Md. 175; *Stone v. State*, 4 Humph. 27; *Marler v. State*, 67 Ala. 65, 42 Am. Rep. 95.

Law books and scientific works cannot be introduced in evidence to prove a fact.

State v. Baldwin, 36 Kan. 8.

Neither can such authorities be used in argument before the jury.

Com. v. Wilson, 1 Gray, 837; *Washburn v. Ouddishy*, 8 Gray, 430; *Ashworth v. Kittridge*, 12 Cush. 193, 59 Am. Dec. 178; *Reg. v. Taylor*, 13 Cox, C. C. 77; *Carter v. State*, 2 Ind. 617; *State v. West*, 1 Houst. Crim. Rep. 371; *Gehrke v. State*, 13 Tex. 568; *State v. O'Brien*, 7 R. I. 336; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41; *Bangs v. State*, 61 Miss. 363; *Yoe v. People*, 49 Ill. 410; 1 Redf. Wills, 145. See also *Smith v. State*, 21 Tex. App. 277; *Pierson v. State*, 21 Tex. App. 14; *Com. v. Austin*, 7 Gray, 51; *Com. v. Murphy*, 10 Gray, 1; *Curtis v. State*, 36 Ark. 284.

Uncontrollable impulse is not a defense to the crime of murder.

State v. Nixon, 32 Kan. 205; *State v. Mowry*, 37 Kan. 369; *State v. Farborough*, 39 Kan. 581; *State v. Mohn*, 25 Kan. 182.

Voluntary intoxication is no excuse for crime, even when so extreme as to make the person unconscious of his acts, or to create a temporary insanity.

Desty, Am. Crim. L. § 26a.

Horton, J., delivered the opinion of the court:

It is contended that the motions challenging the sufficiency of the information should have been sustained. In support of this contention it is argued that at least three separate death strokes or attacks upon the deceased were alleged in one count, and therefore that the information was bad for duplicity, uncertainty, and want of precision. It is further argued that, if there were separate death strokes or attacks, they should have been charged in different counts of the information; not in the same count. Under the common-law system of criminal pleadings the facts alleged in the information ought, perhaps, to have been stated in different counts, but under the criminal procedure in force in this state we think the court committed no error in overruling the motions attacking the information. Section 103 of the Criminal Procedure reads: "The indictment or information must contain—First, the title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties; second, a statement of the facts constituting the offense, in plain and concise language, without repetition." See, also, section 109, which prescribes the sufficiency of an indictment or information; and also section 110, only authorizing an indict-

and contusions were alleged in the information as having occurred at one time, and, although the information stated that each of the wounds was mortal, it concludes as follows: "Of which mortal wounds, bruises, cuts, and contusions so received by said Mary O'Neil as aforesaid, and so inflicted upon her, the said Mary O'Neil, by said Hugh O'Neil, as aforesaid, Mary O'Neil did then and there instantly die; wherefore the said county attorney sayeth that said Hugh O'Neil did then and there feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, and with the intent aforesaid, kill and murder the said Mary O'Neil contrary to the statute in such cases made and provided, and contrary to the peace and dignity of the state of Kansas." "Even at common law it may be alleged that the party died of the divers poisons or wounds charged to have been administered or given, without averring that he died of any one of them in particular; for, as it is said, the truth may be that none of them alone, but all together, caused the death." *State v. Edmondson*, 43 Tex. 162; Maxwell, Crim. Proc. 187, Bishop, Criminal Procedure, § 458, states the rule thus: "We have seen that if an offense may be committed by different means, and the pleader doubts which was employed in the particular instance, he may in one count charge its commission by all, and proof of any one will sustain the allegation. The limit to this doctrine is that the means must not be repugnant." In this case the means employed to cause the death of the deceased are not sufficiently repugnant to compel different counts. The first stroke or attack was alleged to have been made upon the head, face, and body of the deceased with a blunt instrument; the second by striking, kicking, beating, and choking the deceased; and the third, by throwing the deceased upon the ground and against a stone wall with great force and violence.

It is next contended that the court committed error in the admission of previous assaults of the defendant upon the deceased. To prove these previous assaults the state introduced the evidence of several witnesses, showing that they were all made within less than a year before the death of the deceased. They were cruel and brutal, and continued down to the time of her death. This evidence was admissible on the question of motive, for the purpose of showing hatred and malice on the part of the defendant. Whart. Crim. Ev. § 786; *Sayres v. Com.* 88 Pa. 291; *McCann v. People*, 3 Park. Crim. Rep. 272. In its instructions the court limited this evidence as follows: "You are further instructed that if you find from the evidence the defendant ill-treated or abused his wife on occasions prior to the act alleged against him in the information, such acts are relevant to prove motive and for such purposes only."

It is also contended that the court erred in not permitting further evidence to be given tending to show that the deceased was in the habit of becoming intoxicated. The court permitted evidence of such intoxication at 24 L. R. A.

intoxication, but the court announced that it would not continue such evidence unless connected with the assaults. The deceased, on the 19th of November, 1891, was found upon a sofa or settee in a room in her home, dead, with her head fractured on the right side, her face beaten and bruised, a portion of her nose torn off, an eye injured, her right arm torn, her limbs black and blue, her hair full of weeds and dirt, and with marks of a thumb and fingers on her throat.

William Hendricks testified: "Question.

Was you working for Hugh O'Neil in November last? Answer. Yes, sir. Q. At the time this tragedy occurred? A. Yes, sir. Q. You knew his wife, Mary O'Neil? A. Yes, sir. Q. When was the last time you saw Mrs. O'Neil alive? A. The last time I saw Mrs. O'Neil alive she was sitting by the table, crying. Q. Where was that? A. At Hugh O'Neil's house. Q. When was this that you saw her with reference to the time the body was discovered? A. The day before. Q. Where had you been, or where was you when you saw her? A. When I saw Mrs. O'Neil at the table, crying? Q. Yes, sir. A. When I took in the milk in the morning. Q. When was that with reference to the time of breakfast,—before or after breakfast? A. That was after breakfast. Q. How long after breakfast? A. Ten or fifteen minutes. Q. Did you see the defendant after you saw Mrs. O'Neil sitting by the table crying? A. I didn't see him until between ten and eleven o'clock. Q. Of that day? A. Yes, sir. Q. In the daytime? A. Yes, sir. Q. Where did you see him then? A. I saw him out at the north side of the house. Q. Was anybody with him? A. Mrs. O'Neil was on the ground. Q. In what position was she on the ground? A. Lying on the ground. I couldn't tell from where I was whether she was lying on her back or on her side. Q. What, if anything, did you see him do? A. He was pouring water on her. Q. What was he pouring water out of? A. A wash basin, I guess. Q. You may state how long you saw him in that position, and how long you saw him pouring water on her. A. He was not there over two or three minutes. Q. What, if anything, did you see him do after he poured the water on Mrs. O'Neil? A. He took her by the arm or the leg, I couldn't say which, and took her around the corner of the house. Q. How did he take her? A. By the arm or the leg, I couldn't say exactly which, from where I was. Q. State how he took her. Did he lift her up off the ground? Dragging her on the ground? A. Yes, sir. Q. How far did you see him drag her? A. Just around the corner of the house. I couldn't see him any more. Q. When did you see Mr. O'Neil next? A. I didn't see anything more of Mr. O'Neil until that evening. Q. When you saw him, what was he doing? Go on and state the circumstances. A. When I saw him, he sent one of the children out to tell me to come in; he wanted to see me. I went in, and he sent me to town. Q. What time in the evening was that? A. That was in

the evening, about 5 o'clock, I guess; pretty nearly sundown. Q. What did he send you to town for? A. A pint of whiskey and a quarter's worth of baker's bread. Q. Did you go to town? A. Yes, sir. Q. What time did you return? A. I don't know. I guess it must have been nine or ten o'clock. Q. Well, did you see him when you returned? A. Yes, sir. Q. What time in the night? A. It must have been between ten and eleven. Q. Where did you see him next time? A. Up stairs. Q. What, if anything, did he say, and what, if anything, did he do at that time? A. Why, I was going up stairs to bed, and he went out of the bedroom. When he went in he came and asked if the bed was fixed. We told him, 'Yes,' and he said we would have to get along with it the best we could, because mamma was awful sick. Q. He told you that about ten or eleven o'clock in the evening, Wednesday? A. Yes, sir. Q. Did you see him the next morning? A. Yes, sir. Q. What time? A. I guess it must have been about six o'clock. Q. Where did you see him then? A. Down stairs. Q. Did you see him again after that morning,—Thursday morning? A. No, sir; I didn't see him again until I saw him in town. Q. After the arrest? A. Yes, sir. Q. Now, when did you next see Mrs. O'Neil, and under what circumstances? A. The next time I saw Mrs. O'Neil she was in the parlor on the sofa. Q. How did you happen to go in there, and who was with you? A. Mr. O'Neil's father was with me. Q. What time was that? A. It was in the evening,—seven or eight. Q. Well, state—Did you carry a light and go into the room? A. Yes, sir. Q. By what door did you enter the parlor? A. By the outside door. Q. When you went in there, did you have a light? A. Yes, sir. Q. The old gentleman was with you? A. Yes, sir. Q. Where did you go and what did you do? A. I and John Farrel and grandpa [O'Neil's father] took a light from the kitchen, went out through the hall, and onto the porch. I and grandpa went in, and John stood at the door. He told me to come on with the light, so he could see. I went back with the light, and he raised up the quilt, and there she was laying there on the sofa. Grandpa caught hold of her and says: 'The poor thing is dead. She is cold.' He then put the quilt back over her. Q. Then threw the quilt back over her? A. Yes, sir; and then we left."

John Farrel testified: "Question. When did you commence working for Hugh O'Neil? Answer. The 18th of April, 1891. Q. Was you working for him at the time this tragedy occurred at his house? A. Yes, sir. Q. When was the last time you saw Mrs. O'Neil? A. Friday morning. Q. Friday morning of what month and week, if you can remember. I mean when alive? A. Wednesday morning. Q. During what month? A. November. Q. Last November? A. Yes, sir. Q. What week was it? What week in reference to the week you saw her dead? A. The same week. Q. Where was she when you saw her Wednesday morning? A. She was getting breakfast in the kitchen. Q. In the kitchen in the house where they lived in Marion

county? A. Yes, sir. Q. What time in the morning was it? A. Between six and seven o'clock, I should think. Q. Did you eat breakfast at that place that morning? A. Yes, sir. Q. State whether or not Mrs. O'Neil was at breakfast. A. No, sir, she was not. Q. Who was at breakfast that morning? A. Myself, Will Hendricks, and Mr. [Hugh] O'Neil, and old Mr. O'Neil. Q. That is the father of the defendant? A. I suppose so. Q. Anybody else? A. Some of his children. I do not remember whether they were all there or not. Q. Do you know where Mrs. O'Neil was during that breakfast hour? A. I think she was in the dining room. Q. What makes you think so? A. I saw her go in just when we came in to breakfast. Q. That is, as you came in to breakfast, you saw her go into the dining room? A. Yes, sir. Q. Now, did you notice the defendant, Mr. O'Neil, eat during the breakfast hour, during the time you ate breakfast there? A. He ate his breakfast. Q. Did you see him eat his breakfast? A. I saw him there eating a little. Q. Do you know how much he ate? A. No. Q. But you saw him eating? A. Yes, sir. Q. How long did you eat breakfast? A. Fifteen or twenty minutes. Q. Where did you go to after breakfast? A. I went to the barn. Q. How long after that did you return to the house? A. About 12 o'clock. Q. Did you see Mrs. O'Neil at that time? A. No, sir. Q. Where did you get your dinner that day,—Wednesday? A. At Mrs. O'Neil's house. Q. What did you do after dinner? A. I shucked corn. Q. How soon did you leave the house after dinner? A. I should judge between one and two o'clock. Q. State whether or not you saw the defendant, Hugh O'Neil, at that dinner hour. A. No, sir; I didn't. Q. When did you next return to the house? A. About 7 or 8 o'clock,—about 7, I suppose. Q. That same evening? A. Yes, sir. Q. I want to ask you who got dinner that day,—Wednesday? A. I think Hendricks did; I am not certain. Q. Who seemed to be getting dinner when you was there? A. Bill Hendricks was working around the table. Q. What time did you eat supper that evening,—Wednesday night? A. About 8 or 9 o'clock. Q. Who got supper for you? A. I did myself. Q. Who was there at that time? A. Me and Mr. O'Neil's father and the children. Q. Where was Mr. Hendricks? A. He was in town. Q. Where was Mr. O'Neil? A. I don't know. He was in the house, I suppose. Q. Did you see him that evening? A. Yes, sir; I saw him after supper. Q. How long after supper? A. I should judge about half an hour. Q. Where did you see him? A. He came out into the kitchen. Q. What, if anything, did he do? A. He asked if the boy had got back from town yet. Q. Well, did you see him any more that night? A. Yes, sir. Q. What time? A. I do not remember; about 10 o'clock. Q. About 10 o'clock? A. Yes, sir. Q. What transpired at that time,—10 o'clock? A. He came out, and saw that the boy had got back from town, and the boy gave him the whiskey he sent for. Q. The boy gave him the whiskey that he sent for? A. Yes, sir. Q. Did the boy

or do at that time? A. He asked what the whiskey come at. Q. What response did the boy make? A. He said, 'It cost a dollar.' Q. What did Mr. O'Neil say? A. He said, 'It comes pretty high.' Q. Did you see him again that evening? A. Yes, sir. Q. What time? A. I do not know exactly what time it was,—after we went up to the bedroom. Q. Where was it you saw him, and what was he doing? A. He came into the room afterwards. Q. What time did you say that was when he came into the bedroom? A. I do not know. I think it was pretty near 10 or 11 o'clock. Q. What did you see Mr. O'Neil doing at that time? A. I didn't see him doing anything. Q. That was Wednesday night? A. Yes, sir. Q. Where was it you saw him? A. He came into our room after we went into the room. Q. Came into the bedroom after you had gone into the bedroom? A. Yes, sir. Q. What, if anything, did he say? A. Asked how our bed was. Q. What did you say to him? A. Told him it was all right. Q. What further did he say? A. He said we would have to get along with it, for mamma was terribly sick. Q. He said you would have to get along with it, because mamma was terribly sick? Do you know who he meant by 'mamma'? A. I suppose he meant his wife. Q. He generally called her 'mamma'? A. He generally called her 'mamma'; yes, sir. Q. Now, that was Wednesday night, between 10 and 11 o'clock? A. Yes, sir. Q. Who awakened you the next morning? A. Hugh O'Neil did. He generally got up first in the morning. Q. That would be Thursday morning? A. Yes, sir. Q. Who, if anybody, came to your room and awakened you? A. Mr. O'Neil. Q. How soon after that did you see him? A. When I got down stairs. Q. How long was that after you got up? A. Right away after I got up. Q. What, if anything, was he doing at that time? A. I do not know. He was in the kitchen when I came down stairs. Q. Did he say anything to you? A. Yes, sir. Q. What did he say? A. Told me to hitch up a horse; he wanted to go to town for the doctor. Q. Was that all he said to you at that time? A. Well, he said for me to get breakfast for the children. Q. Told you to get breakfast for the children? A. Yes, sir. Q. Did he say anything else? A. Yes, sir. Q. What was it? A. He told me that he would be back in about an hour and a half. Q. What did you then do? A. Got breakfast for the children. Q. Well, you spoke about him asking you to hitch up a horse? A. Yes, sir. Q. Did you do that before or after breakfast? A. Before breakfast. Q. Where did you tie the horse? A. At the gate, south of the house. I suppose it is the south of the house. Q. To the gate? A. Yes, sir. Q. How far was that gate from the house? A. I should judge about 20 feet. Q. Now, you say that after you hitched the horse up and tied it there, you went in and got breakfast? A. Yes, sir. Q. Did you have any more conversation with Mr. O'Neil there at that time than you have related? A. I believe not.

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near him say? A. He told the little girl not to go into the room where her mamma was or he would whip her. Q. Told the little girl not to go into the room where her mamma was? A. Yes, sir; that she was terrible sick. Q. What did he do after saying that to this little girl? A. He went into the dining room, and shut the door. Q. When did you next see him? A. Next time I saw him was in Florence. Q. How soon after that did you see him in Florence,—after he was arrested? A. Yes, sir."

After Hendricks, Farrel, and the father of Hugh O'Neil found the dead body of Mrs. O'Neil on the sofa or settee in the parlor they did not disturb it, but sent for Dr. O. B. Whittecar, the coroner. He testified, among other things, as follows: "Question. Where do you live? Answer. "At Peabody. Q. What, if any, official position did you hold last November? A. I was coroner of Marion county. Q. On or about the 20th of November last, where were you? A. I was in Peabody. Q. Where did you go? A. I was called to Florence by telegram. Q. From Florence, where did you go? A. I went to what was said to be the residence of Hugh O'Neil. Q. Did you go into the house? A. I did. Q. Upon your going into the house, what did you discover? A. I discovered the body of a woman upon the sofa or tete-a-tete in the room in the house. Q. Describe to the jury, as near as you can, doctor, the position in which you found that body. A. The body was lying upon its back, rigid in death,—markedly so; laying, as I said, on this short sofa or tete-a-tete. The body was covered with a comfort, entirely up. The woman had her shoes off, dressed in ordinary clothing, and very much disarranged. Q. Have you a judgment as to whether that body was placed on that lounge before or after death? A. I have. Q. What is your judgment? A. I think it was placed there after death. Q. Did you make any examination of the premises? A. I did. Q. State what you found, if anything. A. Generally speaking, the house was in a very much disordered condition. Clothing, bedding, and household utensils scattered promiscuously all over the house. On what I supposed at that time to be the east side of the house, but which I now think is the north side, because the house does not stand square with the compass, there was a blood stain on the outside on the foundation stone. Q. There were marks in the dust and dirt on the side of the house. Whereabouts in relation to the blood spot? A. Immediately over it. Q. Go on, and describe the size of the blood spot, where it was in relation to the ground, and in relation to these prints that you saw on the side of the house. A. The blood stain on the foundation stone was immediately below the marks on the side of the house. The size of that blood stain, if I remember correctly, was about three inches long by an inch to an inch and a quarter wide. It was of a dark color, apparently made from venous blood. Q. What, if anything, else did you discover there on the front porch leading up to this room? A. I made

no discovery. The discovery was pointed out to me as made by others. Q. What was that? A. Members of my jury pointed out to me hair resembling in color the hair on the head of the deceased lady. This hair was found in the splinters of one of the steps leading up to the porch, in the ends of the boards of the porch, and was pointed out to me. Q. Did you make a comparison between the hair that you found there at that time and the hair in the head of the deceased? A. I did. Q. State what, if any similarity there was. A. They were identical in color, length, and general appearance. Q. Do you know the condition of the hair of the deceased at the time you was there in November last? A. I know, as I saw it. Q. What was that condition? A. The hair was very much disarranged and tangled and full of dirt and straw, several pieces of straw and other grass around there, several pieces of weeds, cinders, coal cinders, and one or two sandburrs were in the hair."

After O'Neil left his home on Thursday morning, November 19, he went to Florence, boarded the train, and was arrested at Cottonwood Falls on Friday, the 20th. From this and other testimony in the record, the claim that evidence of the intoxication of the deceased would have supported the theory of her suicide is not tenable. Evidence of suicide was wholly wanting. Counsel for defendant seem to admit this, for in their brief they say, speaking of the defendant's inherited appetite for intoxicating liquors, that the failure of the court to instruct as requested upon this matter "vitally affected the defendant, because it was virtually the only plea he had. It was practically the only shelter, poor as it was, that he had from the cutting blizzard force of the evidence." Of course, in some cases, the intoxication of the deceased would be very important, and it would be fatal error to reject such evidence. In this case the limit fixed by the court in the introduction of such evidence was not prejudicial.

It is further contended that the court committed error in not permitting defendant's counsel in their argument to read to the jury from law books and newspapers upon the question of insanity and flight. This court has already held that scientific books "cannot be admitted to prove the declarations or opinions which they contain." *State v. Baldwin*, 36 Kan. 1. Wharton says that "in an argument to a court such works may, at the discretion of the court, be read, not as establishing facts (unless such books are regarded as matters of notoriety, as are ordinary dictionaries), but as exhibiting distinct processes of reasoning, which the court, from its own knowledge as thus refreshed, is able to pursue. But, if read to establish facts, capable of proof by witnesses, such books cannot be received. Medical works, consequently, are inadmissible for the purpose of proving the facts they contain." *Crim. Ev.* § 588. In *Legg v. Drake*, 1 Ohio St. 287, it is said: "It is not to be denied but that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, may, by way

of argument or illustration, be not only admissible (in argument), but sometimes highly proper; and it would seem to make no difference whether it was repeated by counsel from recollection or read from a book. It would be an abuse of this privilege, however, to make it the pretense of getting improper matter before the jury as evidence, in the cause." A part of the excerpts attempted to be read conflicted with certain instructions of the court. The court, therefore, under all the circumstances, committed no error in refusing to permit the law books and newspapers to be read to the jury. The counsel for the defendant, however, in their arguments, repeated from recollection very much of the language contained in the rejected law books and newspapers, and the only complaint really is that they were not permitted to impress the jury more forcibly with the authorities from which they quoted.

The more serious questions discussed in the briefs and in the oral argument concern the instructions about drunkenness and insanity. Evidence was offered upon the part of the defendant showing that he had inherited an appetite for intoxicating liquors; that he indulged that appetite during life; and that the habit for drink had grown upon him so that he had the reputation of being an habitual drunkard. It is further insisted the evidence tended to prove that at the time of the death of the deceased the defendant was insane from alcoholism. The following instruction was requested on the part of the defendant, and refused by the court: "If you believe there is a disease called dipsomania, being an inordinate, uncontrollable appetite for intoxicating drink, and if you further believe from the evidence that the defendant by long-continued and excessive indulgence in alcoholic liquors brought upon himself such disease, and that the same had so impaired his mental faculties and his power over his will as to render him subject to furious and uncontrollable impulses to assault and slay his wife, but he did not at the time understand the nature and consequence of such act, and that it was wrong, he is not guilty of any of the offenses charged or included in the information." The court, however, instructed the jury, among other things, as follows: "Voluntary intoxication is no defense to murder in the first degree unless such intoxication should be so extreme as to rob the mind of the power of premeditation and deliberation. Hence, in this case, if you find that the defendant committed the act of killing as charged in the information, and that at the time he did so he was in a state of intoxication caused by his voluntary action, he is guilty of murder in the first degree, unless you further find that such intoxication was so extreme as to prevent his mind from the exercise of deliberation or premeditation; in which latter case he would be guilty of murder in the second degree, or manslaughter in some of the degrees as you are herein instructed." "I instruct you that if you believe from the evidence beyond a reasonable doubt that the defendant did the killing of Mary O'Neil, as charged in the information, but at the time he was so drunk as to be in-

that the defendant had no previous knowledge that when intoxicated that he was liable to commit acts of violence upon his wife or others as a consequence of such drinking, you cannot find the defendant guilty of murder in either of the first or second degrees." "I instruct you that, where a person is shown to have been in the habit of becoming intoxicated, and it is further shown that when intoxicated he is apt to commit acts of violence upon his fellows, and endanger their lives or safety, and such person is shown to have knowledge of such fact, and, having such knowledge, voluntarily becomes intoxicated, then, and in such a case, such person would be as fully and entirely responsible for acts of a criminal nature committed by him while in such state of intoxication as though the act had been committed by him while not intoxicated. Hence, if you believe that the defendant in this case was in the habit of becoming intoxicated, and that while in such state of intoxication, and by reason thereof, was apt to and did assault and beat Mary O'Neil, his wife, in a manner dangerous to her life and safety; and if you further find that the defendant knew that he was apt to assault and beat his wife while so intoxicated, but, notwithstanding such knowledge, voluntarily became intoxicated, and, while so intoxicated, assaulted his wife, and killed her as charged in the information,—then I instruct you that the defendant is guilty in the same degree as he would be had he committed the act while not intoxicated." This court has already declared, in accordance with the views adopted generally by other courts, that if a man kills another while in a fit of voluntary intoxication, it is murder, and he must suffer the penalty." *State v. Yarborough*, 39 Kan. 581; *Lawson, Defenses to Crime*, 582-695, and cases cited. Of course, drunkenness may be considered, as the instructions declare in this case, in determining whether there was that deliberation, premeditation, and intent to kill necessary to constitute the offense charged. *Cline v. State*, 43 Ohio St. 334. Bishop, in his work on Criminal Law, which is quoted approvingly in the brief for the defendant, says: "When a man voluntarily becomes drunk there is the wrongful intent; and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is, therefore, a legal doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence. It is so even when the intoxication is so extreme as to make the person unconscious of what he is doing, or to create a temporary insanity." Section 400 (vol. 1, 7th ed.), p. 258. In section 406 he says: "Again, the law holds men responsible for the immediate consequences of their acts, but not ordinarily for those more remote. If, therefore, one drinks so deeply, or is so affected by the liquor, that for the occasion he is oblivious or insane, he

created a fixed frenzy or insanity, whether permanent or intermittent,—as, for instance, delirium tremens.—It is the same as if produced by any other cause excusing the act; for whenever a man loses his understanding, as a settled condition, he is entitled to legal protection, equally whether the loss is occasioned by his own misconduct or by the dispensation of Providence." Id. If drunkenness produces insanity through delirium tremens or *mania a potu*, or other disease, and a defendant at the time of the homicide has no sufficient capacity or reason to enable him to determine between right and wrong as to the particular act he was doing, or has no power to know that the act was wrong and criminal, he would not be responsible. *O'Grady v. State*, 36 Neb. 320. In cases of delirium tremens or *mania a potu*, the insanity excuses the act, the frenzy being, not the immediate effect of indulgence in strong drink, but a remote consequence superinduced by antecedent drunkenness. *State v. Nixon*, 32 Kan. 205; *State v. Mowry*, 37 Kan. 369; also the various decision cited in *Lawson, Insanity and Defenses to Crime*, pp. 586-680; *O'Grady v. State*, and *Cline v. State*, *supra*.

But, it is argued on account of the instructions given and refused, that the jury were misled in not being permitted to excuse the defendant if alcoholism or other disease had created insanity. We think other instructions of the court sufficiently covered all forms of insanity, because in such instructions the jury were informed that, "when insanity is set up as a defense to crime committed, the rule that the jury must ever keep before their eyes and minds in determining the responsibility of defendant is this: 'Was the accused, at the time of doing the act complained of, conscious of the nature of his act, or did he know that it was wrong to do it?'"

Testimony has been introduced in this case covering several years of the defendant's life prior to the commission of the acts alleged against him. The object was to show the defendant's conduct and habits of life. This is all proper testimony, and you should consider it for what you may think it is worth as bearing upon the question of the defendant's sanity or insanity at the time he committed the act charged against him. If you find that he did commit such an act, remembering that it is the condition of the defendant's mind at the time he committed the fatal assault upon which you are to judge him, and that all or any of this testimony is only competent as it may throw light upon his actual condition at the time of his commission of the act charged against him. . . . If you believe that the defendant was laboring under such a defective reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong, then the law does not hold him responsible for his acts. . . . When habitual unsoundness of mind is once shown to exist either wholly or partially, it is presumed to continue to

exist until the presumption is rebutted by the state.

When a person at the time of the alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is responsible, if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree of capacity, then he is not so responsible. In other words, if he has mental capacity sufficient to distinguish between right and wrong, with respect to the particular act or acts constituting the alleged crime, he should be held responsible for the commission of such act or acts, although he might be insane or imbecile with respect to other matters. Now, there are many sorts of diseases of the mind that are commented upon and discussed by physicians and psychologists in these days, and that are presented in court for the consideration of a jury, and upon which the jury is asked to find that the mind of the accused was, at the time in question, so overthrown as to make him wholly irresponsible, and therefore that he should be acquitted for his otherwise unlawful acts. Now, however varied these diseases may be, I say to you they all come under the great head or generic head of insanity, and in the main test is the rule I have just given you; all else is argument or minor rule under this head, and which must revolve itself back to it." Therefore, in accordance with the prior decisions of this court, the jury were properly instructed upon the evidence concerning the defendant's insanity, whether caused from alcoholism, through delirium tremens, or *wania a potu*, or from any other disease.

This court has gone further than some other courts in holding "that the defendant on a plea of insanity is not required to establish his insanity by a preponderance of the evidence, but, if, upon the whole of the evidence introduced upon the trial, together with all the legal presumptions applicable to the case, under the evidence there is a reasonable doubt whether he is sane or insane, he must be acquitted. To doubt his sanity is to doubt his guilt; and to doubt his guilt, if the doubt be a reasonable one, is to acquit. The doubt of guilt cannot be of a less degree than the doubt of sanity; and if the doubt of sanity be a reasonable doubt, the doubt of guilt must also and necessarily be a reasonable doubt." *State v. Crausford*, 11 Kan. 82. The rule laid down by this court concerning the responsibility of a "person who, at the time of the commission of the alleged crime, has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong," is forcibly challenged by the counsel for the defendant. The theory of irresponsibility from an irresistible or uncontrollable impulse is ably presented. The following authorities are cited against the law declared in the former decisions of this court: *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193. We have also been referred

to a lengthy article "on the legal aspect of insanity," published in N. W. Law Rep. 1, which states, among other things, that "it would be difficult to crowd into the same compass more erroneous ideas than are found in the charge of the court in the *Guiteau's Case*, 10 Fed. Rep. 161." We have examined these authorities, and also read many similar articles in the magazines upon legal or forensic medicine, which support, and even go further than, the views expressed in the Law Review. Some of the articles in the medico-legal journals assert that all crime results from heredity, and therefore that all persons committing alleged offenses should be considered irresponsible, and be subjected to treatment for disease only; not for crime. The decisions cited above are sporadic cases, and against the overpowering weight of authority. Lawson, *Defenses to Crime*, 200-324. *Mr. Justice Valentine, in State v. Nison*, 83 Kan. 205, expressed himself as follows: "It is possible that an insane, uncontrollable impulse is sometimes sufficient to destroy criminal responsibility, but this is probably so only where it destroys the power of the accused to comprehend rationally the nature, character, and consequences of the particular act or acts charged against him, and not where the accused still has the power of knowing the character of the particular act or acts, and that they are wrong. Indeed, it would seem dangerous to society to say that a man who knows what is right and wrong may nevertheless, for any reason, do what he knows to be wrong without any legal responsibility therefor. The law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong, and a crime, and thereby relieve him from all criminal responsibility. Whenever a man understands the nature and character of an act and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it. But upon this question of insane, uncontrollable impulse, we do not wish to express any very definite opinions, as we do not think the question is presented to us in this case." In *State v. Mowry*, 87 Kan. 369, this court adopted the views thus expressed upon uncontrollable impulse. See *State v. Miller*, 111 Mo. 543, where the defendant was charged with rape, and claimed he was irresponsible for the crime because committed under uncontrollable impulse. 37 Am. L. Rev. pp. 299, 300. We are not willing to change the ruling of this court in favor of irresponsibility on account of uncontrollable impulse where the perpetrator is fully conscious that the act he is doing is wrong and criminal. If the law as declared by this court does not offer sufficient safeguards and protection for "that most unfortunate class, who cannot speak for themselves," an act of the legislature may establish a different rule. Until the legislature interferes, we prefer to follow the great weight of authority upon this matter. We are not inclined to adopt the theories of psychological enthusiasts to overthrow the long-established criminal practice

pass an act permitting the state or the accused to have the question of insanity tried before the main trial upon the information or indictment. In such a case a jury of physicians might be required to be summoned to determine the sanity or insanity. At present the question of insanity in a criminal case, where it is claimed that the accused was insane at the time of the commission of the alleged offense, is tried along with all the other questions. *State v. Gould*, 40 Kan. 258.

Several other alleged errors are referred to and discussed in the briefs. All of these have been examined, but we find no prejudicial error therein.

The judgment of the District Court will be affirmed.

All the Justices concur.

Rehearing denied.

STATE of Kansas, *ex rel.* John T. LITTLE,
Atty-Gen.,

DODGE CITY, MONTEZUMA & TRINIDAD R. CO. *et al.*

(.....Kan.....)

"Where a railway company, owning a short line of railroad of twenty-six

***Headnote by HORTON, Ch. J.**

NOTE.—Mandamus to compel operation of railroad.
The right of a railroad company to abandon the exercise of its franchise by ceasing to operate its railroad has been generally denied by the courts when speaking of the subject incidentally, and also in some decisions to that effect.

In case of insolvency the practical question of how the company can be compelled to operate the road presents serious difficulty.

When the railroad company is not insolvent, but finds a certain section or branch of its road unprofitable, the right to abandon that portion for that reason is, so far as actual decisions go, somewhat uncertain. The decisions imply that such an abandonment cannot be allowed.

In *Talcott v. Pine Grove Twp.*, 1 Flipp. 145, it was said "that a railroad cannot be abandoned after it has become one of the thoroughfares of the country, and that the company will, by proceedings in behalf of the state, be forced to continue the road and perform all its duties to the public, is beyond question." This was said, however, not by way of actual decision but in discussing the public character of the road as affecting the validity of town bonds in aid of the road.

In *State v. Sioux City & P. R. Co.*, 7 Neb. 357, it was said that the railroad company, which had received a land grant, "unless relieved by the legislature, must conform to the terms and conditions of the grant, and the entire line must be kept in running order and operated," also that the "state may compel a compliance with the terms of the contract by mandamus, or other appropriate remedy." This was, however, said in a suit to quiet title and cancel a patent for land to the railroad company.

In *People v. Albany & V. R. Co.*, 24 N. Y. 351, 23 24 L. R. A.

plied for the payment of the expenses of the company or the road, and the use of the road has been abandoned for several months, and the road cannot be operated, except at a great loss, by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court, having some discretion in the granting of a writ of mandamus, will not compel, by a peremptory writ, the railway company to replace or put into repair its track, a part of which has been torn up, as such an order would be useless or futile, and of no public benefit.

(May 5, 1894.)

APPPLICATION for a writ of mandamus to compel defendants to repair and relay certain portions of the track and roadbed of the Dodge City, Montezuma & Trinidad Railway. *Denied.*

Statement by Horton, Ch. J.:

This action was commenced in this court on January 4th of the present year, to compel the Dodge City, Montezuma & Trinidad Railway Company and the other defendants to repair and relay certain portions of the track and roadbed of the railway company in the counties of Gray and Ford in this state. It appears from the evidence presented upon the trial that on May 21, 1887, the Dodge City, Montezuma & Trinidad Railway Company was chartered, to exist ninety-nine years, and organized under the laws of the state, with the declared intention of constructing a line of railway from Dodge City, in this state, to Trinidad, Colo. The Monte-

Am. Dec. 235, a suit for specific performance was held not to be an allowable remedy to compel a railroad company to restore the road, when it had torn up its track and dismantled its road with intention to abandon it and this was the extent of the decision, but a majority of the justices sitting in the case expressed the opinion that the remedy was by mandamus or indictment, or at the election of the people by proceedings to annul the existence of the corporation.

In the earliest case on the subject, which was one respecting a tram road, mandamus was issued to compel the restoration of the road and the relaying of the track, where the company had torn up a section of the track to prevent its use by collieries which were in rivalry of business with others in which the owners of the road were interested. The chief justice said "the writ should be to restate and lay down again, but not to maintain, the tram road. *Rex v. Severn & W. R. Co.* 3 Barn. & Ald. 645.

It seems that the road was intended for use by vehicles of others as well as for those of the railway company.

Where passenger trains had been discontinued over a section of track about a mile and a half long from the railroad depot to a dock, where connection was made with steamers according to the course of travel at the time when the charter of the company was obtained, and the railroad company undertook to justify this abandonment of passenger trains over that part of its track by a contract with another railroad company, which was evidently intended to prevent competition by the boats, mandamus was granted to compel the running of passenger trains over this track; and the court regarded the delinquency of the com-

suma Company, during the year 1888, constructed its line of road from Dodge City, in a southwesterly direction, to the town of Montezuma, in Gray county,—a distance of twenty-six miles. At no time has the road been extended further. The Montezuma Company never equipped its road with cars or engines. From the time of completion of the road until May, 1893, it was operated by the Montezuma Company, by an arrangement with the Chicago, Rock Island & Pacific Railway Company by which the latter company was to run its trains over the road at a cost of from \$18 to \$26 per round trip. During the year 1888, all of the capital stock of the company, amounting to 40,000 shares, of \$50 each, was issued, and A. T. Soule, of Rochester, N. Y., became the owner of 88,000 shares, which he owned until the time of his death, in 1890, since which time his son, Wilson Soule, has been the owner thereof; and Fairview township became the owner of 278 shares of the stock, and the remaining 1,722 shares have been owned and held, from that time until the present, by other individuals. The total receipts from sale of stock by the Montezuma Company, from its organization to the present time, are \$68,900. Fairview township, in Ford County, through which the road runs, in September, 1888, became the owner of 278 shares of the stock of the Montezuma Company, and has ever since been the owner thereof, by issuing its bonds in the sum of \$13,900 to the Montezuma Company, on the completion of the road through the township, which bonds are outstanding and unpaid. No other aid was furnished the Montezuma Company, except donations by citizens of Dodge City in the amount of \$800.

The company exercised the right of eminent domain along the entire line of its road. The cost of the construction of the road was \$268,000. In 1888 the Montezuma Company became indebted to A. T. Soule for \$194,888.55, which was used in the construction of the road; and afterwards, in 1889, 1890, and 1891, it became further indebted to A. T. Soule and Wilson Soule in the sum of \$88,000. These sums of money were furnished at various times, for which the company gave to Soule its nineteen promissory notes, aggregating these sums; and the notes not being paid on the 7th day of October, 1891, the Montezuma Company, to secure the payment of the same to Wilson Soule, gave him its mortgage upon all its property, described as follows: "All the line of railway owned by the party of the first part which extends from Dodge City, Kas., to Montezuma, Kas., including the roadbed, ties, and rails thereon, together with all side tracks, depots and appurtenances thereto in anywise appertaining or belonging; to have and to hold the same, together with all and singular the tenements and hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever." On the 19th day of January, 1893, by proceedings in the district court of Ford county, Wilson Soule obtained a judgment against the Montezuma Company for the amounts secured by the mortgage, and a decree foreclosing the mortgage, and an order for the sale of the property, which order was executed by a receiver appointed by the court. The sale was had on the 5th day of September, 1893, and the defendant E. F. Kellogg, who purchased for the defendant Wilson Soule, became the purchaser; and

panty as aggravated, rather than excused, by that contract. It was said that the company which had made the road was bound "to put it into use,—every material part of it,—and keep it in use until discharged by the legislature." *State v. Hartford & N. H. R. Co.* 29 Conn. 538.

In *Com. v. Fitchburg R. Co.*, 12 Gray, 180, it is held that the duty of a railroad company is not more than to meet and supply the public wants, and it is said "if trains run at reasonable and moderate fares cannot be supported, it is because they are not needed."

Mandamus was refused in that case to compel the running of passenger trains over a branch road, on which they had been discontinued after running them for a time, because they were unprofitable. The court said in this case, that the question is not as to the existence of the duty, but as to its extent and qualifications.

An electric street railway company, which had purchased the road of a former company, was compelled by mandamus to perform the duties to the public which grew out of the permission to use the streets given by ordinance. In this case the court says it was "not seriously contended that the whole line is unprofitable," but the company desired to change its line for one that was more direct, claiming that the interests of the company and of the people alike required the change. *Potwin Place v. Topeka R. Co.* 51 Kan. 609.

A receiver of a railroad company was compelled, on application by the attorney-general, to repair and operate a portion of a railroad which he had abandoned. The decision was based, not only on the general ground that the exercise of the franchise could not be abandoned over any portion of
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the road, but also that the company had received a land grant, by acceptance of which it was bound by contract to operate the road. *Farmers Loan & T. Co. v. Henning (Kan.)* 17 Am. L. Reg. N. S. 266.

The United States Supreme Court in *Union Pac. R. Co. v. Hall*, 91 U. S. 848, 23 L. ed. 428, affirming *Hall v. Union Pac. R. Co.* 3 Dill. 515; *United States v. Union Pac. R. Co.* 4 Dill. 479, upheld a mandamus to compel the operation of a railroad as a continuous line, and on the relation of a private individual. But this was not a case of compelling the operation of a road which the company wished to abandon, but merely the operation of the whole road, including that across a bridge, as a continuous line.

That a railroad may be compelled by mandamus to reconstruct and operate a line of road as originally laid out is implied in another decision to the effect that the lessor is a necessary party to such a suit against the lessee, where the latter has changed the line. *Chicago & N. W. R. Co. v. Crane*, 118 U. S. 424, 28 L. ed. 1084.

A mandamus to compel the continued operation of a short line between two stations was denied, where the company, by consolidation, had obtained another line between the two stations which was only two miles longer but passed through an intermediate village. *People v. Rome, W. & O. R. Co.* 108 N. Y. 95.

That a railroad company cannot be compelled by any court sitting in a state to operate any part of its line outside of that state, unless it is a federal corporation and jurisdiction over it given by act of congress, is decided by a federal court in *People v. Colorado Cent. R. Co.* 49 Fed. Rep. 683.

This case also holds that a lessee of the road can-

the order of the court, or of the property to E. F. Kellogg, who took the same in trust for Wilson Soule, the real purchaser. On the 2d day of December, 1893, Wilson Soule sold the superstructure of the road to the Block-Pollak Iron Company, with the understanding that the Block-Pollak Iron Company would remove the same from the roadbed. In the months of December and January, work being carried on until the 10th of January, the Block-Pollak Iron Company, through its agents and employes, G. T. Wisewell, Harry Benjamin, and others, tore up and removed sixteen miles of the superstructure of the road, commencing at Montezuma, and extending east to a point two miles within Fairview township, Ford county, since which time no effort has been made to remove the road, ex-

drawn, and on January 20 a large number of teams were hired to haul rails, but were not used, and on January 26 twelve men pulled spikes for half the day. No part of the superstructure of the road has ever been repaired. Before any of the road was taken up, about one third of the ties were in a defective condition, and if the road were to be used, ought to have been changed at once; the other two thirds ought to be changed within the next three years. The estimated cost of replacing one third of the ties would be \$15,000. In taking up the road the ties were offered for two cents to the farmers for wood, but no buyers were found, and they were left upon the ground. At the time the road was constructed, five stations were established, namely, Dodge City and Grand

not be compelled to operate it, where the lease is void.

If a railroad company has neither funds nor the means of raising funds to perform the service required, a mandamus to repair and improve a portion of its road and increase passenger service thereon will be denied, because it would be unavailing, although the court says this rule, possibly, might not apply if the defendant had willfully and wrongfully put it out of its power to perform the act required. *Ohio & M. R. Co. v. People*, 120 Ill. 300.

Although upon the admitted facts of the case the company was clearly guilty of a violation of duty in not keeping its road in a proper state of repair and a safe condition, the court held that if the company was wholly unable to discharge the duties it owed to the public, and which the law had imposed upon it, a proceeding in the nature of a quo warranto was the proper remedy and not mandamus.

It is also said to be of doubtful propriety to make the order so general, where it was to put the road "in a good, safe, and suitable condition."

The cessation of operation of a railroad because of a strike of its employes is not excusable, if the failure to operate the road is due merely to the refusal of the company to pay sufficient wages to obtain employes. But the court says it would be a different case, if it were shown that the strike had been caused or compelled by some illegal combination or organized body which held an unlawful control of the actions of the employes, and sought through them to enforce its will upon the company, and that the company in resisting such unlawful efforts had refused to obey unjust and illegal dictation and had used all the means in their power to employ other men in sufficient numbers to do the work. *People v. New York Cent. & H. R. R. Co.*, 28 Hun, 543.

Mandamus was denied on the ground that there was a complete remedy by injunction, where a citizen applied for mandamus to compel a railroad company to run its own road, where a rival and competing company was operating it in violation of statute. *State v. Manchester & L. Railroad*, 62 N. H. 22.

Increased facilities.

Mandamus to compel increased facilities for passenger travel was denied in *People v. Long Island R. Co.*, 31 Hun, 125, where the company was running one train each way daily, and the quantity of service was not prescribed by law.

In respect to compelling increased facilities for travel, it is said in *Ohio & M. R. Co. v. People*, 120 Ill. 300: "It is believed, however, no case can be 24 L. R. A.

found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled, by mandamus, to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied that there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled, by mandamus, to perform this, like any other specific duty enjoined by its charter or by other statutory provision."

Compelling completion of road.

The power to compel a railroad company to build its road in the first instance after it has obtained a charter permitting it to build the road has been but little discussed by courts in this country.

In *State v. Southern Minnesota R. Co.*, 18 Minn. 40, mandamus to compel the building of a road to a certain point was denied on the ground that there was no legal obligation to complete the road to that point under statutes empowering the company to build it, and making a grant of lands to aid in the construction.

In England, the earlier decisions proceeded on the theory that a railroad company by obtaining a charter became under contract obligation to build the road. *Reg. v. Eastern Counties R. Co.*, 10 Ad. & El. 531, 2 Perry & D. 642, 1 Railway Cas. 509; *Reg. v. Bristol & E. R. Co.*, 4 Q. B. 162, 3 Gale & D. 384, 8 Railway Cas. 483, 12 L. J. Q. B. 106, 7 Jur. 238; *Reg. v. York & N. B. R. Co.*, 16 Q. B. 898; *Reg. v. Great Western R. Co.*, 1 El. & Bl. 258, 16 Eng. L. & Eq. 341, *Reg. v. Lancashire & Y. R. Co.*, 16 Eng. L. & Eq. 327, 1 El. & Bl. 223, 7 Railway Cas. 266, 23 L. J. Q. B. 257, 7 Jur. 62; *Reg. v. York & N. M. R. Co.*, 1 El. & Bl. 178, 16 Eng. L. & Eq. 299.

But this doctrine was overthrown and the earlier cases disapproved in *York & N. M. R. Co. v. Reg.*, 1 El. & Bl. 868, 18 Eng. L. & Eq. 199, 23 L. J. Q. B. 223, 17 Jur. 690, 7 Railway Cas. 450; and *Great Western R. Co. v. Reg.*, 1 El. & Bl. 874, 16 Jur. 675, which decide that merely empowering a company to build a railroad did not create any implied contract or obligation to build it, and that by building a part of the road, it did not bind itself to complete it.

It will be somewhat strange if the law on the subject of compelling the operation of railroads and portions of railroads when corporations may desire to abandon them is not much more fully developed by decisions in coming years as it has been thus far one of the least developed branches of the law of corporations, while the constant and great increase of railroads will naturally furnish cases of this kind for decision.

B. A. R.

View, in Ford county, and Ensign, Macomb, and Montezuma, in Gray county. At that time Montezuma had about seventy-five inhabited houses, among which were, in operation, five or six stores, two hotels, two livery stables, one bank, printing office, postoffice, and other small business. Ensign was a place of about a half dozen houses, including one store and postoffice. Grand View and Macomb were no towns at that time or afterwards; but a postoffice was established at Macomb, which, in 1892, was discontinued by the government. In December, 1893, more than half the houses had been removed from Montezuma, and the population had been reduced to less than twenty-five. No business was carried on there, except one general store, with postoffice; and at that time Ensign was deserted, and no business whatever was carried on there, except a postoffice. The road was operated from September 5, 1888, to October, 1890, by running one train a day a round trip over the road, six days each week; and from that time until May, 1893, by running one train a round trip each day, for three days each week. The total earnings for the year ending June 30, 1889, were \$1,981.28; operating expenses, \$5,940.53,—making a deficit of \$3,959.25. The total freight earnings for the year ending June 30, 1890, \$2,011.60; total passenger and mail earnings, \$2,463.47. Total earnings, \$4,475.07; operating expenses, \$14,447.49,—making a deficit of \$9,972.42. The total freight earnings for the year ending June 30, 1891, \$919.55; passenger and mail earnings \$1,016.56. Total earnings, \$1,986.11; operating expenses, \$3,026.36,—making a deficit of \$6,080.24. Total earnings for year ending June 30, 1892, were, freight earnings \$2,590.21; passenger and mail earnings, \$959.04, total earnings, \$3,549.25; operating expenses, \$7,790.67,—making a deficit of \$4,151.42. Total earnings for the year ending June 30, 1893, were, freight earnings, \$4,906.50; passenger and mail earnings, \$374.47. Total earnings, \$5,780.97; operating expenses, \$8,024.55,—making a deficit of \$2,243.58. In operating expenses are included all other expenses incurred by the company in connection with the maintenance and operation of the road, except the taxes of 1891 and 1892, which have been on an average \$2,800 per year. During the four years of the operation of the road, the total amount (which is included in the expense item) paid to the officers and employés is \$12,097.53, making an average of \$3,024.88 a year. The Rock Island Company has a branch of its road at Dodge City, and the superintendent of that company testified "that the Rock Island road is better situated to operate the Montezuma road than any other company, and that his company would not take the road as a gift and operate it; that it would cost nearly as much to keep the road in repair to operate it three months of the year as if it were operated all the time, except as to the rails." M. A. Lowe, the general attorney for the Rock Island Company, also testified "that, in his opinion, the Montezuma road could not be operated as an independent line to pay operating expenses, not including taxes, and that the Rock Island

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Company could not operate it so as to make it pay operating expenses, and that his company could not afford to take the road as a gift and operate it for the period of five years." He further testified "that the Rock Island Company had better facilities for operating the road than any other company, and that his company could not keep it in repair and operate it without absolute loss; that the revenues to be derived from the Montezuma road would not pay operating expenses, not taking into account the repairs of the road and taxes." The testimony of H. R. Nickerson, superintendent of the Atchison Company, shows that the cost of maintaining the track of one of the railroads in the western part of the state, under his supervision, and similar to the Montezuma Railway, is from \$111.81 to \$132 per mile each year, and that these figures are below the actual requirements of proper maintenance. The proposed offer of fifteen business men near Dodge City to operate the railway, if they can acquire it by gift or otherwise, if the track were relaid, is more visionary than practicable. All that they are willing at present to subscribe or offer towards the operation is \$3,000. If the road were in the same condition it was before any of the track was torn up, it would cost \$15,000 to put it in reasonable order for mere operation, and then cars and engines would have to be purchased at a large additional expense. \$3,000 is an insignificant sum with which to commence the operation of such a road. It appears, further, from the evidence of the representative of these persons, that they might not be willing to operate the road if the loss were \$1,000 a year. The evidence conclusively shows that the deficit in the operation of the road was a much larger amount than that, and therefore the proposition amounts to little, if anything,—nothing substantial. There is really no showing made that the public is sufficiently interested in the operation of the road to pay all of the expenses for so doing.

Messrs. John T. Little, Atty. Gen., B. F. Milton, and Milton Brown for plaintiff.

Messrs. Sutton & McGarry for defendants.

Horton, Ch. J., delivered the opinion of the court:

This proceeding has been commenced in this court, not for the purpose of compelling the Dodge City, Montezuma & Trinidad Railway Company, or any of the defendants, to operate the line of that railway in Ford and Gray counties, or any part thereof, but merely to require the defendants to repair and relay certain portions of the track and road-bed of the railway company. A railway company may be compelled by mandamus to perform the public duties specifically and plainly imposed upon the corporation; and therefore we have no doubt of the power of this court in a proper case to compel a company to operate its road, and for that purpose to compel the replacement of its track, torn up in violation of its charter. *State v. Missouri Pac. R. Co.* 33 Kan. 176; *Potwin Place v. Topeka R. Co.* 51 Kan. 609;

Barn. & Ald. 646. But the granting of a writ of mandamus rests somewhat in the discretion of the court. *Potwin Place v. Topeka R. Co.* *supra*. The Montezuma Railway Company is insolvent. It has no cars or engines. Its line of road has not been operated for many months. The road cannot be operated except at a great loss. The railway company is not liable to operate it, and has no funds or property which can be applied to the payment of operating expenses. A. T. Soule, the promoter of the railway company, has expended over \$200,000 in the construction and operation of the road without any returns. All of its property was sold, or attempted to be sold, to the Block-Pollak Company, for \$25,000 only. The venture of the promoter, A. T. Soule has been very unsuccessful to him. His experience and that of the other parties investing in, constructing, and operating this railway have been most unfortunate. No one connected with the railway corporation has realized any personal benefit from any bond, mortgage, or subsidy of the road. The Rock Island road, which, by an arrangement with the Montezuma Company, ran its trains over the road from the time of its completion until May, 1893, and which has better facilities for operating the road than any other company or person, will not take the road as a gift and operate it. It seems to be conclusively shown that all the receipts to be derived from operating the road will not pay the operating expenses, not taking into account the repairs of the road and the taxes. The contention on the part of the plaintiffs is that as the railway was sold to E. F. Kellogg for Wilson Soule by a receiver, and not by the sheriff of Ford county, the sale is absolutely void. If this be true, then there is no legal duty upon the part of Wilson Soule to repair or operate the road. If, however, the sale is not absolutely

son, ought to be compelled to operate the road. The Block-Pollak Iron Company cannot, under its conditional purchase of the superstructure, be compelled to repair or operate the road. There is no legal duty upon any of the other defendants to repair the road. Therefore, the question is whether the court will compel, or attempt to compel, the railway company—a bankrupt corporation—to relay the track and repair the roadbed. The court will not make a useless or futile order. It will not do a vain thing. The order prayed for should only be issued in the interest of the public. If the track is replaced, there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has little interest in the operation of the road, or in its being kept in repair. *Morawetz, Priv. Corp.* 1119; *Com. v. Fitchburg R. Co.* 12 Gray, 108; *Ohio & M. R. Co. v. People*, 120 Ill. 200; *People v. Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295. The average life of cedar ties—the kind used on this road—is from three to five years. All the ties laid in 1888 will soon be so much decayed as to be worthless. A large part were worthless when the track was taken up. If the track were relaid, the road would be in no reasonable condition to be used, unless new ties were furnished, and these in a few years would again become decayed and useless. The use of the road was abandoned before any part of the track was torn up. If the track were replaced, it would be of no immediate public benefit,—possibly of no future benefit,—because, if the railway is not operated, the mere existence of a road, not in use, is not beneficial to any one.

The peremptory writ prayed for will be denied, with costs.

All the Justices concur.

INDIANA SUPREME COURT.

Elizabeth BARNARD *et al.*, *Appts.*,
v.

Sarah M. SHIRLEY.

(....Ind.....)

1. One who sinks an artesian well upon his own land and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises is not

liable to injunction and damages for allowing the water to flow into a natural watercourse of a basin in which the well is situated and which is the only practicable outlet for the flow from such well, if the owner is free from negligence or malice and uses due care in avoiding injury to his neighbors.

On Rehearing.

2. A statute forbidding reversal of a judgment when it shall appear that

NOTE.—Some novel questions are raised or suggested by the above case. One is as to the easement of flow over lower grounds or to increase a natural stream, in the discharge of water artificially raised from the interior of the earth. This does not seem to have been discussed in this case. Another question which is the one chiefly presented in this case is that respecting the right to pollute a stream by use for bathing in a sanitarium or hospital. This naturally falls into the question of reasonableness of use within the existing circumstances and conditions. The determination of this is a practical question of the highest importance in many cases.

For pollution by mining operations, see *note to Drake v. Lady Enaley Coal, Iron & R. Co. (Ala.) ante*, 64.

See, as to pollution generally, *Helfrich v. Catonsville Water Co. (Md.)* 13 L. R. A. 117, and *note*; *Barton v. Union Cattle Co. (Neb.)* 7 L. R. A. 457, and *note*; *Chapman v. Rochester (N. Y.)* 1 L. R. A. 296, and *note*.

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the merits of the case have been fairly tried and determined cannot be applied in case of the erroneous sustaining of a demurrer to the affirmative matter in a paragraph of answer when the effect was to exclude evidence of the matters therein alleged, so that it is impossible to determine from the record how far defendant was prejudiced by the ruling.

3. One whose demurrer has been sustained cannot for the purpose of sustaining the judgment challenge the truthfulness of the statements in the pleadings demurred to.

(June 6, 1893.)

APPPEAL by defendant from a judgment of the Circuit Court for Morgan County enjoining her from permitting the water from a medicinal artesian well to flow into a stream running through complainants' premises, the effect of which was alleged to be the pollution of the water of the stream. *Reversed.*

The facts are stated in the opinions.

Messrs. Jordan & Mathews and W. R. Harrison for appellants.

Mr. W. S. Shirley for appellee.

Howard, J., delivered the opinion of the court:

Since May, 1886, the appellee has been the owner of certain lots and lands in and adjoining the city of Martinsville, occupied by her as a farm. Appellants are the owners of certain lots in the city of Martinsville, adjoining the lands of appellee. During the years 1887 and 1888, a well was drilled upon appellants' lots to the depth of 800 feet, in search of gas. Instead of gas, a large volume of water flowed from the well, and has so continued to flow ever since. The water having been found by analysis to possess curative properties for certain diseases, appellants erected a bathhouse upon their said lots, to be used for bathing persons afflicted with diseases who might be benefited by the artesian waters. On the 16th day of September, 1889, the appellee filed her complaint against appellants in the Morgan circuit court, alleging that appellants, after using said artesian water in bathing the bodies of diseased persons, the same having all manner of diseases, including syphilis, and after said water has become befouled and polluted thereby, caused the same to be conveyed in a tile ditch under ground, constructed by them, to the lands of appellee, causing such water to flow upon and over the lands of appellee and into a natural stream of water running thereon, causing said natural stream of water to become befouled and polluted thereby, exposing the same to the stock pasturing and feeding upon appellee's said land where said stock is accustomed to run, feed, and pasture, such as milch cows, horses, and hogs, and the same drinking said water in its befouled and polluted condition as aforesaid. That said stream of water is a small spring branch of pure water, having its source in springs about one mile from appellee's land, and confined in a small channel upon appellee's land, and passing through appellee's land the distance of fifty-three rods, and having no outlet, but sinking into the lands of appellee and others be-

low. That said artesian water, in its polluted condition, so caused by appellants as aforesaid, and so caused to flow upon appellee's land, accumulates in great ponds of water upon appellee's said premises, becoming polluted and stagnant thereon, to the great and irreparable damage of appellee and her said land, and to the stock pasturing and feeding thereon; also endangering the health of persons living upon said land and drinking the milk from said cows. That said mineral water from said artesian well never at any time flowed upon appellee's land and into said stream of water, by percolation or otherwise, until the same was caused to flow thereon and therein by appellants in manner as aforesaid. Concluding with a demand for damages in the sum of \$1,000, and praying that appellants be forever enjoined from causing and permitting said water from said well to run upon and flow over the lands of appellee, and into said stream of water, and for other proper relief. A demurrer having been overruled to this complaint, appellants answered by general denial, and also by special plea. There was a motion to strike out parts of the special answer, which motion was sustained. A demurrer was afterwards filed to the second paragraph of the answer, which was sustained. Appellants moved for a jury to try the cause, and also moved for a jury to answer questions of fact, both of which motions were overruled. To all of these rulings appellants duly excepted. The cause was submitted to the court, and the court, having heard the evidence, found for the appellee, assessing her damages in the sum of \$50, and appellants were "enjoined from causing or permitting the water of the artesian well which shall have been used at their sanitarium and bathhouse . . . in bathing or washing persons afflicted with syphilis or other infectious ailment or disorder to flow into said branch or stream, or over and upon the lands of plaintiff, . . . and are further enjoined and restrained from polluting or corrupting the water from said well which may be left by them to flow into said branch and stream in such manner that the water of said branch and stream other than that flowing from said well may be rendered dangerous or injurious to live stock." A motion for a new trial was overruled.

Various errors are assigned and discussed, but the controlling questions in the case arise under the ruling of the court in sustaining the demurrer to the second paragraph of the answer. This paragraph of answer, omitting the parts stricken out as not material, or as being such as might have admitted of proof under the general denial, is as follows: "For further answer they [appellants] say that the stream of natural water set forth in plaintiff's complaint is a small stream and branch, which flows from sources northeast of the city of Martinsville, thence southward to near the center, north and south of said city, thence westward across said city, thence south to and across plaintiff's said land, and has so flowed for many years prior to plaintiff's having any interest in said land. That the said well from which said waters flow upon the said lots of defendants was dug and

sociation of many citizens of said city of Martinsville, with the assent and approval of plaintiff. That the only means or way of escape of said water is in and along said branch over the said lands of plaintiff. That for more than one year after the said well was so dug and bored the waters therefrom flowed from defendants' said lots into said branch by open ditches, and were so caused to flow by the said association of persons who dug and bored the same, and without objection by plaintiff, and with her acquiescence. That thereupon and thereafter, upon testing said waters by scientific analysis, by drinking and using the same in baths, they were found to be of great value, and to have highly curative properties, and to be of great service and value in healing persons afflicted with various disorders,—rheumatism, neuralgia, kidney affections, paralysis, and many other disorders; whereupon defendants erected a bathhouse to utilize said waters for the benefit of all persons so afflicted upon their said lots at a cost of ten thousand dollars, and have treated, benefited, and cured hundreds of persons from all parts of the country so afflicted as aforesaid, and are still engaged at their said bathhouse in healing and curing such sick and afflicted. That in erecting said bathhouse and in using said waters of said artesian well for the healing of persons as aforesaid, and in all defendants did in the use of said waters and the draining the same away, as complained by said plaintiff, said defendants used all proper and possible care to avoid injury, damage, or inconvenience to said plaintiff and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid. That said plaintiff stood by and assented to and acquiesced in the said expenditure of said sum in the erection of said bathhouse by defendants. That, after so erecting said bathhouse, defendants placed under ground a drain, made of porous tile, to convey the surplus water from said artesian well under ground to the branch above plaintiff's land, because the said branch was the only natural and only convenient outlet for said water, and did not thereby materially increase the flow of water in said branch.

The question presented for decision is new in this state,—whether one who sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, is liable to injunction and damages for allowing the water to flow into a stream which is the natural watercourse of the basin in which the artesian well is situated, the owner being free from negligence or malice, and using all due care in avoiding injury to his neighbor. In a Pennsylvania case the plaintiff was the owner of property on one side of a street, and brought an action for damages for alleged injury to his property by the defendant company, which had constructed its elevated road on its own land, on the other side of the street. It was alleged that the noise, dust, smoke, and cinders, and the constant jar of passing trains,

property, and lessened its value. The court in that case premised that under the constitution of Pennsylvania the company would only be liable if, under the same circumstances, an individual would be liable at common law, and held that in case a natural person were operating the road under the same circumstances he would not be responsible in damages, for the reason that he would have a right to the reasonable use and enjoyment of his property; and if in such use, without negligence or malice on his part, a loss should unavoidably fall upon his neighbor, he would not be liable therefor. No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is a wrong for which there is no liability. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence or unskillfulness, and where the act is not done maliciously. *Panton v. Holland*, 17 Johns. 99, 8 Am. Dec. 369. We need not consume time by further citation of authorities for so plain a proposition. It is settled law. It is true that this principle is qualified to a certain extent. A man may not carry on a business which poisons the air and renders it unhealthy in a thickly populated neighborhood, and especially in the center of a large city. So establishments which involve danger, as powder mills and certain kinds of manufactories, must seek a secluded place, where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established. But the great interests of mankind must go on unhampered. Railroads must reach cities; the treasures of the earth must be drawn from the mines; factories and mills must send forth noise, dust, and smoke. Inconveniences resulting from such causes must be endured by individuals for the general good; otherwise we should have to forego a multitude of the blessings of modern civilization. *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, and authorities there cited. In *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625, the court held that "the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. . . . A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction, and in larger quantities, than previously. If such an act causes damages to adjacent land it is *damnum absque injuria*." The law is the same in this state.

Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205. Where, in Massachusetts, a riparian owner built a dam across a stream, to create a fish pond on his own land, it was held to be a reasonable use of the water; and a mill owner below had no cause to complain of it, either at common law or under the statute of that state as to mills. Yet it seems that a mill owner may not enlarge the quantity of water flowing in a stream from his mill through the land of a lower proprietor by turning a new stream into his pond. The wrong consists in turning any water upon the land which does not naturally flow there. This, however, does not extend to preventing a proprietor upon a stream from digging ditches or doing other acts in the proper cultivation of his land, though the effect of it is to increase the quantity of water in the stream. Washb. Easem. 4th ed. p. 875. In California, a man in irrigating his farm turned a stream upon it from an adjacent ravine. The water percolated through the soil into a neighboring mine in such quantities as to ruin the mine. It was held that the farmer was reasonably exercising his right to irrigate his land, and was responsible only for the injuries caused by his negligence or unskillfulness, or for such as were caused by any wanton abuse of his right. *Gibson v. Puchta*, 33 Cal. 316. In another California case the land owner permitted the water taken from artesian wells on his lands, and carried through a ditch to irrigate his fields, to percolate through the ditch, to the injury of his neighbor's land. It was found that at small expense the water might have been drained from the ditch so as probably to prevent the injury, and he was accordingly enjoined from continuing the injury. What might have been the opinion of the court in case the fields could not be irrigated without injury to the neighbor does not appear. *Parker v. Larsen*, 86 Cal. 236.

The general rule in England is that a person discharging noxious substances into a stream will be liable to the riparian owners lower down for any damages occasioned, yet some exception seems to be made in favor of mining operations. Bainbridge on Mines, 8d ed. 517, says: "It should also be remembered that the prosperity of a mining country and its inhabitants depends upon the successful efforts of the adventurer. The value of all property in the vicinity of mines is inseparably associated with the spirit of adventure. The miner, therefore, should not be harassed in his operations by claims of an unsubstantial or imaginary character, for the benefits he confers generally far surpass the injuries he may commit." In *Mason v. Hill*, Blanch. & W. Lead. Cas. 697, and notes, the exception as to mineral products is also made: "But the right to throw refuse into a natural stream, or discharge into it water which has been used for the precipitation of minerals, and rendered noxious, may be acquired by prescription, custom or user. The same rule applies to smelting and washing processes." Id. 721, and authorities there cited. In this country the severity of the English rule is still further relaxed. "If one builds a dam upon his own premises, and thus holds back

and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some negligence on his part." *Loose v. Buchanan*, 51 N. Y. 477, and authorities cited. "As a general proposition, it is safe to say that the owner of land has a right to make reasonable use of his property, and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below." *Garland v. Towne*, 55 N. H. 57, 20 Am. Rep. 164. The right to flowing water is a right incident to property in land; and while it is a right common and equal to all through whose land it runs, yet as one of the gifts of Providence each proprietor has a right to a just and reasonable use of it as it passes through his land. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. *Elliot v. Fitchburg R. Co.* 10 Cush. 198, 57 Am. Dec. 85. Sewage and waste material may be cast into streams if material injury is not thereby caused. The right of one proprietor to have the stream descend to him pure must yield in a reasonable degree to the right of the upper proprietors, whose occupation of their own lands and whose use of the water for mill, manufacturing, domestic, or other purposes, will tend to make the water more or less impure. So it is of public importance that proprietors of useful manufactories should not be held responsible for slight injuries, or even some degree of interference with agriculture. In regard to some waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and, in some instances, the indispensable necessity, would seem sufficient to decide such cases. Gould, Waters, § 220. In *Health Department of New York v. Purdon*, 99 N. Y. 257, 53 Am. Rep. 22, which was an action to enjoin the sale of adulterated tea, it was said that "courts will not in all cases interfere by way of injunction to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment, its power, however, to do so in case of the exercise of any trade or business which is either illegal or dangerous to human life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages for which no adequate remedy exists at law." In that case it was found that, although the teas were adulterated, yet there was no sufficient evidence that the use of the teas was dangerous to human life or detrimental to health, and therefore the injunction was refused. In *Owen v. Phillips*, 73 Ind. 284, it was attempted to enjoin the re-erection of a flouring mill which had been burned, the claim being made that the mill was a nuisance, and that it could not be operated without becoming a nuisance; that the smoke and cinders made the water of plaintiff's cisterns

and wells foul and impure; and that the noise, smoke, dust, dirt, and offensive odors caused by the running of the mill essentially interfered with plaintiff's enjoyment of life and property. The following instruction in that case was objected to by the plaintiffs because the court modified it, by inserting the words "materially and essentially." "If the jury find from the evidence that the personal enjoyment of the plaintiffs in their residence has been and will be materially and essentially lessened by either the noise, smoke, dust, dirt, cinders, horses, mules, or teams, caused by the running and use of said mill, then the allegations of the complaint have been sustained." The instruction, as so modified, was, however, approved by this court, the court adding that "a lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one," quoting, also, with approval from the opinion rendered by Cooley, J., in *Gilbert v. Shoverman*, 28 Mich. 448, that in such cases "minor inconveniences must be remedied by actions for the recovery of damages, rather than by the severe process of injunction." See also *Bowen v. Mauzy*, 117 Ind. 258. "The granting or refusal of an injunction rests in each particular case in the sound discretion of the court. An injunction ought not, therefore, to be granted when it would be against good conscience, or productive of great hardship, oppression, injustice, or of public or private mischief." *Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109, and authorities there cited.

The natural right to have the water of a stream descend in its pure state must yield to the equal right of those above. Their use of the stream for mill purposes and the other manifold purposes for which they may lawfully use it will tend to render it more or less impure. The water may thus be rendered unfit for many uses for which it had before been suitable; but, so far as that condition results from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally suffers still greater deterioration. Against such injury, incident as it is to the growth and industrial prosperity of the community, the law affords no redress. So in cities and towns, with their numerous inhabitants and diversified business, with their mills, shops, and manufactories, with their streets and sewers, all the products and means of a high civilization, it would be impossible that the pure streams that flow in from the farmsides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes. *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592. That it is not, under all circumstances, an unreasonable or unlawful use of a stream to throw or discharge into it waste or impure matter, and that whether, in any given case, such use would be reasonable or not, is a

question for the jury. See Angell, *Watercourses*, 7th ed. § 140d.

In the case before us the stream flowed through the heart of the city of Martinsville before it reached the lands of appellee. Will it be said that there is any liability for contamination from the refuse of the city? Must it be that one who lives on the lower lands on the banks of a stream shall forbid forever the founding of a city on the lands above, forbid the grading of streets, the building of sewers, the erection of mills, factories, hospitals, or other means of livelihood, comfort, and convenience of the inhabitants? A case in many of its features resembling that now before the court is the well-considered case of *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. 126, 57 Am. Rep. 445. That was a mining case, and the chief question was as to the liability of the mine owners for the flowage of foul water from the mine into a stream which was the natural watercourse of the basin in which the mine was situated. The plaintiff in that case, Mrs. Sanderson, had purchased a tract of land in the city of Scranton, on Meadow brook, near its mouth. The existence of the stream, the purity of its water, and its utility for domestic and other purposes, it is said, was a leading inducement to her purchase of the land. She erected a house, threw dams across the brook to form a fish and ice pond and to supply a cistern, and the water was forced by hydraulic pressure from the cistern to a tank in the house, and was used for domestic purposes and for a fountain. The plaintiff alleged in her complaint that the large volume of mine water which the defendant company poured into the brook above had corrupted the stream to such an extent as to render it totally unfit for domestic use; that the fish were destroyed, the pipes corroded, and her entire apparatus for utilizing the water rendered worthless. She brought her action to recover damages for such pollution of the stream. In the course of the opinion the court says: "It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream, in its natural flow, may reach his neighbor's land. . . . In sinking his well he may intercept and appropriate the water which supplies his neighbor's well. *Acton v. Blundell*, 12 Mees. & W. 824; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 731; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511. Or, if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own

property. Whart. Neg. 939. So, also, each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice may occur to the owner of the adjoining mine. *Smith v. Kenrick*, 7 C. B. 515. One mine owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner. *Bainbridge, Mines*, 297. To the same effect are *Wilson v. Waddell*, 2 App. Cas. 95; *Crompton v. Lea*, L. R. 19 Eq. 115. The defendants, being the owners of the land, had a right to mine the coal. It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong. 'It is established,' says Cotton, L. J., in *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 11 Ch. Div. 783, 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case Brett, L. J., says: 'The cases have decided that where that maxim (*sic utere tuo ut alienum non laedas*) is applied to land and property, it is subject to a certain modification; it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' Page 787. . . . The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to ownership of coal property, and, when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land into the watercourse by means of which the natural drainage of the country is effected. . . . The defendants were engaged in a perfectly lawful business, in which they made large expenditures, and in which the interests of the entire community were concerned. They were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control. As the mining operations went on, the water, by the mere force of gravity, ran out of the drifts, and found its way over the defendants' own land to the Meadow brook. It is clear that for the consequences of this flow which by the mere force of gravity naturally, and without any fault of the defendants, carried the water into the brook, and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants. . . . It is said the defendants created an artificial watercourse from their mine to Meadow brook; but this artificial watercourse was upon their own land, and conducted no more water than, by the natural conformation

of the surface, could otherwise have reached it. If it be suggested that the defendants might have extended this artificial water way, in form of a sewer, to some point of safety, it may be asked where, short of the sea might the sewer be discharged that the same complaint might not be made? Nor do we say that a miner, in order that his mines may be made available, may enter upon his neighbor's lands, or inflict upon him any other immediate or direct injury; but we do say that in the operation of mining in the ordinary and usual manner he may, upon his own lands, lead the water which percolates into his mine into the streams which form the natural drainage of the basin in which the coal is situate, although the quantity as well as the quality of the water in the stream may thereby be affected."

The foregoing case of *Pennsylvania Coal Co. v. Sanderson*, and the reasoning of the court, seem to be closely in point with the case at bar. In both cases the owners cause water to rise from the earth, to become foul, and then to be carried by an artificial drain, and discharged into a running stream, the natural watercourse of the basin or valley in which the water rises, and into which stream the water would naturally flow if left to itself. In both cases the owners were engaged in a lawful and necessary work, of great advantage to mankind at large, and particularly to the community in which they operated; the one in mining out of the earth and distributing coal for heating and industrial uses, and the other also taking out of the earth mineral water for healing and curing the infirm. Both were free from fault or negligence in conducting their business, and in avoiding, so far as possible, all injury to others; the injury in each case being but the necessary incident of a lawful business. In each case there was no other place but the stream for the water to go, so that, if it were unlawful to discharge the water into the stream, then the enterprise itself of necessity would be at a standstill and, a lawful business thus come to an end because it could not be lawfully carried on. It would seem that the decisions show that when a business is dangerous, unhealthful, or otherwise greatly injurious to a community or to an individual, and it is possible to avoid the injury by a more careful management, or even, if necessary, by a removal of the works, to a more secluded or less objectionable place, then the owners of the noxious business will be mulcted in damages, and, if necessary, restrained by the courts. We have seen that in the case of *Parker v. Larsen*, *supra*, when it appeared that the defendant could flow water from his artesian wells over his fields without injury to his neighbor, but did not do so, he was enjoined. In the case of *Indianapolis Water Co. v. American Strawboard Co.* 58 Fed. Rep. 970, where there was a discharge of refuse matter from a strawboard factory into a nonnavigable river used by a water company as a source of supply for furnishing a city with water for domestic and other purposes, it was held that injunction would lie to restrain such pollution of the water supply. In *Kinnaird v. Standard Oil*

Co. 89 Ky. 468, 7 L. R. A. 451, defendant had stored petroleum which leaked and percolated through the ground until it reached plaintiff's spring of water. *Ottawa Gas Light & Coke Co. v. Graham*, 28 Ill. 78, 81 Am. Dec. 263, was a similar case, the offensive substances percolating from the gas works into plaintiff's well. Also *Pottstown Gas Co. v. Murphy*, 39 Pa. 257. Either of two courses could have been followed by the offending defendants in these last three cases. They could improve their works so that the oils would not leak and percolate through the earth to the fouling of the water, or they could remove their works to another locality. Accordingly, damages were assessed in each case for the injury. So of various kinds of dangerous or offensive mills, factories, or other establishments or occupations. If they are conducted in such a manner as to materially and essentially injure adjoining proprietors, the owners may be subject to suits for damages, or, in case the injury is continuous, the business may be enjoined. But in this class of cases either a change in the method of conducting the business, so as to avoid the injury, or else a total removal of the works to another and safer locality, may be had. But the case before us does not belong to this class. Railroads must reach our cities and the marts of trade. They cannot do business elsewhere. Mines and mineral springs, natural gas and oil wells, cannot be removed. They must be operated where they are, or totally abandoned. Where, therefore, a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result notwithstanding such care in the management of the work must be borne without compensation. It is then a case in which the interests and convenience of the individual must give way to the general good.

The demurrer to the second paragraph of the answer in this case admits the facts stated in the answer to be true. We have, then, to consider the statements of the answer as facts, and in the light of these facts examine whether the business of appellants is a lawful business, and whether it is carried on with due care, and so as to do no injury to appellee which can reasonably be avoided. From the answer, then, we learn that said artesian well was dug and its waters caused to flow upon appellants' said lands by an association of the citizens of Martinsville, with the assent and approval of appellee. That the waters from said well flowed into a stream, which, after running through said city, passed over the lands of appellee, and for more than a year so continued to flow, with the acquiescence of appellee. That the only means or way of escape of the water from said well is in and along said branch, which is the only natural outlet for the same; and that the increase of the flow of water in said stream was not materially increased by

the water from said artesian well. That afterwards, by scientific analysis, and by the use of said water for drinking and bathing, it was discovered that the waters were of great medicinal value, and possessed of curative properties in the healing of persons afflicted with rheumatism, neuralgia, paralysis, kidney affections, and various other diseases; that thereupon, for the purpose of utilizing said waters in the cure of persons so sick and afflicted, appellants erected upon their said lots a bathhouse at a cost of \$10,000, in which they have since continued to treat those affected as aforesaid, using said waters. It would seem from these statements that the business in which appellants are engaged is a lawful one. They sunk, or permitted to be sunk, on their own land, an artesian well. This they had a perfect right to do, and, in addition, it would appear that this work was done with the help of many citizens of the town, and with the acquiescence of appellee as well. Such help and acquiescence, however, were not necessary to make the act of sinking the well lawful. It appears that the stream into which the waters flowed naturally from the well is a spring branch, which passes directly through the city before it reaches either the land of appellants or that of appellee. This stream is not only the natural outlet for the drainage of said land, but is the only means or way of escape of said artesian water. But was it lawful to build a sanitarium for the cure of the sick or to bathe in the waters those afflicted with disease? It was certainly lawful to do so, provided the sanitarium is properly conducted and well managed, so as to do no injury to any person which reasonably and with due care can be avoided. This court has already said: "Hospitals and homes for the sick are very far from being nuisances *per se*. They are wise and beneficent charities, to be fostered and encouraged by liberal legislation, and not to be suppressed, or even discouraged, by what may seem to be harsh or restrictive laws." *Bessonies v. Indianapolis*, 71 Ind. 189. But was due care exercised in the construction and management of the sanitarium and in the drainage of the waters therefrom? The answer states "that in erecting said bathhouse, and in using said waters for the healing of persons as aforesaid, and in all that appellants did in the use of said waters and the draining of the same away, appellants used all proper and possible care to avoid injury, damage, or inconvenience to appellee and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid; that after erecting said bathhouse, appellants placed under ground a drain made of porous tile, to convey the surplus water from said artesian well under ground to the branch above appellee's land, because said branch was the only natural and only convenient outlet for said water." It would seem, therefore, that all due care has been exercised in the premises, and that the business is lawful, and that it is conducted in a lawful manner.

It is a question, also, whether appellee, having stood by and assented to and ac-

quiesced in the expenditure of said sum of \$10,000 in the erection of said bathhouse, is not now estopped from seeking to enjoin the continuation of its use. For over a year before this she had also acquiesced in the flowing of the artesian water into the stream, and now she could hardly be ignorant of the purpose for which the sanitarium was to be used. This court has held that, under certain circumstances, by remaining silent, and allowing acts to be done and expense to be incurred, persons may lose their remedy by injunction, and be compelled to assert their rights at law. *Logansport v. Uhl*, 99 Ind. 581, 49 Am. Rep. 109, and authorities there cited. In New Jersey it was held that if a person "has given his consent, either expressly or impliedly, to the erection of expensive works, he cannot afterwards enjoin their operation, though they prove more annoying or injurious than he anticipated." *Hulme v. Shreve*, 4 N. J. Eq. 116. We think the facts stated in the second paragraph of the answer sufficient.

The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings not inconsistent with this opinion.

A petition for rehearing was subsequently filed in response to which on November 11, 1893, Howard, J., on behalf of the court delivered the following opinion:

Counsel for appellee earnestly refer us to the provisions of the statute (Rev. Stat. 1881, § 658), forbidding the reversal of a judgment when it shall appear to the court that the merits of the case have been fairly tried and determined, and contend that the judgment in this case should be allowed to stand, and so prevent further litigation. If, indeed, it should appear to the court that the merits of this case had been fairly tried and determined, it would be our duty to affirm the judgment; but, the trial court having sustained a demurrer to the affirmative matter set up in the answer, we are left unable to say whether appellants were harmed by the ruling. It is only when the allegations of a proper paragraph of pleading may be established by proof under other paragraphs that

the substance will be held harmless. By its ruling on the demurrer in this instance, the court has said that the facts stated in the answer, even if true, would not constitute a good defense to the action. Under this ruling, also, the affirmative paragraph of the answer was, in effect, stricken out, and the appellants had no right to offer proof to sustain its allegations. "Nor," as said in *Wilson v. Monticello*, 85 Ind. 10, "would it be just to a defendant, who has put in a valid plea, to hunt through the evidence to ascertain whether he was or was not injured, for he is entitled to the benefit of the explicit admission made by the demurrer." See also *Pennsylvania Co. v. Poor*, 108 Ind. 558; *Fleetwood v. Brown*, 109 Ind. 567; *Rush v. Thompson*, 112 Ind. 158.

Counsel intimate, further, that it could be shown that the allegations made in the answer are not, in fact, true, and that appellants could have obtained an outlet by constructing a drain to another stream, and so have avoided injury to appellee. In answer to this, "it may be asked," as said in *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. 126, 57 Am. Rep. 445, cited in the opinion, "where, short of the sea, might the sewer be discharged, that the same complaint might not be made?" However that may be, appellee is in no condition to make such contention against the answer. If the averments of the answer were believed to be untrue, they should have been replied to, and the truth of the matter alleged be thus put in issue, and determined. *Gilmore v. McOure*, 133 Ind. 571. Instead of this, however, appellee chose to demur to the answer, and thus to admit the truth of the facts therein pleaded. The facts alleged being thus admitted, the appellants ought to have judgment. We do not wish to be understood as holding that appellants were authorized, by artificial means, to conduct the waters from their spring into the stream upon appellee's land, unless the said waters would have naturally flowed into said stream without such artificial aid; and it was upon this interpretation of the answer that the opinion was written.

The petition for a rehearing is overruled.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Michael MEYER, *Pff. in Err.*,

Sybilla KRAUTER,

(.....N. J.)

*Certain language was used upon the exchange of a horse. Held, under the circumstances, no evidence of a warranty against taking fright at a trolley car.

(June 13, 1894.)

*Headnote by GARRISON, J.

NOTE.—As to implied warranty of fitness of property bought for special purposes, see note to *McQuaid v. Ross* (Mo.) 23 L. R. A. 137. 24 L. R. A.

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover upon an alleged warranty of a horse. *Reversed*.

The facts sufficiently appear in the opinion.

Mr. S. Kalisch for plaintiff in error.

Mr. John A. Miller, for defendant in error:

The jury had left to them matters purely within their province. The intention is a question of fact for the jury. There was no error in refusing the nonsuit, nor in declining to direct a verdict for defendants.

As to effect of representing things sold to be "good," see note to *Crane v. Elder* (Kan.) 15 L. R. A. 795.

Chapman v. Murch, 19 Johns. 290, 10 Am. Dec. 227; *Baldwin v. Shannon*, 48 N. J. L. 596; *Synear v. Wharton*, 48 N. J. L. 97; *Benjamin, Sales*, § 613, and cases.

The intention of the person speaking or acting is for the jury to consider, and the test is, "whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no especial knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter not."

Benjamin, Sales, § 613, and cases; *Wolcott v. Mount*, 88 N. J. L. 496, 499, 20 Am. Rep. 425; *Cook v. Moseley*, 13 Wend. 277.

No particular form of words is necessary to make a warranty.

Oneida Mfg. Soc. v. Lawrence, 4 Cow. 440; *Benjamin, Sales*, p. 566, note K.

Garrison, J., delivered the opinion of the court:

This is an action on the warranty of a horse. The alleged breach was that the horse took fright at a trolley car that came up behind it. There was a verdict for the plaintiff. The question before us is whether there was any evidence of a warranty of which the subsequent behavior of the horse was a breach. In other words, was there proof that the horse was warranted not to take fright in the manner in which he did? The trial court permitted the case to go to the jury with evident hesitancy. Upon a full consideration of the testimony, we think the verdict should have been for the defendant. The case presented is this: There had been transactions in horses between the parties for a number of years. Nine years previously the defendant had sold plaintiff a horse, and had agreed that if it did not suit it could be returned, and "he would try to make it right, and try to find a horse suitable." This horse appears to have been exchanged for another, and that in turn for the horse in suit, and upon each occasion the defendant said: "If it don't suit you bring it back."

With the second horse a receipt had been given in these words: "Said gray horse is sound and kind in single and double harness, and five years old." This was in July, 1891. The gray horse proved to be a kicker, and the plaintiff returned him to the defendant, whereupon the following conversation took place between the vendee and the vendor: "Mr. Meyer, here is your horse. I can't use it." "Why?" he said. I said: "Because he is a kicker. He done so and so." Meyer never said a word, but told one of the boys to take this horse away, and said, "Show him Frank" [the horse in suit]. Well, I went up to the

stable, and he showed me that horse, Frank, and I said: "Frank? Well, if that horse is all right, hitch him up,—put him in the shafts." Mr. Meyer said: "This is your horse, exactly the horse you want; but it costs fifty dollars more." I said, "I won't pay any more." He said: "Well, that is all right, I don't want any more. If you are satisfied, take the horse home." The plaintiff's husband, who gave this testimony, also testified as follows in answer to the question: "Was there anything said about the sort of a horse he was, or the sort of a horse you wanted?" "There was nothing specified what the horse should do, and whether it should please. Mr. Meyer sold one nine years ago to my wife, and he knew she wanted a family horse, and . . . Mr. Meyer agreed that if this horse should not suit us, we could return it, and he would make it right, and try to find a horse suitable."

Giving to this testimony its extreme significance, it might cover vicious conduct, such as that shown by the horse that was brought back and was exchanged for the one in suit. But there is nothing capable of affording an indication that in the sale of any of the horses it was in the minds of the parties to exact or to give a guaranty that the animal should not be frightened by the spectacle of a car drawn without horses, as in the case of a trolley car. It is a matter of common knowledge that horses otherwise well broken and kind show signs of terror at the sight of a moving vehicle drawn by an invisible motor. The court will also take judicial notice of the fact that trolley lines had not superseded horse cars at the time the earliest of these sales were made. Whether they were in anything like general use in the city of Newark in 1891 does not appear from the testimony. As there was no express guaranty of any kind, the jury must find in the language used, and in the circumstances surrounding the last exchange of horses, a warranty broad enough or sufficiently special to cover the case of fright at the sight of a moving trolley car. This, from the considerations above mentioned, could not have been intended as to the earlier purchases, and, as the warranty of the last horse did not go beyond those previously given, there was no evidence from which the jury could find such an intention in the minds of the contracting parties.

As the action is on contract, and not for deceit, mere knowledge of the purpose for which the horse was wanted is without significance; and, in any event, it would be without force unless it was also shown that the vendor knew that the horse was unsuitable for the purpose for which he sold him.

The request that a verdict be directed for the defendant was a proper one, and judgment is ordered accordin

LOUISIANA SUPREME COURT.

SUCCESSION OF Elizabeth BEY.

(46 La. Ann. —.)

*1. When the will is established to have been made by the testator himself, or by a notary at his instance and dictation, in presence and hearing of the subscribing witnesses, unaided by others, and its provisions and expressions are sage and judicious, containing nothing sounding to folly, these facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and impose on those who attack the will the burden of proving insanity at the moment when it was made.

2. Death of the testatrix, by suicide, does not raise a presumption of insanity at date the will was executed. Even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time previous is invalid.

(April 23, 1894.)

APPEAL by the testamentary executor of A Elizabeth Bey from an order of the Civil District Court for the Parish of Orleans refusing probate to an instrument alleged to be the last will and testament of the said Elizabeth. *Reversed.*

The facts are stated in the opinion.

Messrs. Dinkelspiel & Hart, for appellant:

Sanity, or soundness of mind, being the natural condition of mind, insanity is never pre-

*Headnotes by WATKINS, J.

sumed, but must be affirmatively and contradictorily established.

Kingsbury v. Whitaker, 33 La. Ann. 1056, 36 Am. Rep. 278.

The presumption is always in favor of the act; insanity is never presumed.

Chandler v. Barrett, 21 La. Ann. 60, 99 Am. Dec. 701.

If a testament presents a series of wise and judicious dispositions the opus is upon the heirs who attack it to prove unsoundness of mind at the date of its execution.

Ibid.

When the will was made by the testator himself, unaided by others, and its provisions and expressions are sage and judicious containing nothing sounding to folly "it will be assumed, even in case of a person habitually insane, that it was made in a lucid interval; and the burden of proof will be upon those who attack it, to show insanity at the moment when it was made.

Kingsbury v. Whitaker, supra.

The test of the law upon this subject is, whether at the moment of making the will the testator was of sufficiently sound mind to fully understand the nature of the testamentary act and appreciate its effects.

Ibid.

Suicide committed by the testator soon after making his will is not conclusive evidence of his insanity.

Brooks v. Barrett, 7 Pick. 194.

The law draws no inference against the sanity of a person from the mere fact of suicide.

NOTE.—*Suicide as evidence of testamentary incapacity.*

The authorities are uniformly in accord with the above case in holding that suicide alone is not sufficient to invalidate a will although it was made only a short time prior to the suicide.

Suicide soon after making the will is not conclusive evidence of insanity. *Brooks v. Barrett*, 7 Pick. 94.

If there was no evidence of derangement at the time the will was executed, the mere fact of committing suicide a few days afterwards will not invalidate it. *Burrows v. Burrows*, 1 Hag. Eccl. Rep. 109.

In *Chambers v. Queen's Proctor*, 2 Curt. Eccl. Rep. 415, the will of one who just before the execution of it was shown to have been acting under an illusion and who committed suicide was upheld on the ground that at the time the will was executed he was of sane mind.

In the case of *Dalley's Goods*, 2 Swab. & T. 154, 31 L. J. P. 173, 4 L. T. N. S. 477, 7 Jur. N. S. 712, it appears from the argument that suicide will forfeit the goods of decedent to the crown, and some of the older text-writers are referred to, showing conflicting opinions as to the effect upon the will, but that case in accordance with the majority opinion of the text-writers holds that the will is valid,—at least so far as the appointment of the executor is concerned, and that he will be entitled to probate.

Some of the cases, however, seem to give the fact of suicide considerable probative force in determining insanity. Thus it has been said that—

Suicide is not, as an inflexible rule, considered in 24 L. R. A.

itself as evidence of insanity, but it cannot be denied that in most cases it is committed in moments of mental aberration, and is an act which nothing less can otherwise justify. *Godden v. Burke*, 35 La. Ann. 180.

The fact of suicide may be shown in evidence on the question of disposing mind. *Pettitt v. Pettitt*, 4 Humph. 191.

In *Frary v. Gusha*, 59 Vt. 257, in considering the admissibility of evidence of an expert as to what was intimated by suicide, the court says: "While it has been generally held that the fact that one committed suicide is not conclusive evidence of insanity, it has as generally been held that it was evidence tending to show insanity."

In *Re Card's Will*, 28 N. Y. S. R. 523, it is held that suicide may suggest insanity, but the suggestion is greatly enfeebled where the man has reached old age and has no resources of enjoyment and has many trials, and where his will is not unnatural but shows that he understood what he was doing.

Self-destruction is but a fact, together with all the other facts in the case from which the court and jury are to determine the testamentary capacity of the testator, not at the time of committing the suicide but at the time of making the will. *Mo-Elwes v. Ferguson*, 43 Md. 479.

The law makes no inference from suicide. It stands as a fact, together with all the other acts of the decedent's life, together with his character, situation, habits, thoughts, purposes, principles, and affections, as far as these are made known to the jury, from which they are to determine whether or not the decedent, not merely at the time of committing the suicide, but at the time of mak-

Duffeld v. Robeson, 2 Harr. (Del.) 875.

The opinions of medical men are received upon questions of professional skill; but they should state the facts on which such exceptions are based, and the opinions themselves are not conclusive, but must be weighed as other evidence.

Chandler v. Barrett, *supra*.

Messrs. Farrar, Jonas & Kruttschmitt, for appellees, heirs and administrator:

Where general insanity, even with some intervals, is shown, the burden of showing that the particular act in dispute was made during such an interval, is thrown on the party who supposes the validity of the act or contract.

Rev. Civ. Code, art. 1788, § 9.

A lucid interval, under the civil law, is not an apparent tranquillity or a seeming repose. It is not a simple diminution or a remission of the disease, but a temporary cure.

Aubert v. Aubert, 6 La. Ann. 108.

The law recognizes two classes of insane persons—one called *furiosos*, the other *mente captos*; the latter class do not enjoy lucid intervals.

Ibid.

Melancholia is classed as *mente captos*.

Only in cases of *furiosos* or where acts of insanity are rare and intermittent, will apparent wisdom of the testament necessitate proof that decedent was sane at moments of its completion.

Chandler v. Barrett, 21 La. Ann. 58, 97 Am. Dec. 701.

The decision in *Kingsbury v. Whitaker*, 32 La. Ann. 1057, 36 Am. Rep. 278, must be read in the light of the facts therein involved, which explain the expressions therein and give a different effect thereto, than when read by itself.

Mr. Frank Zengel for absent heirs.

ing the will, was of insane mind. *Duffeld v. Robeson*, 2 Harr. (Del.) 882.

And evidence which might not of itself be sufficient to show insanity may become sufficient when coupled with the fact that deceased committed suicide.

Thus where a man was laboring under an insane delusion as to the infidelity of his wife, because of which he shot her and then committed suicide, the court held that there was evidence of his insanity, not only at the time of his death but at the time his will was made, and they set it aside. *Burkhart v. Gladish*, 123 Ind. 337.

In accord with the above decisions is *McAdam v. Walker*, 1 Dow. P. C. 148, in which a man declared his mistress to be his wife in the presence of some of his servants, and a short time afterwards committed suicide, and the question was as to his sanity at the time of the act which was alleged to have constituted the marriage, and it was held that he could not be declared to be insane from the mere fact that he committed suicide.

The weight of the fact of suicide as evidence of insanity has also been considered in cases where the question of testamentary capacity was not involved but the decisions being uniformly in accord upon the question such decisions may throw light upon the question and are therefore inserted here.

In several insurance cases the question has arisen and it has been held that the law does not presume that a person who takes his own life was insane at the time. *Coffey v. Home L. Ins. Co.* 3 Jones & S. 314; *Weed v. Mutual Ben. L. Ins. Co.* 70 N. Y. 561, citing *Grover, Jr.*, in *McClure v. Mutual L. Ins. Co.* 24 L. R. A.

Watkins, J., delivered the opinion of the court:

The legal and presumptive heirs of the deceased resist the probate of her last will, on the ground that she was insane at the time of its execution, and incapable of making a legal and valid testament. The introduction of evidence took a wide range, and at the trial there was judgment in favor of opponents, annulling the will, as having been made by an insane person; and it decreed that, "by reason of her insanity," the testatrix died intestate. The testamentary executor propounded the will for probate, and had an inventory taken, but the probate of the will was resisted by the attorney for absent heirs, who had theretofore been appointed at the suggestion of the public administrator, who had undertaken the administration of the succession, as a vacant estate.

The theory of opponents seems to be that the testatrix was afflicted with that species of insanity known in medical jurisprudence as "melancholia," the effect of which was to render her incapable of transacting the business affairs of everyday life, and, consequently, of making a testamentary disposition; and the fact of her having committed suicide shortly subsequent to the execution of the will is referred to, and relied upon, by opponents, as confirmatory proof of her previous insanity. And it is asserted in the brief, as well as in the oral argument of appellant's counsel,—without denial from the other side,—that the judge below assigned the fact of her suicide as being a weighty, if not a conclusive, proof of her previous want of capacity to make a will. Counsel for the appellees made reference to the proceedings which were inaugurated for the interdiction of the deceased, shortly previous to the making of her will, as a circumstance corroborating her state of confirmed insanity

of New York, 55 N. Y. 561, which case is not fully reported in the place cited. *Terry v. Life Ins. Co.* 1 Dill. 408.

The fact that an insured committed suicide is not of itself evidence of insanity. *Merritt v. Cotton States L. Ins. Co.* 55 Ga. 108.

And in *Fowler v. Mutual L. Ins. Co.* 4 Lane. 203, the court refused to consider suicide proof of insanity.

In *Rex v. Saloway*, 8 Mod. 100, the coroner's inquest found one who had drowned himself in a pond *non compos mentis*, because it is more generally supposed a man in his senses will not be *felo de se*. A motion was made that the inquest be set aside, and the reporter's note says the coroner ought not to presume insanity from the fact of suicide.

In *Rex v. Coronor de —*, Comb. 2, in which a *melius inquitendum* was granted in a case in which the coronor had found a suicide *non compos*, the chief justice says: "It is a vulgar error that none of sane mind can be *felo de se*, and that whosoever kills himself must be *non compos*. For if he be *compos* as to other acts, that sole act shall not denominate him *non compos*."

In *Hales v. Pett*, Plowd. 261, it was determined that one killing himself commits murder.

And in another case upon a trial for murder the defense was insanity, and a desire, intention, and attempt to commit suicide before and at the time of the murder was shown, but the court said the desire to commit suicide did not always evidence insanity. *Reg. v. Barton*, 8 Cox, C. C. 275.

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at that time. To these facts, or incidents, rather, in the life of the unfortunate young woman, all of the testimony on either side seems to have been directed, other evidence being merely corroborative. Arranging these three events in the order of their occurrence, we find from the record that the interdiction suit was filed on the 16th of August, 1893, the will was executed on the 1th of November, 1893, and the suicide occurred on or about the 3d of January, 1893. As it is evident that the test of the sanity of the testatrix at the time of making her will is of the greatest importance,—in fact, is the crucial question in the case,—the terms of the will, and the circumstances surrounding its execution, must be examined at the outset; this court having decided that the test of the law is whether, at the moment of making a will, the testator was of sufficiently sound mind to fully understand the nature of the testamentary act, and appreciate its effect. *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 273. An examination of the will discloses that it was executed in the presence of F. D. Charbonnet, a notary public, and four witnesses, two of whom were practicing lawyers. It appears from the testimony, that on the 18th of November, 1892, during the business hours of the day, the deceased appeared at the notary's office pursuant to a previous agreement to that effect; and that, at the time and place agreed upon, said notary received her last will and testament, in the presence and hearing of the four witnesses, as dictated to him by said testatrix.

A fair synopsis of the testament is as follows, viz.: That the testatrix bequeathed to one of the legatees an improved city lot; to another, a sum of money that was to her credit in a designated homestead association, and a lot of household furniture, etc.; to another, certain shares of stock in the Mechanics' Mutual Insurance Company; to another, certain other shares of stock in the same company; to another, certain other shares of stock in the same company; to another, the family tomb in the St. Vincent de Paul cemetery; and, to another, the vaults in the Odd Fellows' Rest. It was concluded by appointing an executor without bond, denominating him "her good friend." The circumstances under which the testament was executed are detailed by the notary and subscribing witnesses. The notary states that the will was made at his office, during the business hours of the day, and in the immediate presence and hearing of the four witnesses who subscribed their names to the act. That same was executed by him in pursuance of a previous agreement with the testatrix. That, previous to the execution of the will, the deceased had called at his residence to see him, and, learning of his absence, she left with his wife a message for him, to the effect that she desired to see him about making a will. That, accordingly, he visited her, and they had a conversation upon the subject, and agreed upon the price. "She wanted," so the witness states, "the will to be made at her house. I told her what I would charge. She hesitated, and jewed me down. . . . She asked me if I could not do it any cheaper (naming a price); and I told her

if she wanted it at that price to come to my office; and she came a day or two afterwards." This witness further states that, when the deceased came to his office, she stated that it was for the purpose of making her will, and the will "was dictated to [him] by Miss Bey's own lips." That "she appeared to be in a condition such as any ordinary person would that would come to make a will." That, when completed, the will was read to her in the presence and hearing of the witnesses, and she seemed to perfectly understand its provisions, and signed in his presence and that of the subscribing witnesses. That, after its completion, she handed to him the exact amount of the fee agreed on between them some days previously, without any discussion, or suggestion from any one. During the course of the notary's examination, the following occurred with relation to his visit to the residence of the testatrix, viz.: "Q. But you afterwards went to her house? A. Yes. Q. Did she seem to thoroughly understand the object of your visit? A. I asked her if she sent for me; and she said 'Yes.' Q. Did she tell you she wanted a will made? A. Yes." And, with reference to her visit to his office, he said: "Q. If there had been the slightest doubt in your mind as to her sanity, would you have made the will? A. No, sir; I would not. Q. You have known this lady, how long? A. I have known her a long time. I lived in the neighborhood for some time." In speaking of the deceased as she appeared on the occasion of his visit to her, and on that of her visit to his office, he says she was well dressed, and made a nice appearance. Again, he says, in speaking of what transpired at the time the will was executed, the following occurred, viz.: "Q. Did she have any hesitation in declaring her intentions to make a will before you? A. None at all. Q. Did any one help her or aid her in making the disposition? A. No; I would not have written what I did, if anybody had. . . . Q. Did Miss Bey have any papers or memorandum from which she read when dictating the will? A. I never saw any. Q. When you read [the will] aloud to her, and to the witnesses, did she have any paper before her to [enable her] follow the reading? A. I never noticed any." The testimony of this witness is entirely supported, and confirmed throughout, by that of the four subscribing witnesses, they being interrogated and cross-interrogated at length. The testament, dictated as it was by the testatrix, bears internal evidence of judgment, forethought, and careful preparation, as well as accurate knowledge of her property, and the means she possessed at the time of its confection, as well as perfect acquaintance and familiarity with the different persons who are mentioned as legatees. Not only so, but it evidences a sentiment of affectionate interest in, and concern for, the persons she considered her special friends; and she seems to have apportioned her bounty relatively to their nearness to her. And in the dispositions of her will, taken as a whole, she seems to have exercised reasonable care for the mutual interests of all, without making any unreasonable or unusual bequest to any. The only thing preferred against it is that the testatrix instituted friends, instead of collateral

relations, as her heirs. But in the light of the law, she had a recognized right to thus dispose of her property; and her collateral relations resided abroad, and were unknown to her,—no intimacy, or even acquaintance, seeming to have ever existed between them during her lifetime. Certainly, this testament possesses no internal evidence of the insanity of the testatrix at the date of its execution; and the circumstances detailed by the notary and subscribing witnesses negative that idea.

With regard to the interdiction proceedings that were instituted in August, previous to the making of the will in November, nothing need be said beyond the fact that they were but the culmination of a sentiment that prevailed in the community in which she lived, during some months previous, to the effect that she was insane; and the further fact, that they were discontinued, voluntarily, ten days before the will was made, by the parties who inaugurated them, without the assignment of any reason or excuse. Of themselves, they cannot furnish any evidence of insanity, as they did not result in a judgment of interdiction. The person in whose name the interdiction suit was brought states that he had known the deceased for a long time; and that during her father's lifetime she was "a very sensible, fine young lady." He says, "She was of good, sound mind before [he] saw her at Mrs. Roper's." His testimony is that her father died in February or March, 1891, and soon afterwards she removed to the house of one Dr. Keltz, on an invitation of the latter, carrying all of her furniture, clothing, and effects. Another witness states that the deceased was removed from the residence of Dr. Keltz to her own on the 2d of June, 1892, more than two months previous to the institution of the interdiction suit; and, inasmuch as most of the evidence appertaining to her insanity relates to the period of time she resided in Dr. Keltz's house, it is well to look into the circumstances of her arrival at, and her departure from, his house—a period of something more than one year. The witness last referred to states that she had known the deceased about seven years previous to her death, and very intimately. That the deceased and her father lived in a tenement adjoining the one which witness and her husband occupied, there being only a partition wall between them. That, during the seven years of their acquaintance, the greatest intimacy existed between the two families. That she was present when the testatrix's father died, and she describes the death scene and surroundings graphically. That the deceased remained, alone, in her father's house about three weeks, when she moved to the house of Dr. Keltz to live. That, in speaking with witness on the subject, she said: "Well, Dr. Keltz says for me to break up housekeeping, and go to his house, and I will fall into grand society." That witness replied: "All right, Lizzie; just as you wish." That the deceased responded: "Well, I am going to try it; it may be better and it may be worse." Up to this date there is no suggestion of her insanity, the first intimation of it coming from Dr. Keltz, in May, after her installment in his house in March, though it remained undisclosed until the rumor had become flagrant in

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the neighborhood. About six months later she stated to Mrs. Roper that she wished she had broken her neck before she went to Dr. Keltz's house; making many serious complaints, and, among others, that she had been drugged by the doctor, and affirming "that she had not felt well since Dr. Keltz drugged her with those pellets." This lady, Mrs. Roper, states that the first she heard of Miss Bey's alleged insanity was through Mrs. Heitzman, in the spring of 1892. That, about that time, Miss Lizzie Bey sent for her to come to see her, and she went; but that she first met Dr. Keltz, who stated that Miss Bey was "going from bad to worse, was losing her mind." That, on afterwards meeting Miss Bey, she exclaimed: "O, Mrs. Roper, Mrs. Roper, I should have broken my neck the day I first put my foot in this house. . . . I have been taking those pellets; I have been taking too much of those morphine pellets." Soon after this occurrence, the rumor of Miss Bey's insanity was publicly discussed in the vicinity of Dr. Keltz's residence, and it created quite a sensation among the people of her acquaintance. Many people visited Dr. Keltz's house for the purpose of seeing the insane girl, without protest or objection on the part of any member of Dr. Keltz's family. On the contrary, these visits were apparently encouraged by them. A day or two after the occurrence above related, Dr. Keltz called Dr. Castellanos to see Miss Bey professionally; and he held a short interview with her, in the presence of a number of persons who seem to have been attracted there through curiosity, and afterwards gave it as his opinion that she was suffering from melancholia. The day following the interview, Mrs. Roper carried Miss Bey to her house to live, said removal being made at the instance of Dr. Keltz's wife. On the occasion of Miss Bey's removal from the house of Dr. Keltz, he stated to Mrs. Roper "that, if anything happens to her," she must let him know; qualifying the observation by the remark that she might die, or that she might have to be strapped down. All of this occurred in Miss Bey's presence. Dr. Keltz, as a witness, states that he had been the family physician of Miss Bey's father, and had known the family for several years prior to her coming to his house to live; but the first symptoms of insanity developed in May, 1891,—two months after her coming into his house to live. He speaks of having only seen her once after she was removed to Mrs. Roper's, and that was in October, 1892. In speaking of her capacity to make a will, he says: "The disease may have abated but I do not think she was ever after of sound mind." Notwithstanding the fact that Miss Bey was removed from his house on the 2d of June, 1892, and he had not seen her afterwards until October, Dr. Keltz admits that he had first suggested her interdiction, and that the suit was filed at his request in August. Though Dr. Seaman had seen Miss Bey, professionally, after her removal to Mrs. Roper's, and he testified, at the commencement of the trial of the interdiction suit, that she "had been subject to fits of melancholia" for six months previous, yet it is a fact that the interdiction suit was discontinued, at his suggestion mainly, ten days prior to the making

of the will, and subsequent to the delivery of his testimony therein. But it does not appear that Dr. Seaman ever made a careful examination of Miss Bey with a view to making a test of her insanity; and hence the conclusion is that his opinion was based upon casual observation.

Dr. Szabary was called, and interrogated by opponents, as a medical expert on matters of insanity, and he testifies that he visited Miss Bey professionally during the time she was at Mrs. Roper's house, and he states that her disease was nervous prostration. He states that he visited her twice, and found no other sickness except emaciation and prostration. Those two visits were made on June 4 and 8, 1892, respectively; that is, immediately after her removal to the residence of Mrs. Roper on the 2d of June. The doctor states that he questioned her critically as to her condition, and that she answered him simply and satisfactorily, giving no evidences of insanity. The following interrogatories and answers will best discover the true situation, viz.: "Q. During the entire conversation, was there anything which she said that would lead you, as a medical man of standing and reputation, to think that she was out of her mind? A. No, sir. Q. Then, on the other hand, speaking affirmatively, as a medical man, was there, or was there not, sufficient evidence that she was an intelligent person? A. Yes. Q. A person of good common sense? A. Yes. Q. She spoke to you lucidly and plainly? A. She answered all my questions. Q. And answered them sensibly? A. Yes. . . . Q. Did she have the appearance that would indicate, in the slightest degree, that her mind was disordered or disarranged? A. None whatever. . . . Q. Are you prepared to say, doctor, that you made an examination of her mental condition, and that you are prepared to testify as to its condition at that time? A. Yes, sir. Q. As an expert? A. Yes; as the physician in charge of the insane asylum, years ago, I can tell you something about it. . . . Q. If there had been, in your judgment, the slightest indication tending toward insanity in this woman, would you, or not, have noticed it? A. I would. Q. Would it not have come directly under the investigation you were then making? A. Yes. Q. Did you notice anything of the kind? A. There was nothing to be noticed tending to show that she was insane. Q. From her looks, demeanor, and general conduct, was she, or not, in your opinion, as an expert, capable of attending to her business, and attending to the ordinary affairs of life? A. She was." It is a noteworthy fact that this doctor was first called to see Miss Bey the day after she had been removed to Mrs. Roper's, and that Dr. Castellanos was called to see her the day previous to her departure from Dr. Keltz's residence; and, while their statements are diametrically opposed to each other in respect to the lady's mental condition on those two occasions, we are of opinion that the difference is mainly attributable to the radical change in her situation and surroundings, occasioned by her removal from Dr. Keltz's to Mrs. Roper's house. Under the circumstances detailed, we are disposed to attach greater importance to the testimony of Dr. Szabary than

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to that of either of the other medical experts, owing to his special fitness to testify in reference to insanity, and to his having made a most careful examination of the testatrix, and under more favorable conditions.

Outside of the isolated expressions of opinion by Drs. Seaman and Castellanos,—we do not include that of Dr. Keltz,—none of the opponents' leading witnesses testified to facts or circumstances which occurred subsequent to Dr. Szabary's examination of Miss Bey, though all of the executor's witnesses devote almost exclusive attention to such subsequent facts and circumstances. These witnesses state that they had known the deceased for ten or twenty years, and they concur in the opinion that she was not insane, while admitting that she did evince some idiosyncracies while she resided at Dr. Keltz's house. All of them join in the statement that she was generally right-minded and sensible while she lived with Mrs. Roper, and was at all times capable of attending to her own affairs; and it is in proof that she did attend to the payment of her taxes, the collection of her rents, and the management of her investments. And it is also in proof that, on the day the interdiction suit was fixed for trial she was present at the wedding ceremony of Mrs. Roper's son, and participated in the wedding feast. Even Dr. Keltz admitted that Miss Bey had given him promissory notes in liquidation of her board while at his house. A careful examination of the evidence, embracing the dates above given, has satisfied us that Miss Bey was, at the moment of making her will, of sufficiently sound mind to fully understand the nature of the testamentary act, and appreciate its effects; whether the will was made during the existence of a lucid interval, or by a person of absolutely sound mind, it is comparatively unimportant to inquire. The theory of the medical experts favoring the insanity of the testatrix is that she was afflicted with melancholia, which in its nature is incurable, and not susceptible of lucid intervals. Such is the opinion of authors on medical jurisprudence, and it was likewise a precept of Justinian, which has been recognized in the jurisprudence of this court. *Aubert v. Aubert*, 6 La. Ann. 104. But it is our opinion, accepting this theory, that the evidence does not make a case against the testatrix of melancholia; but, conceding for the argument, that the evidence tends in that direction, the clear and indisputable proof of the will having been made at a time when the testatrix was perfectly rational and apparently sane contradicts it, and renders it an unacceptable theory, or proves her sanity altogether. Our code recognizes the validity of a will made by an insane person during the existence of a lucid interval. Rev. Civ. Code, art. 1788, § 9.

The rule in reference to the power and strength of mind necessary to make a will is well stated in *Chanier v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701, thus: "So far as the latter is concerned [the amount of intellect required in a testator], a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator

should have more mental vigor and a more lucid memory than a person who makes a contract." The court states the French jurisprudence to be the same as our own, or, rather, that our jurisprudence has followed the treatises of the French commentators; the rule being that, if the testament presents a series of wise and judicious dispositions, it is for the heirs who attack it to prove the unsoundness of mind at the date of the testament; if, on the contrary, it contains dispositions such as would cause insanity to be presumed, it is for the legatee to prove the sanity of the testator, as against the terms of the testament. *Coin, Delisle, Don. & Test. p. 82.* The legal presumption is always in favor of the sanity of the testator. *3 Droit, C. C. p. 44; 8 Marcade, p. 403; 8 Dur. Dr. Fr. p. 167.* The presumption of sanity does not cease because the testator has experienced some transitory intellectual derangement at a time anterior to the testament. *2 Trop. Don. & Test. p. 58.* The English jurisprudence is the same. *Chambers v. Queen's Proctor, 2 Curt. Eccl. Rep. 415; Ray, Medical Jurisprudence of Insanity, 272; 1 Jarman, Will's, p. 72; Fullack v. Alkinson, 8 Hagg. Eccl. Rep. 527; Halley v. Webster, 21 Me. 461; Clark v. Fisher, 1 Paige, 174, 2 L. ed. 605, 19 Am. Dec. 402; Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 380.*

In the instant case, the circumstances that are recited and relied upon as indicating the mental unsoundness of the testatrix are not nearly so strong or so convincing as those recited in the *Chandler Case*, while those surrounding the testatrix at the time of making the will are very much the same. The opinion in the *Chandler Case* is thus concluded: "If the acts of insanity are rare, and occur at periods distant from each other and from the date of the testament, the testament, if not destitute of good sense, and betraying no folly on its face, will sustain itself [and] be presumed to have been the offspring of a healthy relation and a lucid memory." The will under consideration fulfills all of those requisites completely. The proven acts of folly occurred some months previous to the execution of the will. The will is sensible throughout, and was by the testatrix dictated to the notary, without any memorandum or suggestion from any one, and betrays no folly on its face. The extrinsic evidence of insanity of Bowditch, on which the court decided the case of *Kingsbury v. Whitaker*, 82 La. Ann. 1057, 86 Am. Rep. 278, was in our opinion much stronger than it is in this case against Miss Bey, and yet the judgment annulling the will of Bowditch was reversed, notwithstanding three of the most distinguished physicians of the city of New Orleans testified that the testator was insane, and the Boston physicians testified in the same tenor, and Bowditch had been regularly interdicted by a judgment of court, and he was incarcerated in the asylum. The court said: "When physicians tell us that Bowditch must have been insane on the 24th of June, 1876 [the date on which the will was executed], we turn to the will, written entirely by himself, as shown by the testimony of two witnesses of unimpeached character and veracity, who saw and conversed with him on that day and at that moment, to whom he spoke very rationally of his will, and

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we must conclude that the physicians were mistaken," etc. The will of Miss Bey contained more convincing proof of her sanity, and the notary and four subscribing witnesses testify, most circumstantially, to its dictation by her in a manner clearly indicative of her sanity. In the *Kingsbury Case* the rule of interpretation, as formulated from the consensus of opinion on the subject, is thus stated: "The real question is whether the brain or other physical organ, whatever it may be, which is the medium through which the action of the mind is manifested, is so diseased or impaired as to make it an untrustworthy vehicle for the conveyance of the true wish or will of the testator, unbiassed by any delusion which may be the result of disease. The law fixes the time for the application of this test at the moment when the will is made, and expressly recognizes the capacity of persons subject at times even to complete dementia to make a will in lucid intervals. When the will is established to have been made by the testator himself, unaided by others, and when its provisions and expressions are sage and judicious, containing nothing sounding to folly, the facts establish a presumption, even in the case of a person habitually insane, that it was made during the existence of a lucid interval, and imposes on those who attack the will the burden of proving insanity, at the moment it was made." This rule is more accurately stated than the one formulated in the *Chandler Case*, and we prefer to follow it. But the will of Miss Bey sustains all the requirements of this rule, as well as of the former; for, in our view, her will is good and valid, whether it be interpreted by intrinsic or extrinsic evidence. But if we go further, and look into the evidence surrounding the suicide of the testatrix, it is impossible to conclude that, even if she were confessedly insane at the time, it evidenced her previous insanity at the time of making her will.

The following is the full text of the letter that was found on the person of the deceased after her death, viz.: "New Orleans, Jan. 3d, 1893. Dear Friends: I wish to inform you that I am tired of living, so concluded to take my life. Dr. Keitz and Dr. Castellanos said that I was insane, and going from bad to worst, that I would not live longer than two or three days after they took me out of his house to Mrs. Roper's they would have to strap me down; it is going on to eight months and have not bee strapped yet, and am no more insane than he is. When dead I ask of Dr. Seaman, the Corner, to examine my brain and let the public know what he said about me. I am not sick, and not well; I do not know what ails me; he must have drugged or got some one to harm me, for it is not natural what I have; I cannot live any longer, for I am in misery and cannot help myself. I have my will made some months ago to my friends with the exception of ten shares of stock of the Mutual Ins. Co., to pay my funeral expenses, by my adopted brother Henry Schippmann who is my testator, if there is any left to keep it and give Margaret \$50.00. It is hard for me to take my own life, but I hope God and my friends will forgive me, for I could not live longer, there is not another person in this City that is like I am, the party who did that to me

I hope will have no luck and follow me soon. When my body is found let Mrs. Roper be notified, and let Mr. Duprees, the Undertaker, bury me. Mrs. Roper's address is 675 North Rampart Street. Yours, truly Elizabeth Bey." This letter evidences care and thought; and it corresponds throughout with the whole pitiful story that is detailed by other witnesses. It evinces an exact memory of former transactions, especially the occurrence of the 2d of June, 1892, when, in the presence of a number of persons, she was examined by Dr. Castellanos; and of the 8d of June, when she was removed to Mrs. Roper's house. Its reference to her will is quite significant indeed; and the exactness of her recollection as to the reservation of certain shares of insurance stock for the purpose of defraying the expenses of her funeral is even more remarkable for its tenacity. Instead of this letter, dated on January 8, 1893, proving her insanity, it furnishes additional evidence of the sanity of the deceased.

Dr. Ray makes the following observations on the question of the suicide of a testator as affecting the validity of his will, on the theory that suicide raised a presumption of insanity: "At present," says that author, "the fact of suicide has no other importance than what it derives from its connection with the mental derangement which must be supposed to have given rise to it. Courts would very justly refuse to consider it as *sufficient proof of insanity*, in the absence of other proofs, because it might have been the act of a rational mind, and because, too, if it really had sprung from insanity, the delusion had been so circumscribed as not to have prevented the judgment in regard to testamentary dispositions and other civil acts. The principle adopted in the ecclesiastical courts is that in case of *doubtful sanity*, among which those of suicide must always be ranged, the validity of the individual's testament must be determined *solely by the character of the instrument itself*." (Our italics.) "Here is a difficulty that courts will never be very anxious to encounter, and that is to determine the exact connection of suicide with insanity in point of time, supposing the latter to be admitted. When this act is the only proof we have of mental derangement, we are left without the means of ascertaining where this connection began to exist or to disappear; and, consequently, nothing can be more difficult than to decide within what time, either before or after the suicidal attempt, the individual can be pronounced insane. It not uncommonly happens that a person kills himself, or makes the attempt, shortly after making his will, when the question requires judicial decision whether or not the insanity which led to the fatal act existed at the time of making the will. The practice has usually been, if there were no other evidence of unsound mind, either in his conduct, in his conversation, or in the testamentary dispositions themselves, not to impeach the testator's sanity. In a certain case it was said by Sir John Nicholl that when there was no evidence of insanity at the time of giving instructions for a will, the commission of suicide three days afterwards did not invalidate the will by raising an infer-

ence of previous derangement." *Burrows v. Burrows*, 1 Hagg. Eccl. Rep. 109, *Chief Justice Parker*, also, held that suicide committed "fifteen days after the date of the person's will was not sufficient. In the absence of other evidence, to prove him insane, and thus invalidate the will on account of the difficulty just mentioned." *Brooks v. Barrett*, 7 Pick. 94. "Similar views prevailed in *Duffield v. Robeson*, 2 Harr. (Del.) 383; *Chambers v. Queen's Proctor*, 2 Curt. Eccl. Rep. 415. In both of those cases, suicide occurred the next day after the execution of the will; and, in the latter, delusions were proved to exist on the three [days] next previous to the will." Ray, *Jurisprudence of Insanity*, p. 448, § 460. In the *Brooks Case*, the court maintained the principle that, "if the evidence be doubtful the presumption of the law in favor of sanity is to have its effect." Dr. Ray lays down the general proposition that, even when the suicidal act is unquestionably the effect of insanity, it does not necessarily follow that a will prepared within a short time of it is invalid."—that is to say, if the will be reasonable. Ray, *Medical Jurisprudence of Insanity*, p. 449, § 461. "If the will be a rational act, rationally done, a suicidal act, or attempt, ought not to invalidate it, because the presumption is either that the will was made before the mind became impaired, or that the derangement was of a kind that did not prevent the judgment from using ordinary discretion in the final disposition of property." Id. p. 450, § 452. Other authorities and text-writers might be cited with advantage, but we prefer to rest our conclusions on this branch of the case upon the opinion of Dr. Ray, on account of his exceptionally concise and correct conclusions of law, as well as on account of this court having, in other cases, cited his works with approval. On this branch of the subject, as on the one previously argued, our conclusion is clear to the effect that even conceding for the argument that Miss Bey was insane on the 8d of January, 1893, when she penned the letter that was afterwards found on her person, after her death by suicide, there is nothing to show any causal connection between the act of suicide and the circumstances surrounding the execution of her last will. Altogether, our conclusion is that on the 18th day of November, 1892, when Elizabeth Bey executed her will, she was of sufficiently sound mind to fully understand the nature of the testamentary act she executed, and appreciated its effects, and that, consequently, her will is good and valid. Hence, the judgment appealed from must be annulled and reversed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed; and it is now ordered and decreed that the will of Elizabeth Bey, which was executed on the 18th of November, 1892, be declared legal and valid, and entitled to probate and registry. And it is further ordered and decreed that the aforesaid last will and testament of Elizabeth Bey, deceased, be and the same is ordered to be probated, registered, and executed; and that opponents pay all costs of both courts.

John L. SARRADAT *et al.*, *Appts.*

(46 La. Ann.—)

- *1. City Ordinance 4155, Council Series, is constitutional, legal, and valid.
 2. The city council of New Orleans has the unquestioned authority to designate a place where perishable food may be sold, such as meats, fish, fruits, vegetables, etc., to regulate the police of the market places, to lease the same,

*Headnotes by McENERY, J.

NOTE.—Market regulations restricting sales.
 American cases.

Regulations and ordinances as affecting contracts.

Ordinarily, the relation of a licensee to a market stall with the city is not that created by ordinary contracts, and the party cannot claim the premium back which he has paid for a stall where the market house was torn down some years thereafter. *Woelpper v. Philadelphia*, 38 Pa. 203.

Nor can he claim that his permits cover spaces in a new market house. *People v. Meyer*, 24 N. Y. S. R. 968.

Nor is he entitled to damages in condemnation of the market house. *Strickland v. Pennsylvania R. Co.* 21 L. R. A. 224, 154 Pa. 348.

And a market license is not a contract against competition. *Peck v. Austin*, 22 Tex. 261; *Jacobs v. Levy*, 27 La. Ann. 619; *Rosa v. New Orleans*, 1 La. 126; *Newson v. Galveston*, 7 L. R. A. 797, 76 Tex. 559.

And the license is no guarantee that it will be continued. *Newson v. Galveston*, *supra*.

And a tenant of a market is subject to the exercise by the council of the power to remove the market. *Petz v. Detroit*, 95 Mich. 169; *Cougot v. New Orleans*, 16 La. Ann. 21; *Gall v. Cincinnati*, 18 Ohio St. 563.

And it was said in *Jacksonville v. Ledwith*, 9 L. R. A. 69, 26 Fla. 163, that a legislature may confer the power to establish or change a market.

And for good cause under the power vested in the city council of Charleston, it may revoke a stall license. *Charleston v. Goldsmith*, 2 Speers, L. 423.

And a party who has a license is not deprived of his property without due process of law by an ordinance forbidding private markets within certain limits, as he is not denied the right to sell meat only at a particular place. *Newson v. Galveston*, 7 L. R. A. 797, 76 Tex. 559.

Possession of a stall under an invalid contract with the market master is not that of a trespasser. *San Antonio v. Royal* (Tex.) June 16, 1891.

And an ordinance providing for ejectment of a party occupying a stall without the consent of the collector does not apply to a party who obtains possession under a former collector. *Douat v. Beombay*, 15 La. Ann. 377.

A city cannot recover on an implied contract for use and occupation from one who sells without a license, where there are no stalls for the wholesale market, nor portions of space defined under an ordinance requiring produce dealers to pay a license fee of fifty dollars. *Baltimore v. Grieves*, 20 Wash. L. Rep. 608. See *Newport v. Saunders*, 3 Barn. & Ad. 411, *infra*.

A permit to occupy a market stall does not constitute property right. *Barry v. Kennedy*, 11 Abb. Pr. N. S. 421.

Corporate privileges and grant.

Where a permanent market was incorporated for the sale of hay and straw, the sellers of produce 24 L. R. A.

not for the purpose of revenue solely, but in order to maintain the market buildings, and the police of the same; and for this purpose to authorize the lessee to charge a reasonable sum for stalls and space.

3. Because one raises his own produce, gives him no right to sell it in violation of a city ordinance.

4. The city ordinance regulating the markets must give free access to the markets, and afford proper facilities to persons who desire to sell goods which the ordinance requires to be exposed for sale there. The ordinance must be impartial, making no discriminations, and creating no monopolies, and offering no serious impediments to trade.

may be confined to producers. *Hughes v. Farmers Assn.* 1 Phila. 368.

A city authorized by its charter may grant exclusive privileges to a party erecting a market house with a right to lease stalls. *Palestine v. Barnes*, 50 Tex. 538.

But a charter authorizing a corporation to sell milk does not grant the privilege of violating a city ordinance against the sale of milk without a license. *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 563.

Market regulation and rules.

A city may under the power to regulate markets, adopt such regulations as are necessary for the preservation of public health and conducive to the public interest and use of house. *State v. Garibaldi*, 44 La. Ann. 809; *State v. Leiber*, 11 Iowa, 407; *Philadelphia v. Davis*, 6 Watts & S. 269.

And in *Atlanta v. White*, 33 Ga. 223, it was stated that the city controlling a market house could regulate by contract the use of it to certain hours, but that such regulation and prohibition would not be presumed in a criminal case.

Requiring license for sales in market.

City ordinances under their charters prohibiting sales in the market by non-producers without having obtained a license, have been generally sustained as valid. *Re Nightingale*, 11 Pick. 166; *Com. v. Rice*, 9 Met. 253.

And an ordinance requiring a small fee for stalls, is valid. *Cincinnati v. Buckingham*, 10 Ohio, 257.

So one prohibiting all butchers who are not licensed from cutting meat in public market is valid. *Brooklyn v. Cleves*, Hill & D. Supp. 231.

So an ordinance prohibiting produce wagons standing within the limits of the market at certain times without permission of the superintendent is valid. *Com. v. Brooks*, 109 Mass. 355.

But in *Hughes v. Detroit*, 4 L. R. A. 363, 75 Mich. 574, it was held that the prohibition of a sale except from stands and its confining of farmers to places where there was inadequate accommodation and virtually shutting out sales from market, was void. But subsequent to this case an ordinance which did not prohibit farmers and gardeners from selling their produce through the city but was intended only to prevent such wagons standing until such produce was sold, was held to be a reasonable restriction and within the power given in the charter to prohibit and prevent incumbering or obstructing of the streets. *People v. Keir*, 78 Mich. 98.

Where the charter prohibits the city council from assessing any charge upon persons bringing provisions to the market in wagons, but allows the prevention of huckstering and forestalling, an ordinance cannot include persons as hucksters who are not within the ordinary meaning of that term. *Mays v. Cincinnati*, 1 Ohio St. 233.

And under a power to pass ordinances the penalty of which does not exceed twenty dollars for one offense, an ordinance affixing a fine at from one

APPEAL by defendants from a judgment of the Recorder's Court of New Orleans convicting them of a violation of a city ordinance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Sambola & Ducros for appellants.

Messrs. E. A. O'Sullivan, City Atty., and George W. Flynn, Asst. City Atty., for the State.

McEnery, J., delivered the opinion of the court:

The defendants were convicted and fined for

to five dollars for every hour that a person may keep his wagon in the market without a license, may exceed twenty dollars and is therefore void. *Com. v. Wilkins*, 121 Mass. 356.

Licenses for streets.

Generally all ordinances prohibiting sales upon the streets are strictly construed, and unless clearly authorized by the charter, will be held void as in restraint of trade or unreasonable. *Barling v. West*, 20 Wis. 307, 9 Am. Rep. 576; *Chaddock v. Day*, 4 L. R. A. 309, 75 Mich. 537; *St. Paul v. Traeger*, 25 Minn. 243, 33 Am. Rep. 462; *Milton v. Hoagland*, 3 Pa. Co. Ct. Rep. 238.

And under an ordinance providing that no person shall keep, leave, or deposit truck carts, wagons, or carriages on a street, a push-cart peddler who is licensed cannot be convicted under such ordinance, although he remained with his cart for over half an hour at one place selling his wares. *State v. Bayantia* (Minn.) Oct. 24, 1893.

Under the authority to prohibit sales of vegetables and produce during market hours, a city has no power to prohibit the sale of vegetables and farm products, except by licensed vendors. *State v. St. Paul Municipal Ct.* 32 Minn. 329.

A city may be enjoined for maintaining a market or taking pay therefor in front of private property on the street. *McDonald v. Newark*, 42 N. J. Eq. 126.

But a city may be authorized to pass an ordinance prohibiting sales at auction upon the streets, alleys, and sidewalks and public grounds of the city. *White v. Kent*, 11 Ohio St. 550.

Licenses for shops.

Ordinarily cities have the power to regulate meat shops, and other similar business by rules and regulations and requiring a license therefor, and such ordinances are generally valid. *New Orleans v. Dubarry*, 33 La. Ann. 481, 30 Am. Rep. 273; *Atkins v. Phillips*, 10 L. R. A. 158, 26 Fla. 281; *Kinsley v. Chicago*, 124 Ill. 359; *St. Paul v. Colter*, 12 Minn. 41, 30 Am. Dec. 278; *St. Louis v. Spiegel*, 8 Mo. App. 478; *State v. Dubarry*, 46 La. Ann. 33; *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731.

And a license was required to be obtained by the butchers from the clerk of the county court and the penalty, a double tax collected by distress, was sustained. *State v. Manz*, 6 Coldw. 557.

And a butcher who carried on business in the market, but who went out in the country to purchase his cattle, was required to take out a license. *Sledd v. Com.* 19 Gratt. 813.

But an ordinance requiring a license and in addition that the party shall give a good bond, providing that he will keep a record of sales for the inspection of the police, was invalid as in restraint of trade, and in this case not authorized by any statute. *Long v. Shelby County Taxing Dist.* 7 Lea, 134.

And an ordinance prohibiting the establishment

violating sections 22, 26, 27, of City Ordinance 4155, Council Series, amended by Ordinance 4274, Council Series. They appealed, alleging the unconstitutionality and illegality of the ordinance. In detail the defense is that the provisions of said ordinance are oppressive, and contrary to the enlightened policy of the state, and, "inasmuch as section 27 aforesaid prohibits the sale of their vegetables in any other part of the market or vicinity, and during more than half the business portion of the day,—i. e. between the hours of seven o'clock A. M., and two o'clock P. M. in violation of the first and the two hundred and sixth articles of the state constitution;" that the said sections of the ordinance are arbitrary, and in

of a private meat, fish, or vegetable market, without permission of the city council is void, where it makes no provision for such permission. *State v. Dubarry*, 44 La. Ann. 1117; *State v. Deffes*, 45 La. Ann. 683.

And where the ordinance requires that no person should sell fresh meat at retail, without a license from the common council, at such rates as they should fix, and the discretion given to the council to grant or withhold a license was too sweeping, the ordinance was in restraint of public trade, unreasonable and void. *St. Paul v. Laddier*, 2 Minn. 190, 73 Am. Dec. 89.

And where an ordinance for the sale of fresh meat properly included the sale of game or fish, a subsequent ordinance, requiring a new license for the sale of such articles, was void. *Vosce v. Memphis*, 9 Lea, 294.

And one who complies with all the requirements of police and sanitary ordinances cannot be also required to produce a written consent of the majority of the property owners near a proposed private market. *State v. Garibaldi*, 44 La. Ann. 830.

Prohibition of sales except at market.

An ordinance prohibiting the keeping of a private market within six squares of the public market, where it is authorized by statute, is valid. *State v. Natal*, 39 La. Ann. 430, 41 La. Ann. 587; *Natal v. Louisiana*, 139 U. S. 621, 35 L. ed. 238; *Gossigi v. New Orleans*, 41 La. Ann. 522.

Six squares are computed by starting from around the far side of the street, around the public market, and walking six blocks, the nearest way. *Vidalat v. New Orleans*, 43 La. Ann. 1121.

And a radius of six blocks is not measured in an air line, but by the usual route by which a person would walk. *State v. Schmidt*, 41 La. Ann. 27; *State v. Barthe*, Id. 46.

And the term "squares" is used in the usual way and includes the width of the street also. *State v. Berard*, 40 La. Ann. 172.

And the word "blocks" means the same as squares. *State v. Deffes*, 44 La. Ann. 164; *State v. Natal*, 42 La. Ann. 612.

And the legislature may grant the power to prohibit private markets between twelve squares of the public market. *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563.

Ordinarily, an ordinance prohibiting the sale of meat, poultry, fish, game, and the like, except at a public market, will be sustained as reasonable and in the proper exercise of police power, where it is authorized by a statute or charter. *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Winnabow v. Smart*, 11 Rich. L. 551; *Newson v. Galveston*, 7 L. R. A. 797, 78 Tex. 559; *St. Louis v. Weber*, 44 Mo. 549; *St. Louis v. Jackson*, 25 Mo. 37; *Exparte Canto*, 21 Tex. App. 61, 57 Am. Rep. 609; *Buffalo v. Webster*, 10 Wend. 100; *Brooklyn v. Cleves*, Hill & D. Supp. 231; *Bush v. Seabury*, 8 Johns. 413; *State*

restraint of trade, and in contravention of common as well as private rights; that the provisions of section 22, if they apply to defendants' calling, exclude them from the markets, in violation of their constitutional rights to sell their produce; that the sale of the defendants' vegetables is not a nuisance, and injurious to the public health; that the police force of the city and the market lessees are convinced of the illegality of the ordinance, and have not heretofore attempted to enforce it, and permit the sale of vegetables from gardener's carts at the market on the payment of 25 cents per day. Article 206 of the Constitution has no application to the case. Article 1 has reference to the origin of government from the people, and defines the legitimate objects of government, its

legitimate end being "to protect the citizen in the enjoyment of life, liberty, and property." Its failure to protect the public health would be as great a violation of its "legitimate end" as to entirely depart from its object by the enactment of a law infringing upon the rights of the individual. We may assume, therefore, that the proper regulation of the market is a sanitary measure, being for the purpose of promoting the public health, and a legitimate exercise of the governmental power. In the exercise of this power the legislature has conferred ample and complete power on the city council to establish markets, and to provide for the cleanliness and salubrity of the city. In carrying out this conferred power, the city council has the power "to designate certain

v. Pendergrass, 106 N. C. 664; *Ash v. People*, 11 Mich. 247, 83 Am. Dec. 740; *Radkins v. Robinson*, 53 Ga. 613; *Morano v. New Orleans*, 2 La. 217; *First Municipality of New Orleans v. Devron*, 4 La. Ann. 278; *First Municipality of New Orleans v. Cutting*, Id. 335.

Under an ordinance excepting farmers who sell meat produced on their own farms from a license, a butcher is not within the proviso who fattens sheep on his farm, only as an appendage to the butcher's shop. *Homewood v. Wilmington*, 5 Houst. (Del.) 123; *Rochester v. Pettinger*, 17 Wend. 265.

Generally the power given to establish public markets and confine the sale of commodities within the limits thereof, has been sustained where the same is reasonable and in consideration of public health. *Ex parte Byrd*, 84 Ala. 17; *Henry v. Macon* (Ga.) Feb. 12, 1893.

And where a green grocer had a license before a market place was established, he was required to comply with the market regulations, forbidding the sale and purchase of marketable articles during market hours. *Bowling Green v. Carson*, 10 Bush, 64.

But an ordinance prohibiting the sale of fresh meat outside of the market, and the keeping of a private market for such a purpose, was held unreasonable and void, as an ordinance must be reasonable and not create a monopoly. *Bloomington v. Wahl*, 46 Ill. 489.

And the grant to establish and keep up a market does not of itself give the power to prohibit persons from selling marketable articles elsewhere within market hours. *Bethune v. Hughes*, 23 Ga. 660, 73 Am. Dec. 749.

In *Henry v. Macon*, *supra*, the court in referring to *Bethune v. Hughes*, said, that the legislature knew that they could not confer authority to pass any ordinance which would be wholly prohibitory upon sales elsewhere than in the city market.

And a city ordinance cannot restrain a merchant from selling vegetables at his place of business outside of the market limits, under pretext of regulating markets, as this would be unreasonable and in restraint of trade. *Caldwell v. Alton*, 33 Ill. 416, 85 Am. Dec. 282.

An ordinance prohibiting dairies within certain limits, and giving the council the authority to grant permission, which is not general in its operation among the class it affects, is void. *State v. Mahner*, 43 La. Ann. 496.

An instruction that the city may prohibit the sale of fresh meat, except in market, yet if the jury believe the ordinance is in restraint of trade, and trade in fresh meat is not unlawful, then they should find the defendant not guilty, is contradictory and void. *Peoria v. Calhoun*, 29 Ill. 317.

These cases fully sustain the position taken in *State v. Sarradax*, as to the power of the city 24 L. R. A.

council to confine the sale of perishable goods and provisions to certain places and times, and require a license fee for use of market stall, or a license fee for shop.

Tax.

Under the power to regulate and license a certain business the corporation cannot pass an ordinance which is in effect a revenue measure. *Brooklyn v. Nodine*, 26 Hun, 512; *Kip v. Paterson*, 26 N. J. L. 298; *State v. Rowe*, 72 Md. 548; *Mestayer v. Corrige*, 33 La. Ann. 707; *State v. Blaser*, 36 La. Ann. 363.

And a butcher is not liable to be taxed as a trader. *State v. Yearby*, 32 N. C. 551, 33 Am. Rep. 664.

Nor a manufacturer. *Tippencanoe v. Boercher*, 5 Ohio C. Ct. Rep. 6.

Nor is a farmer liable to be taxed as a dealer where he sells some produce for a neighbor as his agent. *Barton v. Morris*, 10 Phila. 360.

But a grocer may also be compelled to take out a butcher's license. *Eastman v. Jackson*, 10 Lea, 162.

And a butcher may be required to take out a license tax on his carts and horses in the city, although he pays a property tax on the same in the county. *Frummer v. Richmond*, 31 Gratt. 646, 31 Am. Rep. 746.

And a butcher license tax is not invalid in classifying them as meat shop keepers. And in permitting them to deliver goods without further license. *St. Louis v. Freivogel*, 95 Mo. 532.

An act providing that it shall be lawful to make prudential by-laws, relative to public market and taverns, gin shops, and hucksters, does not authorize them to require a huckster's license, where it does not appear necessary, and is used as a means of crippling business. In this case he had paid an excise tax also. *Dunham v. Rochester*, 5 Cow. 462.

Slaughtering.

The right of a city to prohibit the slaughtering of animals in the city limits and confine that business to certain districts, is generally conceded. *Lowenstein v. Myers*, 49 N. Y. S. R. 306; *Chicago v. Rumpff*, 45 Ill. 90, 33 Am. Dec. 196; *Rock Island v. Huesing*, 25 Ill. App. 600; *Villavaso v. Barthol*, 32 La. Ann. 247.

And the slaughter-house statute giving the exclusive privilege for twenty-five years to a company providing for accommodations for the public was sustained. *Slaughter-House Cases*, 33 U. S. 36, 21 L. ed. 394.

But a state cannot make a grant of this character that cannot be modified by a subsequent legislature. *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 748, 28 L. ed. 535.

The question of slaughtering animals more properly belongs to the topic "Nuisances."

spots or places for the sale of certain articles of provisions. In doing so they facilitate the people in the purchase of provisions of first necessity by confining the sale of them to particular places and hours of the day, and they facilitate the inspection of provisions; and by the hire of stalls they raise money to defray the expenses of building market houses, and pay the salaries of officers they appoint to prevent the sale of unsound provisions; and they have an undoubted right to prevent the violation of ordinances they may pass in establishing markets." *Morano v. New Orleans*, 2 La. 217. The doctrine enunciated in this case seems to be universal. Dill. Mun. Corp. § 313; *Parker & W. Public Health & Safety*, par.

806; *State v. Gisch*, 81 La. Ann. 544. The right to establish public markets is accompanied by the right to prevent the establishment of private markets within prescribed limits. *Parker & W. Public Health & Safety*, par. 807; *State v. Gisch*, *supra*; *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 508; *State v. Schmidt*, 41 La. Ann. 27; *State v. Barthe*, 41 La. Ann. 46; *State v. Natal*, 42 La. Ann. 612; *State v. Deffes*, 44 La. Ann. 164. And also to prohibit the peddling about the streets of the city of all perishable food articles. The city council therefore has the unquestioned authority to designate a place where perishable articles of food, such as meat, fish, fruits, and vegetables, may be sold; the market limits; to

English cases.

Market rights and disturbance.

The occupier of a stall in a market is liable to the owner of the market in an action of assumption, without proof of a contract. *Newport v. Bauncera*, 8 Barn. & Ad. 411. See also *Baltimore v. Grieve*, 20 Wash. L. Rep. 13.

Where there is a market grant, an action will lie against others defrauding the owner of the profits of his market by erecting a rival market near. *Mosley v. Chadwick*, 7 Barn. & C. 47 *note*, 8 Dougl. 117.

Under a statute prohibiting a sale, except in a dwelling place or shop, the party was liable for keeping a place in which were sheds for the sale of cattle, in competition to a market. *McHole v. Davies*, L. R. 1 Q. B. Div. 50, 38 L. T. N. S. 501, 45 L. J. M. C. 30.

And a sale on a covered skittle ground is not excepted as though made in a dwelling house or shop. *Hooper v. Kenshole*, L. R. 2 Q. B. Div. 127, 46 L. J. M. C. 160, 36 L. T. N. S. 111, 26 Week. Rep. 368.

But a wooden shed attached to the house supported on wooden posts is within the proviso of such a statute. *Ashworth v. Heyworth*, L. R. 4 Q. B. 316, 38 L. J. M. C. 91, 20 L. T. N. S. 459, 17 Week. Rep. 668, 10 Best & S. 309.

And the shop need not be attached to the dwelling house of the party himself. *Wiltshire v. Willett*, 11 C. B. N. S. 240, 31 L. J. C. P. 8, 4 L. T. N. S. 355, 10 Week. Rep. 44.

The right to protect market privileges against disturbance may be acquired by prescription. *Macclesfield v. Pedley*, 4 Barn. & Ad. 397, 1 Nev. & M. 708; *Mosley v. Walker*, 7 Barn. & C. 40, 9 Dowl. & R. 463; *Penryn v. Best*, L. R. 3 Exch. Div. 282, 45 L. J. Exch. 103, 38 L. T. N. S. 805, 27 Week. Rep. 126; *Pickards v. Bennett*, 2 Dowl. & R. 389.

And the right obtained to hold a market by prescription, in certain places, in the manor, does not create a presumption that it was to be at those places only, but the presumption may exist that it was to be at any convenient place in the manor. *De Rutzen v. Lloyd*, 5 Ad. & El. 456, 6 Nev. & M. 778.

A lease from a borough corporation of premises, with covenants of quiet enjoyment which he uses for the sale of cattle, is liable under the English Market and Fair Act of 1847, and the lease confers no right which the corporation could not interfere with by establishing a market. *Spurling v. Bantoff* [1891] 2 Q. B. 384, 60 L. J. Q. B. 745, 65 L. T. N. S. 564, 40 Week. Rep. 157, 50 J. P. 132, 17 Cox. C. C. 372.

In an action for disturbing market, a change of place does not forfeit plaintiff's rights. *Dorchester v. Ensor*, 39 L. J. Exch. 11, L. R. 4 Exch. 335; *Rex v. Cotterill*, 1 Barn. & Ald. 67.

A person having the right of a stall in front of his shop in the market may maintain an action for disturbance of this right by allowing another on market days near that place. *Ellis v. Bridgnorth*, 24 L. R. A.

15 C. B. N. S. 52, 38 L. J. C. P. 278, 9 Jur. N. S. 1078, 8 L. T. N. S. 668, 12 Week. Rep. 58.

A disturbance of a market may occur where a contract of sale is made upon a day other than that upon which the market was held. *Exeter v. Heaman*, 37 L. T. N. S. 534; *London v. Low*, 40 L. J. Q. B. 144, 42 L. T. N. S. 16, 28 Week. Rep. 250, 44 J. P. 169; *Dorchester v. Ensor*, *supra*; *Elwes v. Payne*, L. R. 12 Ch. Div. 468, 45 L. J. Ch. 581, 41 L. T. N. S. 118, 28 Week. Rep. 234; *Yarde v. Forde*, 1 Lev. 206, 1 Mod. 60, 1 Vent. 98.

Where the accommodation is not inadequate, a rival market will be enjoined. *Goldamid v. Great Eastern R. Co.* 47 L. T. N. S. 727, affirmed L. R. 25 Ch. Div. 510, 53 L. J. Ch. 371, 32 Week. Rep. 841.

But in an action against a person selling out of the market it is a good defense that the accommodations are inadequate. *Re Islington Market Bill*, 3 Clark & F. 513; *Prince v. Lewis*, 5 Barn. & C. 363, 8 Dowl. & R. 121, 2 Car. & P. 66.

And where a corporation has the grant of a market privilege under 37 & 38 Vict., they were not entitled to exclude the public from the covered portions of the market during market hours and devote the building to other purposes. *Edinburgh Magistrates v. Blackie*, L. R. 12 H. L. Cas. 685.

The owner of a market may lose his right of action for disturbance of his market by lapse of time. *Holcroft v. Heel*, 1 Bos. & P. 400.

The mere selling in a private shop, not within the limits of a market place, marketable articles on market days, is not in point of law an injury to the market. *Manchester v. Lyons*, L. R. 22 Ch. Div. 287, 47 L. T. N. S. 677; *Macclesfield v. Chapman*, 12 Mees. & W. 18, 13 L. J. Exch. 32, 7 Jur. 1041.

And where a statute authorized preventing sales and purchases by those who live within the town, or within a mile of it, an attempt to prevent a purchase or sale by any one, is invalid. *Snell v. Belleville*, 30 U. C. Q. B. 61.

Tolls.

A claim of tolls for goods sold in the market is supported by evidence of a right to toll for goods brought into market and there sold. *Moseley v. Pierson*, 4 T. R. 104.

But a baker who lives outside the limits of a borough, who delivers bread to his customers in the borough from a car, three days in the week, is not liable for exposing for sale an article for which tolls may be taken. *White v. Yeovil*, 61 L. J. M. C. 213.

No, a hawkers of an article on which toll is not authorized to be taken, cannot be made liable under the act establishing a market. *Caswell v. Cook*, 11 C. B. N. S. 637, 31 L. J. M. C. 185.

The Prior of Dunstable's Case, 11 Hen. VI., Lib. 7, p. 19 A. is explained in the case of *Macclesfield v. Chapman*, 12 Mees. & W. 18, 13 L. J. Exch. 32, 7 Jur. 1041, to amount only to this, that a person shall not

regulate the police management of the market places; to lease the same, not for the purpose of revenue alone, but in order to maintain the proper police of the markets; the building of market houses, and the repairs of the same; and for this purpose to authorize the lessee to charge a reasonable sum for stall and market room. *Morano v. New Orleans*, 2 La. 217.

The establishment of market places is for public convenience, as well as for the promotion of the cleanliness and health of the city. It is not a permit or license to sell particular articles there, and therefore no special license for selling at that particular place can be exacted. But this does not prohibit the payment for the use of stalls and market room or space, which is exacted for the purpose of keeping up the market places. The market places having for their double purpose the preservation of the public health and the general convenience of the public, all persons who resort to them for the sale of such articles as are required to be sold there must have access to them. The market regulations must be impartial, affording the same rights to all, avoiding the creation of monopolies in one or several persons, and the prohibition of trade in any article, or

an undue restraint of trade. *Parker & W. Public Health & Safety*, par. 306; *Dill. Mnn. Corp.* § 380; *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69; *State v. Mahner*, 43 La. Ann. 497. Section 23 of the ordinance prohibits the peddling of meats, fish, game, fowls, vegetables, and fruits in any of the public markets, or within six blocks of same. Section 26 gives the right to market wagons to back up to the banquettes along the markets, to deliver goods previously sold to occupants of stalls. It prohibits the owners of the wagons from selling their produce from said wagons between the hours of 7 A. M. and 2 P. M. No fees or dues are to be collected from said wagons. Section 27 prohibits the sale of any article on the sidewalk or the public walks in front or in the rear or around any of the markets. The offense of defendants was selling from their wagons while they were backed to the market banquette for the purpose of delivering goods sold to owners of stalls.

Under the terms of the law referred to above, we are unable to see where any of the rights of defendants were infringed. They were dealers in vegetables, which the ordinance required should be sold, if within market lim-

take the benefit of the lord's market and customers attending it and yet fraudulently deprive him of the tolls.

The grant of a fair "*cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi forum pertinentibus*" does not give a right to take tolls. *Egremont v. Saul*, 6 Ad. & El. 924.

And an action of trover will lie against the party taking toll where it should have been taken by dipping with the hand, and toll was taken by sweeping with the hand so as to take more than the regular toll. *Norman v. Bell*, 2 Barn. & Ad. 190.

The owner of a market could not maintain an action for disturbance against a rival market, where the holder of the latter was not liable for tolls. *Abergavenny Imp. Com. v. Straker*, L. R. 42 Ch. Div. 83, 58 L. J. Ch. 717, 60 L. T. N. S. 756, 38 Week. Rep. 158.

And a person who supplies milk to customers upon their doorsteps, in pursuance of a contract, is not liable for evading tolls, where there is no statute forbidding such sale. *Quilligan v. Limerick Market*, L. R. 14 Ir. Rep. 285.

Sales by sample.

A sale by sample of a tollable article has been held to be a disturbance of the market. *London-derry v. McElhinney*, 9 Ir. C. L. Rep. 71.

And a person who left his sheep forty yards from the market, and then went to the market and brought his customers to his sheep, was liable in an action on the case by the lessee of the market. *Bridgland v. Shapter*, 5 Mees. & W. 375.

And in *Tewkesbury v. Bricknell*, 2 Taunt. 120, it was held that an action on the case may be maintained by a market corporation against a seller of corn by sample.

This was based on *Moseley v. Pierson*, 4 T. R. 104, a dictum: "If the plaintiff's demand had arisen on contract of sale by sample, he would have brought a different kind of action, an action for the fraud in not bringing the goods into the market."

But a sale by sample, on a market day, near the market, is not a disturbance unless done with the intent of evading toll. *Brecon v. Edwards*, 1 Hurlst. & C. 51, 6 L. T. N. S. 233, 31 L. J. Exch. 368, 8 Jur. N. S. 461, 24 L. R. A.

Where a judgment was had for toll traverse, for the sale of forty-one quarters of corn, by two sacks pitched in the market, a new trial was granted, because it did not appear but that the sale was two sacks, and it might be inferred that the corn was at a distance. *Vines v. Reading*, 4 Bing. 8, 12 Moore. 201, 1 Younge & J. 4.

And an action on the case by the owners of market cannot be maintained against the purchaser of corn, alleging that he bought the corn in the market by sample. *Tewkesbury v. Diston*, 6 East, 438, 2 Smith, 508.

And a prescription of toll for goods sold by sample in the market and afterwards delivered cannot be maintained. *Hill v. Smith*, 4 Taunt. 520, 10 East, 478.

** License and regulation.*

A by-law and regulation prescribing the places where fresh meat or other articles are sold and requiring a license for the sale of certain articles is valid. *Pigeon v. Montreal Rec. Ct.* 17 Can. Sup. Ct. Rep. 495; *Snell v. Belleville*, 30 U. C. Q. B. 81; *Kelly v. Toronto*, 23 U. C. Q. B. 425.

Where only licensed hawkers may sell at market or at their own houses, others who have no licenses are liable. *Openshaw v. Oakeley*, 60 L. T. N. S. 922, 53 J. P. 740, 18 Cox, C. C. 671.

And a by-law fixing the amount of licenses for hawkers is not void as repugnant to a previous by-law, providing that no license should be required from peddler of a small article that could be carried in a small basket. *Vergo v. Toronto*, 22 Can. Sup. Ct. Rep. 447.

But the by-laws regulating a market must not be so restrictive as to interfere with the frequenters of the same, or it will be void as in restraint of trade as a by-law forbidding throwing the skins of animals on the ground occupied by the market or on a cart on the market ground, without leave from the superintendent. *Worthy v. Nottingham Local Board*, 21 L. T. N. S. 582.

In the preparation of this note cases in regard to "Adulteration of food," "Inspection of food," "Nuisances," "Oleomargarine," and "Occupation and peddler's license,"—have been omitted, although some of the cases included incidentally touch upon the last-named subject. I. T.

its, within market hours. They were not excluded from the sale of their produce in the markets. They could have rented stalls or space, and disposed of their goods within the market inclosure. There was no monopoly created in favor of one or more persons by the prohibition of the sale of certain articles immediately on the banquettes and approaches to the markets. This regulation did not prevent their sale elsewhere, either in the market or beyond the market limits. The market ordinance is not oppressive, as it interferes with no right of the defendants. It is not partial, and does not operate against them exclusively, but is applicable to the vendors of articles or goods required to be sold within certain limits and within certain hours. The conflict about the deficiency of room for the numerous carts or wagons at the market has nothing to do with the case. There is no prosecution for obstructing the approaches to the market by defendants' carts.

The testimony which was rejected also has no place in determining the question at issue. It is immaterial whether the defendants for a long time were permitted by the market lessees and the police to sell from their wagons while backed to the market sidewalks, or that they were required to pay 25 cents for selling from their wagons. The ordinance does not require the payment of such a fee, and the evidence was irrelevant.

Because the defendants raised the produce which they sold, in violation of the ordinance, gave them no special privilege of exemption from its operation. The case of *State v. Blaser*, 36 La. Ann. 863, relied upon by defendants, presents a different state of facts, and different issues were involved, and it therefore is inapplicable here.

Judgment affirmed.

Caroline LEMAN, *Appt.*,

v.

MANHATTAN LIFE INSURANCE CO.

(46 La. Ann.—)

- *1. In an action on a life policy, proofs of loss, stating suicide as the cause of death, are admissible, but not conclusive against the assured.
- *2. In such actions, when the defense is self-destruction, the burden of proof is on the insurer to establish the suicide; and when circumstantial evidence, only, is relied on, the defense fails, unless the circumstances exclude, with reasonable certainty, any hypothesis of death by accident, or by the act of another.
- *3. No such exclusion of any hypothesis save suicide can be predicated on the mere fact of the dead body of the person insured, found with a mortal wound from a gunshot, the discharged pistol wedged on the thumb, "as if thrust in forcibly," and there being other circumstances inconsistent with self-destruction.

(May 7, 1894.)

*Headnotes by MILLER, J.

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in favor of defendant in a proceeding to enforce the payment of the amount alleged to be due under a policy of life insurance, the payment of which was resisted on the ground that decedent committed suicide. *Reversed.*

The facts are stated in the opinion.

Messrs. A. H. Leonard and Morris Marks, for appellant:

Where the dead body of an insured is found under such circumstances and with such injuries that death may have resulted from negligence, accident, homicide, or suicide, the presumption is against suicide as contrary to the general conduct of mankind and a gross moral turpitude.

May, Ins. p. 459, § 325; *Mallory v. Travelers Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Guardian Mut. Ins. Co. v. Hogan*, 80 Ill. 85, 23 Am. Rep. 180; *Travelers Ins. Co. v. McConkey*, 127 U. S. 667, 32 L. ed. 811.

The burden of proof is on an insurance company when it alleges that deceased committed suicide, and the evidence must exclude all other reasonable hypotheses. Circumstantial evidence which does not exclude all other reasonable hypotheses proves nothing.

Phillips v. Louisiana Equitable L. Ins. Co. 26 La. Ann. 405, 21 Am. Rep. 549; *Home Ben. Assn. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160; *Sargent v. Home Ben. Assn.* 85 Fed. Rep. 711; *Penfold v. Universal L. Ins. Co.* 85 N. Y. 817, 39 Am. Rep. 660; *Edwards v. Travelers L. Ins. Co.* 20 Fed. Rep. 662; *Mallory v. Travelers Ins. Co.* *supra*; *Germain v. Brooklyn L. Ins. Co. of New York*, 30 Hun, 535; *Mutual Ben. L. Ins. Co. v. Davies*, 87 Ky. 541; *Accident Ins. Co. of North America v. Bennett*, 90 Tenn. 256; *Dennis v. Union Mutual L. Ins. Co.* 84 Cal. 570; *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198; *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 272; *Travelers Ins. Co. v. McConkey*, *supra*.

The circumstances under which the dead body of the insured was found and the injuries thereon, as shown by the evidence in this cause, are such that death may have resulted from homicide or accident, and all the witnesses examined as experts on behalf of defendant company so concede and state on cross-examination.

The total absence of any evidence even tending to show any reason or cause for suicide, the total absence of any direct evidence tending to show suicide, and the evidence showing that insured was at the time of his death a prosperous merchant, of high standing financially and socially, whose relations with his wife and children were happy and affectionate, and whose mind was to all outward appearances free from anxiety or trouble, are facts inconsistent with the theory of suicide.

Inquests are not admissible as evidence of causes of death.

May, Ins. p. 705, note 4; *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486; *United States L. Ins. Co. v. Kielquist*, 26 Ill. App. 567; *Niblack, Mut. Ben. Soc. p. 210*, § 175; *Mutual L. Ins. Co. v. Schmidt* (Ohio) 8 Am. L. Rep.

NOTE.—As to effect of provision avoiding policy if death results from suicide "sane or insane," see 24 L. R. A.

Billings v. Accident Ins. Co. of North America (Vt.) 17 L. R. A. 89, and note.

629; *Cook v. Standard Life & Acc. Ins. Co.* 84 Mich. 12.

Plaintiff is not estopped by the statements made in "Proofs of Claim." She may show and has shown that such statements were erroneous.

Home Ben. Asso. v. Sargent, 142 U. S. 698, 85 L. ed. 1165; 13 Am. & Eng. Encyclop. Law, p. 657; *Hoffman v. Supreme Council of A. L. of H.* 85 Fed. Rep. 252, "Statement of Physician"; *Bachmeyer v. Mutual Reserve Fund L. Asso.* 89 Wis. 255; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 460, 24 L. ed. 253; *United States L. Ins. Co. v. Kielgast*, and *Ingersoll v. Knights of Golden Rule*, *supra*.

Messrs. Dinkelspiel & Hart, for appellee:

Where, under a policy of insurance, which is a conditional contract of indemnity, proofs of loss must set up, specifically and categorically, the date, circumstances, and cause of death, etc., and proofs of loss are made in conformity with said contract, no suit will be allowed to be instituted, much less legally prosecuted, by attempting to show facts at the time the case is tried, and for the first time, which are substantially at variance with the proofs of loss furnished to the insurer.

Cook, L. Ins. § 119, and authorities there cited; *Campbell v. Charter Oak Fire & Marine Ins. Co.* 10 Allen, 218.

A policy of insurance with a clause in the contract to the effect that if the assured die by his own hand, sane or insane, and in case of death by suicide, the company agrees to pay the net reserve of the amount due on said policy, is reasonable and legal, and the courts will maintain said contracts.

Bigelow v. Berkshire L. Ins. Co. 98 U. S. 284, 23 L. ed. 918; *Pierce v. Travelers L. Ins. Co.* 84 Wis. 389; *De Gogorea v. Knickerbocker L. Ins. Co.* 65 N. Y. 237; *Chapman v. Republic L. Ins. Co.* 6 Biss. 238; *Bois v. Massachusetts L. Ins. Co. Ct. App. for Parish of Orleans*, Opinion No. 284.

On petition for rehearing.

The second clause in the policy is as follows:

"The company does not insure against self destruction in any form, whether insured be sane or insane, but in every such case will pay the legal net reserve on this policy at the time of death."

This clause has been uniformly upheld by all the courts of the country.

Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 551.

The proofs of death became as much a part of the petition as the policy itself; and if the proofs of death are to be ignored and the plaintiff given a judgment which she would not be entitled to if the proofs had not been executed then a case is made out different from the pleadings, and relief given to which the party is not only not entitled, but for which she did not ask.

Every admission upon which a party relies is to be taken as an entirety of the facts which make for his side, with the qualifications which limit, modify, or destroy its effect.

The preliminary proofs presented to an insurance company, in compliance with the condition of its policy of insurance, are admissible as prima facie evidence of the facts stated 24 L. R. A.

therein, against the insured and on behalf of the company.

Mutual Ben. L. Ins. Co. v. Newton, 89 U. S. 23 Wall. 82, 23 L. ed. 793; *Campbell v. Charter Oak Fire & Marine Ins. Co.* 10 Allen, 218.

In setting aside the verdict of the jury, the court has in effect overruled the accepted and uniformly established practice of the ablest courts of the country.

According to Rice on Evidence, p. 791, juries are the judges of the value of evidence, and that able commentator cites a section of the California Code of Civil Procedure, which, according to him, is believed to embody the prevailing sentiment of the American judiciary as regards this subject.

We find there: "The jury, subject to the control of the court in the cases specified in this code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive.

"That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

"That they are not bound to decide in conformity with the declaration of any number of witnesses which do not produce conviction in their minds against a less number, or against a presumption, or other evidence satisfying their minds." Observe, a presumption satisfying their minds may be preferred to any number of witnesses.

"That evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict."

Where a case fairly depends upon the effect or weight of testimony, it should never be withdrawn from the jury unless the testimony be of such a conclusive character as to compel the court, in the exercise of sound judicial discretion, to set aside a verdict rendered in opposition to it, and has declared it could not do so except by usurpation of the functions of the jury.

Rea v. Missouri, 84 U. S. 17 Wall. 532, 21 L. ed. 707; *Phenix Mut. L. Ins. Co. of Hartford, Conn. v. Doster*, 106 U. S. 30, 27 L. ed. 65; and other authorities cited in Rice on Evidence, p. 800.

The proof in cases of this kind must almost necessarily be established by circumstantial evidence. The suicidal act is one ordinarily committed secretly, and to prove it resort must be had to circumstantial evidence.

Rice on Evidence, p. 801, citing *Rea v. Missouri*, *supra*; *Strauss v. Abrahams*, 32 Fed. Rep. 810; *Stoutenburgh v. Hopkins*, 48 N. J. Eq. 577.

The question of suicide in this case, being one of inference, the court should not disturb the verdict of the jury.

Sioux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Redf. Railways; Patterson v. Wallace*, 28 Eng. L. & Eq. 48; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

Miller, J., delivered the opinion of the court:

The plaintiff sues on a policy of insurance issued by the defendant on the life of her husband. The defense is, the husband com-

mitted suicide, and the policy excludes liability in cases of self destruction, sane or insane. The jury found for the defendant, and plaintiff appeals from the judgment on the verdict.

The proof of loss furnished the company, *i. e.* statements of the undertaker, physicians, agent, and friend, as well as the coronor's inquest, stated suicide as the cause of death. The defendant, offering these proofs, insisted plaintiff was bound by them; that is, defendant objected to any testimony contradicting these proofs. The court admitted the testimony. It is to be observed, at the outset, the cause of death, in this case, is purely a matter of opinion. There is no testimony whatever on the subject, except the fact the insured was found dead, from a mortal gunshot wound, with a pistol wedged in the bend of his thumb, and the body so disposed (as will be discussed in another place) as to suggest inferences entirely consistent with accidental death, or, at least, not of a character to exclude every supposition but suicide. I opinions of witnesses as to the cause of death are to be accepted as conclusive, contained in statements which the company exacts under their policy, it is a harsh application of the supposed rule as to the effect of such statements. In our opinion, neither reason nor authority support the contention of the company in this respect. We think the proofs of death were admissible, to be weighed by the jury with other testimony administered. Such was the ruling of the lower court, and we sustain it. See *Home Ben. Assn. v. Sargent*, 142 U. S. 699, 85 L. ed. 1165, *Mutual Ben. L. Ins. Co. v. Newton*, 89 U. S. 22 Wall. 36, 52 L. ed. 795; *Phillips v. Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549.

The authorities, perhaps, do not go the full length here affirmed; but they tend to give the proofs of death admissibility, but certainly do not assert their conclusiveness. The better opinion is, the insurer is not estopped by the proofs. *Bliss, Ins.* § 265.

The discussion on the point that suicide should be regarded as proceeding from insanity, and not bar recovery, even though the policy stipulated no recovery in cases of self-destruction, has been ended, as life policies now, usually, we believe, contain what is known as the "sane or insane clause," *i. e.* no recovery in cases of suicide, sane or insane. That clause is in this policy. But still, notwithstanding the sane or insane clause, to defeat a recovery on this policy, it must appear the deceased took his life. In this case the testimony, mainly, the mute witness of the dead body, is all on which the company relies, besides the statements in the proofs of loss, from those who were possessed of no knowledge, save that afforded by the body of the deceased. There is in the record a mass of what is termed "expert testimony." It, of course, consists of theories as to the cause of the death. The testimony is of those who testify from their experience in the use of firearms; and from physicians, who draw their inferences from the gunshot wound, the position of the body, and other circumstances. The admissibility of such

testimony is, at best, doubtful. *Bliss, Ins.* §§ 378, 379. The court, at last, must determine the basis and potency of all such theories, arising from all the facts. These facts are: The body, found with the wound from a gunshot, causing death; the discharged pistol, wedged, or as if it had been forced, on the thumb of the right hand; the body reclining on the sofa, as of one sleeping; the left arm rested in the breast; the right leg crossed on the left; the head in the usual position of one in repose, and there being no evidence of any convulsive movement, if we correctly translate the technical word "jactitation," used by the physicians who testify. The pistol was tightly wedged" to the thumb, so as to require force to remove it. The question is whether these appearances point to suicide, to the exclusion of any other cause. Why not, with equal potency, to accidental death, or death by the hand of another? Dr. Gray, who was one of those who gave a statement, at first, attributing the death to suicide, seems to have changed his opinion. He testifies: "I was first led to believe it was suicide from the fact that the body was dead, and the pistol was on his hand. But the fact, as stated in a previous answer, viz. that the thumb was thrust through guard of pistol, and tightly wedged, as if it had been thrust in forcibly; the force necessary to draw the thumb from the guard; the absence of any evidence of jactitation, or of having been any, as shown by the precise manner in which the body laid, with arms folded, the legs crossed at ankles, as in a person sleeping,—have raised doubts in my mind as to how his death did occur,—whether by his own hand, or by that of another." The testimony of others professing to be experts as to the handling of firearms, and the causes of this death, reaches a conclusion different from that of Dr. Gray. We think, giving all due effect to the expert testimony, it is at least fair to say it does not establish the suicide. In any consideration of the cause of the death, weight is due to the condition of the deceased in life, *i. e.* his domestic relations, his means, his health, and the state of his mind. It is human experience that the motive or prompting for self-destruction is to be sought, and usually found, in domestic unhappiness, ill health, financial troubles, or insanity. In this case, no such causes are exhibited by the record. The deceased was fortunate in business; had a wife and children to whom he was attached, and with whom he was happy. He parted with them on the day of his death in the best of spirits, and the shock of his death came a few hours later. No physical malady or mental disturbance or financial trouble existed to furnish any cause for taking his life. In this condition of the record, there is no adequate basis to refer the death to the intentional act of the deceased. If there are indications that point to suicide, there are other features not consistent with that theory. When, as in this case, circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evidence must be of a character to exclude, with reasonable certainty, any other cause of death.

If the evidence falls short of this exaction, the suicide is not proved. The fact of death remains, and that casts the liability on the company insuring against death, with the excepted case of self-destruction, which the company fails to establish. This appreciation of the evidence and of the burden of proof constrains us to set aside the verdict and judgment of the lower court in favor of the defendant. *Bliss, Ins.* §§ 366, 367; *Mallory*

v. Travelers Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410; *Phillips v. Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that plaintiff do have and recover from defendant \$5,000, with legal interest, and that appellee pay costs.

Rehearing denied May 30, 1894.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA.

Giuseppa GIANFORTONE

v.

City of NEW ORLEANS.

(61 Fed. Rep. 64)

1. A statute making municipal corporations liable for the destruction "of

NOTE.—Liability for property destroyed by mob.

- I. General doctrine.
- II. Liability.
- III. Grounds of liability.
- IV. Extent of liability; damages.
- V. When not liable.
- VI. Contributory negligence.
- VII. Necessity of notice.
- VIII. State statutes.
- IX. Constitutionality of statutes.
- X. Construction of statutes.
- XI. Power to enforce judgment.
- XII. Right of action over.

I. General doctrine.

The general principle of the law deducible from the decisions and generally admitted is, that municipal corporations are not liable upon any doctrine of common law to an action for damages occasioned to the property of a private individual by the acts of a mob or riotous assemblage.

Municipal corporations are invested by the laws of their incorporation with the duties of imposing and regulating police powers, such duty being held to be administrative and legislative, officers being appointed for the purpose of carrying out the same.

Under these laws of incorporation it has also been held that such corporations are not liable for damage caused by such assemblies.

Corporations are, however, liable in such cases, where the liability is imposed upon them by statute of the legislature of the several states, expressly passed for such purpose, the terms and conditions of which are to be strictly followed.

As a general rule, a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office. To render it liable, it must appear that it expressly authorizes the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation on the subject to which they relate. *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585.

A corporation appoints its officers to office, but does not in that act sanction their official delinquencies, nor render itself liable for their official misconduct. *Ibid.*

Quasi corporations, created by the legislature for purposes of public policy, are subject by the common law to an indictment for the neglect of duties enjoined on them, but are not liable to an action for such neglect unless the action be given by 24 L. R. A.

property" by mobs will not make a city liable for killing of a person by a mob.

2. The protection by a municipal corporation of life being a public governmental duty, a city is not liable for failure in its performance, unless made so by statute.

(April 7, 1894.)

some statute. *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63.

City authorities are not bound to place officers or guards to prevent trespasses and depredations, and are not liable for any destruction unless committed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authorities, and which tumultuous assemblage the civil authorities had reasonable ground to believe would take place for the purpose of destroying the property. *Duffy v. Baltimore*, Taney, C. C. 300.

The omission of a duty imposed upon police officers by law, productive of prejudice to an individual, is not a corporate injury. *Jolly v. Hawesville*, 89 Ky. 279.

No action lies against a corporation for a breach of its duty, by any person specially injured by the breach. The only remedy is by way of information or indictment. *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 35.

Yet the general rule that the common law that a municipal corporation is not liable for the misfeasance or nonfeasance of one of its officers, in respect to a duty specifically imposed by statute on such officer, has no application in a case within the provisions of the Maryland code. *Hagerstown v. Dechert*, 33 Md. 389.

A distinction has been drawn between those powers delegated to a municipal corporation to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the corporate limits, and its adaptation to the purposes of residence and business. The municipality representing the state, as to the first,—discharging duties incumbent upon the state; and representing the pecuniary and proprietary interests of individuals; as to the second, the responsibility for acts done or omitted, in the first, being governed by the same rule of responsibility which applies to like delegations of power; the rules governing the responsibility of individuals being properly applied in the second class. *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375, 377.

Where the liability of the city was based upon the act of incorporation which made it "the duty of the council to regulate the police of the city, preserve the peace, prevent riots, disturbances, and disorderly assemblies," the court held the city not liable for damage done by a riotous mob, the provision referring to the passing of ordinances en-

ACTION to recover damages for the alleged negligence of defendant in permitting the killing of plaintiff's husband by a mob. *Judgment for defendant.*

The facts are stated in the opinion.

Measra, Henry Chiapella and Sambola & Dueros for plaintiff.

Mr. E. A. O'Sullivan, City Atty., for defendant.

forcible by officers appointed for that purpose. *Ibid.*

The same conclusions were reached by the court in *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585; *Hart v. Bridgeport*, 13 Blatchf. 290; *Cheaney v. Hooser*, 9 B. Mon. 380; *Ward v. Louisville*, 16 B. Mon. 184; *Baltimore v. Poultney*, 25 Md. 107; *Cobb v. Portland*, 55 Me. 381, 92 Am. Dec. 598; *Hermits of St. Augustine v. Philadelphia County*, Bright. (Pa.) 116; *Louisiana v. New Orleans*, 109 U. S. 253, 37 L. ed. 936; *Clear Lake Water Works Co. v. Lake County*, 45 Cal. 90.

So they were upheld in *Boylard v. New York*, 1 Sandf. 27, where the action was brought against the city for damages occasioned by the discharge of a cannon in violation of the laws, in a public park during a public meeting sanctioned by the city authorities.

And the case of *Levy v. New York*, 1 Sandf. 465, further illustrates the principles of nonliability at common law of such corporations.

Where the action was for personal injuries received, while aiding the police officers in arresting offenders by virtue of the city ordinance, the statute not providing for the remedy, the question being whether such liability was founded in tort or on contract, the court held there was no claim against the city, the parties being engaged in the service and as representing the authority and dignity of the state, and not merely of the city, the liability of municipal corporations being fixed by statute, and not dependent upon any contingency so uncertain as the conduct of its officers. *Cobb v. Portland*, *supra*.

The question of the city's liability was raised in *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585, there being no provision in the city charter subjecting it to liability for the acts of a mob, and the court stated that it knew of no principle of law that subjected a municipal corporation to a responsibility for the safety of the property within its territorial limits, there being nothing in the nature or design of a municipal corporation that imposed such a duty upon it.

The refusal of relief in *Prather v. Lexington*, *supra*, was placed upon the broad ground that the officers of a city were quasi civil officers of the government, although appointed by the corporation, and were personally liable for their malfeasance or nonfeasance in office, but for neither was the corporation responsible; that the omission of a duty imposed upon them by law, productive of prejudice to an individual, was not a corporate injury; and further that the duty of the officers of the city were prescribed by a statute from which they derived their power. *Ibid.*

II. Liability.

The state legislature has power to impose liabilities upon counties, towns, and cities for damage to property through a riot, and such power extends to directing the time and manner of enforcing such liability. *Hagerstown v. Sehner*, 37 Md. 180.

The liability thus imposed is imperative, where the plaintiff has not been guilty of negligence. *Greer v. New York*, 3 Robt. 406.

Such an action will lie no matter whether the owner of the damaged property is a resident or

Parlange, District Judge, delivered the following opinion:

This is a suit in damages against the city of New Orleans, brought by Giuseppa Gianfortune, widow of Pietro Monasterio, on her own behalf and as natural tutrix of her minor children, issue of her marriage with said Monasterio. The petition alleges that Monasterio, together with other persons, was ar-

not. *Williams v. New Orleans*, 23 La. Ann. 507; *Chadbourne v. New Castle*, 43 N. H. 196.

The act complained of must be that of a mob or riotous assemblage within the meaning of the statute. *Street v. New Orleans*, 32 La. Ann. 577; *Duryea v. New York*, 10 Daly, 300; *Fauvia v. New Orleans*, 20 La. Ann. 410.

Even though the original purposes for which the crowd assembled may be lawful, yet they may unite in unlawful conduct and thus become rioters. *Solomon v. Kingston*, 24 Hun. 532.

In *Darlington v. New York*, 81 N. Y. 164, 88 Am. Dec. 245, it was held that the legislature had the power to render the property of the city liable to such a judgment as a judgment recovered for any other cause of action, the property owned by the corporation being subject to a law-making power of the state vested in the legislature. *Affirming* 28 How. Pr. 352.

The duty and obligation of the state to provide for the safety of property against the destructive violence of mobs of lawless and riotous men is too plain for question, and the supplemental obligation imposed upon cities and counties to provide compensation for the injury or destruction of property, which they could not or would not prevent, is but another application of the same principle of public duty. *Luke v. Brooklyn*, 43 Barb. 54; *Salles v. New York*, 47 Barb. 447.

The liability of cities and towns under the provisions of the Louisiana statute is no longer an open question. *Williams v. New Orleans*, *supra*; *Folsom v. New Orleans*, 23 La. Ann. 536.

Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation by a delegation of power, either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585.

The law allows its officers, in execution of its sentence, only to do what is necessary, and for that reason will not sanction destruction without limit by individuals. *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711.

In *Chestnut Hill & S. P. Turnp. Co. v. Rutter*, 4 Serv. & R. 6, 8 Am. Dec. 675, it was held that a corporation was liable for a tort upon an action of trespass on the case, the declaration showing that the act was unjust and wrongful. *Lyman v. White River Bridge Co.* 2 Ark. 255, 16 Am. Dec. 705, to the same effect.

It must be shown by the evidence that the property was destroyed by a riotous and tumultuous assemblage, too strong to be resisted without the aid of the civil authority. *Duffy v. Baltimore*, Taney, C. C. 200; *Street v. New Orleans*, 32 La. Ann. 577; *Fauvia v. New Orleans*, 20 La. Ann. 410; *Duryea v. New York*, 10 Daly, 300.

So the city authorities must have reasonable grounds for believing that such an assemblage had taken place, or was about to take place. *Duffy v. Baltimore*, *supra*.

And there must also be the want of reasonable diligence to suppress or prevent it. *Ibid.*

The fact that the property destroyed is so delapidated as to be a nuisance and dangerous to enter, is no defense, as it cannot be lawfully abated by a

chief of police of New Orleans, that he was prosecuted, together with said other persons, for said crime, before the criminal district court for the parish of Orleans,—the trial resulting in a mistrial as to Monasterio and two of his coaccused, and in a verdict of acquittal as to six of his coaccused; that immediately after said verdict, a conspiracy was formed by a certain body of men, unknown to the peti-

tioned at naught the findings of the jury in the criminal district court, and with the sole purpose of taking the law into their own hands, and of summarily, and without trial, destroying, by wholesale slaughter, the lives of Monasterio and his coaccused, all of whom were then incarcerated in the parish prison; that, in pursuance of said conspiracy, a mass meeting was called for the next day at Cluy

riotous or tumultuous assemblage, *Ibid.*; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711.

Neither is the inability of the sheriff to do what is necessary to suppress the riot a defense under the New York Act of 1855, any more than his neglect would be a ground for it, the liability being, irrespective of either, imposed for the destruction of property by the riot, whether the sheriff has done all in his power or not to prevent it. *Wolfe v. Richmond* *Supra*, 11 Abb. Pr. 270, 19 How. Pr. 370.

Nor is the fact that the premises were kept for illegal purposes a defense; the proper remedy in such a case being to remove the nuisance and not to destroy the property. *Moody v. Niagara County* *Supra*, 46 Barb. 659, affirmed, 36 N.Y. 297, under title *Ely v. Niagara County* *Supra*; *Blodgett v. Syracuse*, 36 Barb. 626.

In the last-mentioned case the defense rested entirely upon the provision of the third section of the New York Act of 1855, exempting corporations from liability for injury to, or destruction of, private property, when such injury or destruction was occasioned, or in any manner aided, sanctioned, or permitted by the carelessness or negligence of the person whose property was destroyed, and he had not used all reasonable diligence to prevent the injury complained of. *Blodgett v. Syracuse*, *supra*.

Where the mob, originally collected for the lawful purpose of seeing a fire near the plaintiff's premises, subsequently showed signs of a desire to break in upon his premises which he was notified to vacate and to remove his goods, but neglected to do, and put up his shutter and locked the doors when the mob became boisterous, the plaintiff applying to the chief engineer of the fire department for protection, who turned a stream of water upon the crowd, when he was struck with a brick, and retired for a revolver, and the crowd then rushed upon the store, broke into it and carried away the plaintiff's stock,—it was held that although the purposes for which the crowd originally assembled were lawful, yet there was no defense to the action, as they ultimately conducted themselves in an unlawful and wrongful manner, and that notice was not material under the circumstances of the case. *Solomon v. Kingston*, 24 Hun, 562.

The fact that a state, when called upon, renders its assistance and sends a portion of its military to the scene of the riot, does not absolve the corporation from its implied obligation to preserve the peace, nor from its responsibility for a neglect of that duty. *Allegheny County v. Gibson*, 90 Pa. 397, 25 Am. Rep. 670.

In *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711, the defendant's contention was that the acts were justifiable as the property was a nuisance by reason of the noxious exhalation and offensive smell and stench arising from business operations, and that it was contributory negligence in the plaintiff to continue such business. The court held the town liable as such evidence was not admissible, and gave damages for the actual value at the time of its destruction.

The question in such cases is whether the destruction of the property was caused by the owner's illegal or improper conduct, or if not then
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whether he gave the proper notice, in case he had notice himself long enough beforehand to enable him to do so. *Chadbourne v. New Castle*, 48 N. H. 196; *Wing Chung v. Los Angeles*, 47 Cal. 531.

Where the plaintiff had no knowledge of the intention or attempt to destroy the property in question, the proof being merely that of an apprehension, it was held that the plaintiff was entitled to recover. *St. Michael's Church v. Philadelphia County*, *Bright*, (Pa.) 121.

Allowance should, however, be made for any seeming defect in the plaintiff's evidence, caused by the violence of the mob. *Hermits of St. Augustine v. Philadelphia County*, *Bright*, (Pa.) 116.

In *Williams v. New Orleans*, 23 La. Ann. 537, the action was founded upon the Statutes of 1857 as re-enacted in 1899, the defense being that the Act of September, 1868, establishing a metropolitan police district and providing for the government thereof, divested the city of New Orleans of the power and means to maintain order and suppress riots, mobs, and insurrections, but the court held the city liable, the liability of municipal corporations for losses occasioned by riotous conduct within their limits not depending upon the condition of having police forces, the underlying principle on which the Laws of 1855 as re-enacted in 1899 were founded, being that it is the interest of every one that property should be protected, and that it was for the general good that such acts should exist, the metropolitan police, although not under the control of the city authorities, being established for the benefit of the city and the other places within the metropolitan district.

Where the question was one of jurisdiction, the court held in *Atlantic Dock Co. v. Brooklyn*, 2 F. & S., 44, the pier injured being within the limits of the city of Brooklyn, that the boundary of territorial jurisdiction between the counties of New York and Kings was the actual line of low water on the Brooklyn side, whether corresponding with the low-water mark on the east river shore, or varied by the permanent encroachment of docks, piers, and wharfs, or other artificial erections for the purpose of general commerce, and that therefore the city was liable. See also, *Orr v. Brooklyn*, 36 N.Y. 661, *infra*, V., where the city was held not liable for the destruction of a floating elevator.

In *Hagerstown v. Dechert*, 23 Md. 369, the mayor was notified and protection claimed, some hours before the damage, but no steps were taken or used by him and the defendants contended that neither the mayor nor the other authorities of the town, had any lawful power to create or employ a police force, for the purpose of preventing or suppressing riots, or to call on the citizens for aid for that purpose, and that without such power no liability could devolve upon the town under the provisions of the code. The court, without passing upon the construction of the code, held that the acts of an assembly incorporating the town gave full and ample means for the preservation of the peace, and to call on the citizens to aid in the prevention and suppression of a riot; and further that conceding the construction to be corrected, it was clear that

statute, on the main street of the city, which assembly was advertised in the morning newspapers of the city; that in answer to said call a crowd congregated at said place, where inflammatory speeches were made, and that, after the passions of the mob had been aroused, it moved in a body to the parish prison; that some forty or fifty armed men, whose names are unknown to the petitioner, preceded the main body of rioters, and se-

cluded admission inside the walls of the prison by breaking open a rear door of the building, meeting with no resistance from the police authorities; that said armed body took possession of the prison, and shot down and killed Monasterio and ten of his concussed.

The petition further avers that if the mayor and chief of police of the city, upon reading in the newspapers the advertisement of the proposed mass meeting, had taken the proper

the town could not escape liability for want of requisite power in the mayor.

Where, in answer to an application for a mandamus to compel the treasurer to pay a certain claim out of moneys in the treasury, it was contended *inter alia* that neither the judgment nor the claim based thereon was an existing or valid claim against the city or county, the court held that under section 4452 of the Political Code every municipal corporation was responsible for such injuries. *Bank of California v. Shaler* 55 Cal. 322.

Under sections 4453, 4453, 4455, of the same Code, and the Act of April 23, 1858, section 84 of the Consolidation Act, the claim for such damages need not be presented in the first instance to the board of supervisors for their rejection or allowance as in the case of general demands, but a judgment must be first had and the claim as found thereon must be ordered to be paid by the board, unless they appeal, their discretion only extending to the question of appeal. *Ibid.*

Clear Lake Water Works Co. v. Lake County, 45 Cal. 90, to the same effect.

The California Act of March 27, 1858, created a new right and provided a new remedy therefor complete in itself. *Ibid.*

III. Grounds of Liability.

If the city is liable, in its corporate capacity, for the outrage committed by a mob which occasioned the injury, it can only be upon the ground that the existence and lawless intention of the mob were known to the mayor or marshal of the city, and that they neglected or refused to use any means, or to make any efforts, to prevent the perpetration of the unlawful act which could have been prevented by them. *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 565.

The ground of liability is the existence of a mob or riot in the county, and the destruction of the property by such mob, the New York Act of 1855 not placing the responsibility either on the act of the sheriff or upon his neglect to act. *Wolfe v. Richmond* Supra, 11 Abb. Pr. 370, 19 How. Pr. 370; *Duffy v. Baltimore*, Taney C. C. 200; *Street v. New Orleans*, 32 La. Ann. 577, to the same effect.

It must be proved that the premises were injured or the goods removed by such an assembly, and that such mob could not be resisted without assistance of the proper authorities, and also that the city had reason to believe that such a mob assembled, and that the city had ability to prevent the same but was negligent in the exercise of its powers. *Baltimore v. Poultney*, 25 Md. 107; *Wolfe v. Richmond* Supra., *Duffy v. Baltimore*, and *Street v. New Orleans*, supra.

The charging the county with the consequences of the riot is not to punish for the acts or negligence of the sheriff, but for the county's own conduct in permitting such riots to take place. *Wolfe v. Richmond* Supra. supra.

Evidence tending to show the want of reasonable diligence in the suppression of a riot is admissible. *Hagerstown v. Dechert*, 32 Md. 369, wherein the evidence showed the indifference on the part of the mayor, and his sympathy with the spirit and

temper of the mob.

It is not the possibility or probability that a sheriff might arrive in time to save the smallest portion of the plaintiff's property, or to arrest a rioter that should disturb the plaintiff's claim against the county. *Schlelein v. Kings County* Supra, 48 Barb. 490.

The law will not tolerate the spectacle of a great city looking on with indifference while property to the value of millions is being destroyed by a mob. *Allegheny County v. Gibson*, 90 Pa. 597, 35 Am. Rep. 670.

The liability imposed by the statute is irrespective of any liability or neglect on the part of the city. *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605.

IV. Extent of Liability.

Damages.

The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers, the liability of the former for damages being created by a law of the legislature and can be withdrawn or limited at its pleasure. *Louisiana v. New Orleans*, 109 U. S. 225, 27 L. ed. 935.

Where the proof showed that the mob forcibly broke into plaintiff's store, threw a large portion of his stock into the street, which was then in the possession of the rioters, such property being instantly appropriated by the mob and carried away, and the store then set on fire and consumed with such property as was not carried away, the court held the city liable for the property so carried away by the mob, as well as for that destroyed by fire,—the taking and carrying away of the plaintiff's property, coming within the words of the New York statute, rendering the city liable for property "destroyed or injured." *Series v. New York*, 47 Barb. 447.

In such an action the instruction to the jury should direct them to find damages against the corporation, so far as such interruption and injury were the direct and natural results of the attack of the mob. *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605.

The plaintiff need not prove every article destroyed; a general estimate of the plaintiff's damage is sufficient, it being a matter to be considered from necessity, in mass and not in detail. *Hermits of St. Augustine v. Philadelphia County*, Bright. (Pa.) 116.

In such an action, the plaintiff is entitled to recover the full amount of any damage sustained to the property, and the full value of goods taken away forcibly, or surrendered in fear of injury. *Baltimore v. Poultney*, 25 Md. 107; *Series v. New York*, 47 Barb. 447; *Solomon v. Kingston*, 24 Hun, 552; *St. Michael's Church v. Philadelphia County*, Bright. (Pa.) 121; *Hermits of St. Augustine v. Philadelphia County*, supra; *Brightman v. Bristol*, 65 Me. 423, 20 Am. Rep. 711.

Interest may be added at the jury's discretion, running from the time of the destruction of the property. *St. Michael's Church v. Philadelphia County*, supra.

steps for the protection by the police of the parish prison, as well as the lives of the prisoners, the riotous assemblage would not have organized, nor have proceeded to the parish prison, nor have taken the same, and the slaughter would have been prevented; that the parish prison is a massive building, easy to defend by a handful of disciplined policemen, for a time, at least, and until the militia of the state, or other police assist-

ance, could have been summoned; that, from the place where the mass meeting was held, to the parish prison, no police officers were stationed, with instructions to arrest the march of the mob; that the police force at the parish prison was insufficient, imperfectly armed, and demoralized, and yielded easily to the mob; that the safety of the prisoners might have been provided for by their prompt removal to another prison; that the

Or from the commencement of the suit. *Hermits of St. Augustine v. Philadelphia County, supra*. See also, *Green v. New York*, 3 Robt. 405, *ubi infra*; *Folsom v. New Orleans*, 23 La. Ann. 808.

Exemplary damages cannot be given, however, against the county. *Hermits of St. Augustine v. Philadelphia County, supra*.

But the city would not be liable under such a statute, where the destruction of the property could, by ordinary care and prudence, have been avoided. *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 805.

And the fact that the plaintiff published certain articles, which tended to the destruction of his property, is competent evidence upon the question of the exercise of ordinary care and prudence in the publication of such articles, and the mitigation of damages. *Ibid*.

In *Fortunich v. New Orleans*, 14 La. Ann. 115, damage was done to fruit stands of the plaintiffs in the fruit market, the question presented being a bill of exceptions to the defendant's introducing the city ordinance prohibiting the opening of the market-stalls after 12 o'clock M. in evidence as a complete bar to the plaintiff's action. It was held that although such ordinance was no defense, yet it might be given in evidence for the purposes of mitigation of damages.

But the value of such goods cannot be recovered, except it is shown that the plaintiffs, having knowledge of the danger, made reasonable efforts to give notice to the mayor or sheriff of the danger and took no part in the proceedings. *Wing Chung v. Los Angeles*, 47 Cal. 531.

Where the jury gave the plaintiff a verdict for the value of his life interest in the property injured or destroyed, with interest upon such value from the time of final demand upon the comptroller, the court held that if the jury ascertained the value of the plaintiff's interest in any other way than by assessing the value of the buildings, it was doubtful whether the plaintiff could claim interest as a right, but otherwise the verdict was correct. *Greer v. New York*, 3 Robt. 405.

In *Folsom v. New Orleans*, 23 La. Ann. 808, \$15,000, the amount awarded in the court below was the only matter in controversy. The plaintiffs appealed, thinking the amount too small, the city not instituting a careful scrutiny into the matter, calling no witnesses and making no effort to ascertain the amount of the city's liability; the court accepted the uncontradicted testimony of the plaintiff's witnesses, and ordered and decreed judgment against the city for \$20,888 with interest on costs of both suits.

V. When not liable.

If the injury was done upon a sudden excitement, which the civil authorities had not good reason to apprehend, or from a suddenness had not time to prevent, they are not responsible. *Duffy v. Baltimore*, Taney, C. C. 300.

So if diligent inquiry was made after notice that danger was apprehended, and reasonable precautions taken by the city authorities to guard against such riots and tumultuous assemblage. *Ibid*.

Where the damages were occasioned in the first 24 L. R. A.

instance by a few boys pulling down the stoop, their numbers gradually increasing to fifty or sixty, until the house was wrecked and taken down, the court held the city could not be made liable under the act, the property not being destroyed or injured by a mob or riot. *Duryea v. New York*, 10 Daly. 300.

Where the plaintiff's declaration failed to allege the existence of the mob and its intentions known to the city marshal, or the watchman appointed by the charter, or any application to them for assistance, but merely alleged the failure and refusal of the city to suppress the mob, "although well knowing of the same," the declaration was held defective, even in case the liability contended for rested upon the city. *Prather v. Lexington*, 13 B. Mon. 559, 56 Am. Dec. 585.

So where the like facts were alleged and further that notice was given to the mayor that the mob would assemble, and application was made for protection and assistance, the court held the city was not responsible, relying upon *Prather v. Lexington, supra*. *Ward v. Louisville*, 16 B. Mon. 184.

In the above case, the court pointed out that the declaration omitted to state the manner and time of the notice so as to show its sufficiency to enable the officers notified to use with effect the means of defense or protection within their power, or that they could by those means have prevented the injury. *Ward v. Louisville, supra*.

The question, however, was decided upon the broader ground that it was not shown that the city had been guilty of any breach of duty, and that she was not liable for the delinquencies or failure of her executive and ministerial officers, in the preservation of the peace and good order of the city, and that upon general principles of law she was not responsible for injuries committed by lawless individuals or mobs, and was not made responsible by statute; and further that the petition did not show an illegal act done under the city's authority, or that she was guilty as a corporation for a breach of a legal duty. *Ibid*.

In *Orr v. Brooklyn*, 30 N. Y. 661, the question was whether the *locus in quo* of a floating elevator with its machinery at the time of its destruction, was within the boundaries of the county of Kings of which Brooklyn was a portion, and the court held (the elevator lying below low-water mark) that it was outside of the county, and therefore the action did not lie, the waters below low-water mark and the lands under them being expressly declared to be within the limits of the county of New York. See *Atlantic Dook Co. v. Brooklyn*, 3 Keyes, 444, *supra*, II.

Where the action was brought to recover the value of a schooner burnt by a mob, the court held that it was incumbent upon the plaintiff to render his claim against the city certain, and that the Act of 1855 did not apply, there being no evidence to show anything beyond the fact that cotton had been put on the schooner, and that she was taken to the opposite bank of the basin, and it was not proved that she was destroyed by a mob, although while she was burning a number of persons were present. *Fauvia v. New Orleans*, 20 La. Ann. 410.

In *Robinson v. Greenville*, 43 Ohio St. 625, 61 Am.

mayor was not in his office that morning, and could not be found, and that he gave no instructions to the police to disperse the mob; that the mayor is the chief magistrate and chief executive of the city, is at the head of the police force, and is charged with the duty of seeing the laws executed, and of preserving peace and good order within its limits; that the chief of police, next in command to the mayor, was equally derelict in his

duties, and was, together with the mayor, and all of the employes, agents, deputies, and subordinates, guilty of gross carelessness and culpable negligence; and that by reason thereof, and of their failure to perform the duties of their respective offices, the city of New Orleans is liable in damages to the petitioner in the sum of \$10,000, on a cause of action which had accrued to said Monasterio, and which has survived his death, and become

Rep. 857, the action was brought to recover damages for an injury to the person, sustained by reason of the negligence of the corporation's agents, by reason of the discharging of a cannon by an unruly mob. The court held the corporation not liable, even though under section 2340 of the Revised Statutes of Ohio, such a corporation was bound to keep its streets in repair, and cause the same to be kept open and free from nuisance, and the fact that the city had notice of such an illegal act made no difference.

Where the petition alleged that owing to a violation of the duty of the defendant to preserve the peace and prevent riots the plaintiff's premises were destroyed, and contended that the specific duty to prevent riots was imposed by the legislature, it was held that under the Act of 1833, section 6, 34 Ohio Laws, 271, providing that "it shall be their duty to regulate the police of the city, preserve the peace, prevent riots, disturbances, and disorderly assemblages" the duty to prevent riots was in connection with the duty to regulate the police and to preserve the peace, and the city was not liable for the destruction of such property, or for the acts of its officers. *Western College of Homoeopathic Medicine v. Cleveland*, 12 Ohio St. 375.

So where the act was that of a well-organized body of citizens, acting under the orders of and in obedience to a state government ordained by the people and wielding legitimate power, such corporations, exercising the sacred rights of resistance to oppression or usurpation, and the state cannot legally be held liable for damages of property in such a case. *Street v. New Orleans*, 33 La. Ann. 577.

In the above case the city had no control over the police force, which had been removed by the state authorities from its post of legitimate duty and converted into a military brigade, armed, equipped, officered, and marched out to disperse the citizens, who had assembled to protest against the usurping of the state government. *Ibid*.

Where the action was brought by the widow against the city, to recover damages for the killing of her husband by an armed mob, who took him from the jail and hung him, the court held the remedy was by way of action in the name of the personal representative of the deceased, for the benefit of the widow and children if any, or next of kin, and that the action in the present case was improperly brought by the widow. *Atchison v. Twine*, 9 Kan. 360.

In a case where a policy of insurance exempted the company from liability, in case of loss or damage by fire caused by means of an invasion, insurrection, or riot, it was held under the Indiana Revised Statutes 1881, § 1981, which provide that if three or more persons shall do an act in a violent and tumultuous manner, they shall be guilty of a riot, that the invasion in the night-time by force of a dwelling house, and compelling the occupant to vacate under threats of violence and the subsequent burning of the building, by men in disguise, amounted to a riot within the meaning of the policy. *Germania F. Ins. Co. v. Deokard*, 3 Ind. App. 361.

In *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 412, 79 Tex. 32, it was held that a common car-

rier might, by special agreement, stipulate for exemption of liability for loss of property occasioned by a mob or strike, or threatened violence to person or property, it being shown that the carrier diligently endeavored to forward the property over the line of railroad contemplated by the parties, but failed, owing to a railroad strike.

In *Street v. New Orleans*, 33 La. Ann. 577, plaintiffs sued the city for damages to property, by a body of rioters who took violent possession of the state house and other buildings of the city, and used and carried away and destroyed, or otherwise illegally disposed of plaintiff's property, the city denying the claim, urging a special defense that the city government was suspended of its functions after a certain date, and that the then state government, which had the exclusive control of the police, had been subverted, or had ceased to exercise authority, both the state and city governments being at the time under the control of a *de facto* government which rendered the state powerless to hinder the act complained of. The court held that it must be proved that the body of men who took possession of the state house was a mob or riotous assemblage within the meaning of the statute, and, in default thereof, must fall in the action.

VI. Contributory negligence.

Those who seek indemnity against the action of a mob are bound to keep property, likely to be the object of attack, in a position a man of ordinary prudence would keep it if he wished to guard against a mob. *Eastman v. New York*, 5 Robt. 369, 397.

It being a general principle of law that there is no remedy for a loss caused by the plaintiff's want of ordinary care. *Underhill v. Manchester*, 45 N. H. 214.

If the damage would not have happened but for the plaintiff's action, and could have been guarded against by ordinary prudence according to the circumstances of the case, the city will not be liable. *Chadbourn v. New Castle*, 48 N. H. 193.

The party must avoid everything which might aid, sanction, or permit the injury to be done, and where he knows of the intended injury he must use all reasonable diligence to prevent it, and as an evidence thereof must show that he has applied to the sheriff of the county for protection. *Wolfe v. Richmond Supra*, 11 Abb. Pr. 270, 19 How. Pr. 370; *Moody v. Niagara County Supra*, 46 Barb. 659.

Diligence on the part of the owner often preventing the intended injury or destruction, the remedy is made dependent upon such use of diligence. *Moody v. Niagara County Supra*, *supra*.

Where the mob became violent and unruly through drink supplied by the owner of the premises, their violent action in the destruction of the property being caused by his refusal to further supply them, the court held the county not liable, the destruction being caused or aided through the plaintiff's own act in the supplying of such liquor. *Paladino v. Westchester County Supra*, 47 Hun. 397.

So where the act complained of was that of persons who developed into rioters upon the plaintiff's premises, owing to the fact that her servants had freely supplied them with intoxicating liquors.

vested in petitioner, individually and as mother and tutrix.

Act No. 51 of 1855 (now La. Rev. Stat. § 2453) provides that "the different municipal corporations in this state shall be liable for damages done to property by mobs or riotous assemblages in their respective limits." Anterior to the enactment of this statute, there was no liability, under the law of Louisiana, on the part of municipal corporations, for

the destruction of property by mobs. In 1855 a similar statute was enacted in the state of New York, and as late as the year 1865, a vigorous attack was made upon its constitutionality, but its validity was sustained by the court of appeals of that state. See *Darlington v. New York*, 81 N. Y. 164, 88 Am. Dec. 248. This case is of much value and interest, as setting forth the history of the legislation by which municipal corporations

Hill v. Rensselaer County, 119 N. Y. 344; *Underhill v. Manchester*, 45 N. H. 214.

Even though the parties originally assembled with an illegal intent, the plaintiff's servants in charge being blamable. *Hill v. Rensselaer County*, 83 Hun. 194, affirmed, 119 N. Y. 344.

In an action under the New Hampshire statute, the illegal and improper conduct on the part of the owner of the property will not be presumed, and he need not prove the legality or propriety of his conduct. *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 606.

VII. Necessity of notice.

Notice must be given when the party has knowledge of the intention or attempt to destroy his property, or to collect a mob for that purpose, and he is not required to give notice when he has no such knowledge, and cannot be debarred of his remedy though he has not given such notice. *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670. *Donoghue v. Philadelphia County*, 2 Pa. 230, to the same effect.

When a statute directs notice to be given, the rule is that it is to be given in writing. In this respect the statutory differs from the common law. *St. Michael's Church v. Philadelphia County*, *Bright*. (Pa.) 121.

Under the Pennsylvania act, notice is only necessary when the plaintiff has knowledge of the threatened attack, verbal notice being sufficient. *Donoghue v. Philadelphia County*, *supra*.

It must be explicit in designating the property threatened, and in giving information to the proper officer of such threat or intention to attack or destroy. *St. Michael's Church v. Philadelphia County*, *supra*.

The notice must be given by one of the plaintiffs, or by an agent duly authorized for that purpose. *Ibid*.

Where the notice was given by a person who had a mere power of attorney to sell property on behalf of the plaintiff, it was held sufficient within the act. *Donoghue v. Philadelphia County*, *supra*. *Lavery v. Philadelphia County*, 2 Pa. 233, to the same effect.

The fact that threats and complaints were made to the owner is competent evidence with respect to the question of notice. *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 606.

The liability of the city or county is general, applying to all cases whatever, where property may be destroyed by riots or mobs, the comprehensiveness of the section only being restricted so far as to deny the remedy, where the party has been previously apprised and afterwards fails to give the required notice, notice only being required in such cases. *Moody v. Niagara County* *Supra*, 46 Barb. 669.

With regard to the question of notice as contained in the New York statute, it was held that such statute unnecessarily contemplated that sufficient period of time should intervene between the threat or attempt and the execution of the deed, to admit of notice being given. *Ibid*.

Such notice is given to the sheriff, whose duty it is to take all legal means to protect the property,

and in case he neglects or refuses he is made individually liable for the damages sustained. *Schellein v. Kings County* *Supra*, 43 Barb. 490.

It is not intended to restrict the action against the city or county, but such as shall give notice to the sheriff if such notice be useless for the purpose of protection. *Ibid*.

The notice is not for the purpose of fixing any liability on the sheriff. *Wolfe v. Richmond* *Supra*, 11 Abb. Pr. 270, 19 How. Pr. 870.

The object of the notice required by the New York Act of 1855 being for the purpose of protection only. *Schellein v. Kings County* *Supra*, *supra*.

The fact that the plaintiff was detained in custody and held during the destruction of the property is sufficient to excuse notice. *Moody v. Niagara County* *Supra*, *supra*.

In *Ely v. Niagara County* *Supra*, 36 N. Y. 297, where the action was brought under the New York Act of 1855, the plaintiff not notifying the sheriff of any authority or attempt to destroy the property, or of any facts brought to his knowledge, not being apprised of any threat or attempt until the destruction had considerably progressed, and when apprised being unlawfully taken into custody by the police and others acting in concert with the rioters, and confined until after the destruction was complete, the court held that under the circumstances notice was not required.

When the crowd becomes a riot, there is no time to give notice. *Solomon v. Kingston*, 24 Hun, 562.

In *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670, the property destroyed belonged to an inhabitant of another state and was being transported over the line of the railroad company whose employes were on a strike, notice not being required under the act, and the company was held liable, even though it was beyond its power to suppress the riot, the state militia having been called out and the mob fired upon prior to the destruction.

If, upon knowledge had of an intention to attack or destroy the property of the plaintiffs, or to collect a mob for the purpose, the plaintiffs did not give notice to the sheriff of the county, or the alderman or constable of the ward, sufficient time intervening to enable them to do so, they cannot recover under the Pennsylvania act. *St. Michael's Church v. Philadelphia County*, *Bright*. (Pa.) 121.

Where under such circumstances the civil authorities could and would have afforded protection if notified, no recovery can be had because it is his own fault or negligence that the injury was not prevented. *Newberry v. New York*, 1 Sweeny, 369.

If he deserted the store in order to give notice, the crowd becoming threatening, it might be urged that he had not used reasonable diligence to prevent the damage. *Solomon v. Kingston*, *supra*. See this case *supra*, II.

Upon this question see further, the provisions of the state statutes, *infra*, VIII., and also X.

VIII. State statutes.

By section 4452 of the Political Code of California (Hittell's ed. vol. 1, p. 573), every municipal corporation is responsible for injuries to real or personal

are made liable for the destruction of property by mobs. Judge Dillon, in his work on *Municipal Corporations* (vol. 2, § 959), says: "Public or municipal corporations are under no common-law liability to pay for the property of individuals destroyed by mobs or riotous assemblages, but in such case the legislature may constitutionally give a remedy." Numerous cases cited.

"At common law . . . a municipal

corporation is not liable for the destruction of property by a riotous assemblage of persons, or for the neglect of its officers in not preserving the peace, and preventing such destruction. But this doctrine is not in accordance with sound public policy, and has been changed by statute in many of the states. . . . But the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded

property situated within its corporate limits, done or caused by mobs or riots.

By section 4453, such action must be tried in the county in which the property injured is situated.

And by section 4454, must be commenced within one year after the act is committed.

By section 4455, on the certificate of the presiding officer, or the clerk of the court, the board of supervisors of the county or the legislative authority of the city, must by ordinance direct and cause a warrant for payment to issue on the general fund, and the same must be paid in regular order and be collected by a tax upon the property, within a period of not more than three years.

But by section 4456, if the plaintiff in such action has been guilty of negligence, he cannot recover.

By section 5436 of McClain's Annotated Code of Iowa, vol. 2, 1888, p. 1574, the person or persons committing the acts specified therein are answerable to any person injured, to the full amount of the damage by him sustained in an action at law.

Section 5 of the General Statutes of Kentucky, ed. 1888, chap. 1, p. 163, provides, if within any city of this commonwealth, any church, convent, or chapel, dwelling house, or house so used or designed for the transaction of lawful business, or deposit of property, any ship, ship yard, boat, or vessel, or any railroad, or property of any kind belonging to any railroad company, or any articles of personal property, shall be injured or destroyed, or if any property therein or thereon shall be taken away or injured, by any riots or tumultuous assemblage of people, the full amount of the damage so done shall be recoverable by the sufferer or sufferers, by action against said city: Provided, the authorities thereby have the ability, of themselves or with the aid of their own citizens, to prevent such damage: And provided also, that no person shall maintain such action who shall have unlawfully contributed, by word or deed, towards exciting or inflaming such tumult, or who shall have failed to do what he reasonably could towards preventing, allaying, or suppressing it: And further provided, that no liability shall be incurred by such city, unless the authorities thereof shall have had notice or good reason to believe that such riot or tumultuous assemblage was about to take place, or, having taken place, shall have had notice of the same in time to prevent said injury or destruction, either by their own force, or by the aid of the citizens of such city.

In *Jolly v. Hawesville*, 89 Ky. 279, the action was brought under the General Statutes of Kentucky, chap. 1, § 5, to recover for death caused by a gun shot, in a disorderly proceeding and riotous assembly, and the court held such action would not lie as the provisions of the statute restricted it, in express terms, to cases of injury to property, and that it was not meant to authorize a recovery against a city for personal injuries resulting from the malfeasance or neglect of police officers.

By section 2453 of the Revised Statutes of Louisiana, ed. 1876, p. 639, it is provided that the different municipal corporations in this state shall be liable for the damages done to property by mobs or riotous assemblages in their respective limits.

Under article 82, section 1, of the Public General 24 L. R. A.

Laws of Maryland, ed. 1898, p. 1268, the full amount of the damage done by any riotous or tumultuous assemblage of people shall be recovered by the sufferer or sufferers, by suit at law against the county, town, or city within whose jurisdiction such riot or tumult occurred.

But by section 2 of the same article, the authorities must have had good reasons to believe that such riot or tumultuous assemblage was about to take place, or having taken place, must have had notice of the same in time to prevent said injury or destruction, either by its own police or with the aid of the citizens, the intention of the article being that such liability shall not rest upon such county, town, or city, unless the authorities having notice have also the ability of themselves or with other citizens to prevent such injury, such action to be prosecuted within three years from the time of its accrual.

Under section 8 of the same, indemnity is not to be recovered where it is satisfactorily proved that the city authorities and citizens, when called upon by civil authorities, have used reasonable diligence and all the powers entrusted to them for the prevention of such riot.

By section 13 of chapter 40 of the Public Statutes of New Hampshire, ed. 1891, p. 145, if persons unlawfully, riotously, and tumultuously assembled, injure or destroy any property, real or personal, the town within the limits of which such property is situate, is liable to the owner thereof for the damages suffered by him in an action on the case.

But by section 14 of the same, no person shall be entitled to the benefits of the foregoing provisions, if it shall appear that the destruction of his property was caused by his illegal or improper conduct, or unless it appears that he, upon knowledge had of the intention or attempt to destroy his property, or to collect a mob for such purpose, sufficient time intervening, gave notice thereof to the mayor, one of the select men, or a justice of the peace of the town in which the property was situated.

And by section 15 of the same, any town which shall pay any sum of money under the provisions of the thirteenth section may recover the same in an action on the case against any one, or against two or more jointly, who shall have injured or destroyed the property.

Where the action was brought against the city to recover damages for property destroyed by a mob, under the New Hampshire statute it was held the city was liable even though it could not have prevented the mischief and the rioters were not citizens. *Palmer v. Concord*, 48 N. H. 211, 97 Am. Dec. 605.

In the above case, the plaintiff was a publisher and printer of the "Democrat Standard," and his printing materials were destroyed by a mob, consisting of privates in the First New Hampshire Regiment Volunteers, the defendants justifying their actions by producing in evidence a copy of the paper containing certain articles libeling the regiment. *Ibid*.

In *Carey v. Paterson*, 47 N. J. L. 365, it was held that a married woman was not barred of her action for an injury to property by a riot, by an elapse of three months after the injury and before suit, she

on contract. It is a statutory right, and may be given or taken away at pleasure." Numerous cases cited. 15 Am. & Eng. Encyclop. Law, *verbis*, *Municipal Corporations*, p. 1183.

It is therefore clear that, in the absence of a statute, municipal corporations are not liable for the destruction of property by mobs, and I have stated that as late as 1865 the constitutionality of such a statute was

contested. Even now, in a number of states, there are no statutes imposing the liability upon municipal corporations.

Act No. 51 of 1855 cannot be construed so as to include within its purview loss of life caused by a mob. It was not until the enactment of Act No. 71 of 1884 that an action could be maintained in this state for damages caused by the death of a human being. See *Vredenburg Case*, 88 La. Ann. 627; *Van Am-*

being within the saving clause of the section relating to riots which confers the right of action.

By section 5 of the New Jersey Act, Revised Statutes, 778, each city of the state is made liable to actions on the part of the owners of real estate or personal property for an injury to such property, or its destruction by riot. Such right is limited by the 9th section of the statute, which provides, no action shall be maintained against any city or county, under the provisions of this act, unless the same shall be brought within three months after the loss or injury.

By chapter 423 of the New York Laws of 1855, it is provided, § 1, whenever any building or other real or personal property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for the damages sustained by reason thereof.

And by section 2, such action or actions may be brought and conducted in the same manner that other actions may be prosecuted by law, and the judgment may be appealed from in the manner now provided for appeals in civil actions; and whenever any final judgment shall be recovered against any such city or county, in any such action, the treasurer of said city or county shall, upon the production and filing in his office a certified copy of the judgment roll, pay the amount of such judgment to the party or parties entitled thereto, and charge the amount thus paid to said city or county.

And by section 3, the right to recovery is barred, if the person or corporation whose property has been destroyed or injured in any way aided, sanctioned, or permitted such destruction through carelessness or negligence, or unless they have used all reasonable diligence to prevent such damage and notified the mayor of the city, or the sheriff of the county immediately after being apprised of any threat or attempt to destroy or injure the property, upon receipt of which notice such officers shall take all legal means to protect the property, or in case of refusal or neglect shall be liable for such damages, the party aggrieved to be entitled to elect to bring his action against the officer instead of the city or county.

Section 4 of the Act entitles the party aggrieved to maintain an action against each and every person engaged or participating in such riot.

Section 5 bars the right of action after three months from the time of the loss.

The Pennsylvania Act of May 31, 1841 (Pamphlet Laws, 416), provides that "in all cases where any dwelling house or other building or property, real or personal, has been or shall be destroyed within the county of Philadelphia in consequence of any mob or riot, it shall be lawful for the person or persons interested in and owning such property to bring suit against said county where said property was situated and being, for the recovery of such damages as he or they shall sustain by reason of the destruction thereof, and the amount which shall be recovered in such action shall be paid out of the county treasury, on warrants drawn by the commissioners thereof, who are hereby required to

draw the same as soon as said damages are finally fixed and ascertained.

Under section 3 of the same statute, no person or persons shall be entitled to the benefits of this act, if it shall appear that the destruction of his or their property was caused by his or their illegal or improper conduct, nor unless it be made to appear that he or they, upon the knowledge had of the intention or attempt to destroy his or their property, or to collect a mob for such purpose, and sufficient time intervening, gave notice thereof to a constable, alderman, or justice of the peace of the ward, borough, or township in which said property may be situated, or to the sheriff of the said county, and it shall be the duty of the said sheriff, alderman, constable, or justice of the peace, upon receipt of such notice, to take all legal means to protect said property so attacked or threatened.

In an action brought under the above statute the court held that a property owner could not be in default for want of notice, unless he had knowledge of an intention on the part of the mob to destroy his property, and that there was sufficient time intervening to give the notice contemplated by the act, the object of the notice being to inform the proper officer so that he might protect the property. *Allegheny County v. Gibson*, 90 Pa. 307, 35 Am. Rep. 670.

Constitutionality of statutes.

State statutes imposing such liability upon cities and towns and municipal corporations have been declared constitutional and valid both by judicial decision and by legislative action.

The Pennsylvania Act of 1841 was held wise, just, and beneficial, because it was the duty of the county to protect its citizens against lawless violence, and if it did not do this, to make reparation for the injury which they might sustain from such violence. *Hermits of St. Augustine v. Philadelphia County*, Bright, (Pa.) 116.

Where the proceedings were brought under the thirteenth section of the Pennsylvania Act of June 16th, 1836, giving judgments for injuries, for the destruction of property in the city and county of Philadelphia by mobs or riots, upon the owner's application to the court of sessions or the mayor's court, the act was held constitutional and valid. *Re Pennsylvania Hall*, 5 Pa. 204.

In *Luke v. Brooklyn*, 43 Barb. 54, the court held the New York Act of 1855 constitutional.

So in *Moody v. Niagara County Suprs.*, 46 Barb. 659, wherein it was contended that the New York Act was in conflict with the provision of the constitution of the state, declaring that "the county shall never be made responsible for the acts of the sheriff," the court held the act complained of, namely, the destruction of the plaintiff's property, was the act of a mob of riotous assemblage, and not the act or default of the sheriff, and therefore the statute was not in conflict with the constitutional provision.

So in *Davidson v. New York*, 27 How. Pr. 343; *Darlington v. New York*, 31 N. Y. 164, 86 Am. Dec. 248; *Stiles v. New York*, 47 Barb. 447; *Atlantic Dock Co. v. Brooklyn*, 3 Keyes, 444; *Eastman v. New York*, 5 Robt. 389; *Orr v. Brooklyn*, 36 N. Y.

bury Case, 37 La. Ann. 651, 55 Am. Rep. 517. As, prior to 1855, municipal corporations were not liable for any acts of violence committed by a mob, it is beyond question that, when the legislature enacted Act No. 51 of 1855,—our jurisprudence then being that no damages could be had for the loss of a human life,—it was not contemplated that such an action as this one could be maintained under that statute. By no possible intendment

could "property," in 1855, have been made to include a human life. As, neither by the common law nor by the civil law, could the price of a human life be sued for, and as it has been shown that there is no implied liability on the part of municipal corporations for any acts of violence committed by mobs, it is perfectly clear that if the legislature, in 1855, had intended to innovate in both respects, it would have done so clearly. It is

651, and *Wolfe v. Richmond* *Supra*. 11 Abb. Pr. 270, the statute was upheld.

In *Hagerstown v. Sehner*, 37 Md. 180, the Maryland Statute of 1837, chapter 223, was approved of upon this ground.

So in Louisiana. *Folsom v. New Orleans*, 28 La. Ann. 293, and *Williams v. New Orleans*, 28 La. Ann. 507.

The New York Act of 1855 "for compensating parties whose property might be destroyed in consequence of mobs and riots" does not require the presence of three fifths of the members of the legislature elected to each house to make it law, and therefore is not contrary to the constitution. *Darlington v. New York*, *supra*.

The policy upon which the act is framed, is to make good at the public expense the loss of those who, without their own fault, were injured in their property by acts of lawless violence, which it is the duty of the government to prevent, and principally to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. *Ibid*.

Such act is not unconstitutional by reason of the suits instituted thereunder, resulting in requiring contribution from taxpayers, as tending to the taking of property without due process of law, or as taking private property for public use without just compensation. *Ibid*.

In *Eastman v. New York*, 5 Robt. 369, 307, the court stated that the case of *Baldwin v. New York*, 42 Barb. 549, had not so disturbed the foundation of the decision in *Darlington v. New York*, *supra*, as to the constitutionality of the Laws of 1855, as to render it still an open question, and that if the statute was imperative rendering all property of the corporation subject to the call of the state for any purpose, and the judgment and execution thereon are the mode of reaching it, the court was bound by that decision, and was not at liberty to doubt its correctness.

X. Construction of statutes.

The obligation to make indemnity, created by the statute, has no more element of contract in it, because merged in the judgments of the court, than it had previously. *Louisiana v. New Orleans*. 109 U. S. 233, 27 L. ed. 936.

The term "contract" is used in the constitution in its ordinary sense, and signifying the agreement of two or more minds after consideration proceeding from one to the other, to do or not to do certain acts, mutual assent to its terms being of its very essence. *Ibid*.

Mobs and riots are generally of sudden growth, and the legislature could hardly have intended to make the remedy of the property owner practically dependent upon the want of secrecy or celerity on the part of the rioters. *Palmer v. Concord*, 48 N. H. 211, 37 Am. Dec. 606.

The statute must receive a reasonable and liberal construction. *Schelllein v. Kings County* *Supra*. 43 Barb. 490.

Riots being the mischief to be remedied, the statute is to be construed, if possible, so as to suppress 24 L. R. A.

the mischief. *Underhill v. Manchester*, 45 N. H. 214.

With respect to the meaning of the words "illegal or improper conduct" as used in the New Hampshire statute, the court gave to both words a distinct and usual meaning, "illegal" meaning something "unlawful, contrary to law," and "improper" meaning "that which is not suitable, unfit, not suited to the character, time, or place." *Chadbourn v. New Castle*, 45 N. H. 196.

Under the New York Statute of 1855, there is no room for any question of diligence on the part of city authorities. The act is imperative if the party damaged has not been guilty of any lack of diligence on his part, and the failure of a bailee to notify the mayor or sheriff cannot be imputed to the plaintiff, such notification being a matter of good faith, there being no evidence that the plaintiff knew of any threats of, or expected a riot. *Eastman v. New York*, 5 Robt. 369, 307.

The Statute of 1855, chapter 420, has been construed to mean that if a mob be maddened by the voluntary or unlawful act of the claimant, and the destruction of his property is the result, a good defense exists in favor of the city or county when sued for the injury occasioned by the mob, and that no action would be supported if such destruction or injury was occasioned or in any manner aided, sanctioned, or permitted by the carelessness or negligence of such person. *Paladino v. Westchester County* *Supra*. 47 Hun, 337.

In *Barley v. New York*, 47 Barb. 447, it was held that the plain object of the act was to compensate such persons as should, without their fault, suffer loss by the violence of mobs.

The carrying away of the plaintiff's property by the rioters is a sufficient destruction as to the plaintiff, within the meaning of the statute, plunder as well as wanton injury usually being the work of rioters. *Solomon v. Kingston*, 24 Hun, 362.

The words "shall have used" as appearing in the statute refer to the time and to some event, and were meant to refer to previous precautions and are used to prevent destruction by a mob. *Eastman v. New York*, *supra*.

With respect to the words "carelessness or negligence" as used in the New York statutes, it has been stated that the intention of the legislature was that a party should not recover if he omitted some obvious precaution, or failed to exercise some care, which, if it had been timely bestowed in view of a threatened or apprehended danger, would have averted the calamity. *Blodgett v. Syracuse*, 36 Barb. 525.

The object and purpose of the statute, in requiring notice of any threat or attempt by a mob to injure property, was for the purpose of protection to the property, to enable the constituted civil or military authorities to meet and overcome rioters, illegal force by organized legal force, and afford protection to persons and property. *Newberry v. New York*, 1 Sweeny, 399.

The proper construction of the act should be, that if a party is informed of a threat, and has time to notify the sheriff so that he can take legal means to protect the property, the omission

also evident that Act No. 51 of 1855 does not provide for terror, or other injuries to feelings, caused by mobs. That act being the only statute of Louisiana mentioning municipal corporations by name with regard to torts, if the city of New Orleans can be held liable in this action, it must be by force of some other law. I understand that all claim that this action is based on the Act of 1855 is abandoned, but it is urged that the city of New Orleans may be held liable under article 2315, Civ. Code La., as amended by Act 71 of 1884, which article now reads: "Every act, whatever, of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband, or wife, as the case may be."

In support of the view that the city is liable in the present action under article 2315, Civ. Code, the plaintiff cites cases which she contends were decided against the city by virtue of that article of the Code. The par-

ticular cases cited may have been decided under article 2315 of the Civil Code, or they may have been based upon the implied liability of municipal corporations. However this may be, those cases bear but incidentally on the matters in hand.

The solution of the question presented in this case is free from difficulty, and results from making a clear distinction between those powers and duties of the city of New Orleans which are private, and those which are public or governmental. It must be borne in mind that the city of New Orleans is not sued in this action for any commission or omission by its corporate capacity. It is being sued for the neglect of duties of its officers.

"So far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws made to enforce the general policy of the state,—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters, they should stand as does sovereignty, whose agents they are,—subject to be sued only when the state.

to give the notice is fatal. *Sobliellein v. Kings County Supra*, 43 Barb. 490.

The provisions of the statute relating to notice do not apply in cases where the city has full notice of the tumultuous assemblage by reason of its existence. *Newberry v. New York*, *supra*.

The intention of the legislature could not be made to depend upon an act, which it would be otherwise utterly impossible for the plaintiff to perform. *Moody v. Niagara County Supra*, 43 Barb. 659.

The word "nuisance" as used in the Ohio Revised Statutes, section 2640, has been held not to include an assemblage of persons engaged in an unlawful act, such as the firing of cannon in the public street, but it refers to something which is fixed or permanent, as a defect in the street. *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 637.

If the act is rigidly enforced when violated, the effects will be found beneficial. *Hermits of St. Augustine v. Philadelphia County*, Bright. (Pa.) 116.

The words "person or persons" as used in the Pennsylvania Act of May 31, 1841, include municipal corporations. *Kensington Comrs. v. Philadelphia County*, 13 Pa. 76; *Hermits of St. Augustine v. Philadelphia County*, *supra*; *St. Michael's Church v. Philadelphia County*, Bright. (Pa.) 121.

With respect to the meaning of the words "illegal or improper conduct" the court declared that, what is improper conduct within the meaning of the act was a nice question, and that the assertion of a legal right, in a legal manner, in pursuit of a legal business, was not such "improper conduct" as would prevent the owner of property destroyed by a mob from recovering its value under the statute. *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670.

XI. Power to enforce judgment.

The plaintiff has no such vested right in the taxing power of the city as to render its diminution by the state to a degree affecting the present collecting of judgments and deprivation of property 34 L. R. A.

within the 14th Amendment of the Constitution, as a party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it. *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 998.

Although the taxing power of the city may be limited so as to prevent the receipt of such funds by means of taxation, yet its state legislature may from proper appeal make other provisions for their satisfaction. *Ibid*.

Judgments though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages are property, in the sense that they are capable of ownership and may have a pecuniary value; yet it was held that the plaintiff could not be said to be deprived of such property, so long as the judgments continued an existing liability against the city. *Ibid*.

In *Louisiana v. New Orleans*, *supra*, a mandamus was applied for to compel the city to levy taxes and pay a judgment recovered against it, in an action for damages occasioned through riot. The court refused the writ, the state having changed the taxing power of the city, the power to tax being so limited as to postpone the payment of the judgments.

XII. Right of action over.

By section 15 of the New Hampshire Act, chap. 34 of the General Statutes, the town paying moneys under the provisions of the twelfth section of the same act may recover the same in an action on the case of the rioters. The meaning of such section is, that in an action on the case there is a remedy which by section 12 it is liable to indemnify. The remedy depends upon its discharging its liability by payment, and not upon the form of the action by which its liability is enforced.

In *Chadbourne v. New Castle*, 48 N. H. 196, it was held that all who were engaged in the mob were responsible for the damage done, the statute making the town or city liable in certain cases also.

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by statute, declares they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed,—powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damages to which an individual or private corporation exercising the same powers, for purposes essentially private would be liable." 15 Am. & Eng. Encyclop. Law, *verbis* *Municipal Corporations*, p. 1141, and cases there cited.

"Neither the federal nor the state governments are liable for the unauthorized torts of their officers, and municipal corporations are entitled to the same exemptions when they act in a governmental or political capacity. But when the tort is committed in the performance of some municipal or corporate duty, which is private in its nature, the corporation is liable." 19 Am. & Eng. Encyclop. Law, *verbis* *Public Officers*, p. 514, and cases there cited.

Field, in his work on the Law of Damages (page 88, § 37), says: "The true doctrine is that the powers conferred in the sections we have been considering are of a legislative and governmental nature, for a defective execution of which the city cannot be held liable. In discharging these legislative functions, the city acts as a quasi sovereign, and is not responsible for a neglect or nonperformance of its officials or agents."

Citations from authoritative text-writers to the same effect as the citations just made could be multiplied.

Nearly forty years ago, in the case of *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218, the supreme court of Louisiana distinctly recognized the doctrine that a municipal corporation, in the exercise of power which it possesses for public purposes, and which it holds as part of the country, enjoys the exemption of government from responsibility for its own acts, and for the acts of its officers deriving their authority from the sovereign power. The suit was against the city of New Orleans for the value of a slave wrongfully and unjustifiably killed by the police of the city, in a police raid ordered by the chief of police. The supreme court, in reversing the judgment against the city rendered by the lower court, said: "The judgment we think erroneous, and the error results from a failure . . . to make the proper distinction between the liability of a municipal corporation for acts of its officers in the exercise of powers which it possesses for public purposes, and which it holds as part of the government of the country, and those which are conferred upon it for private purposes. Within the sphere of the former, it enjoys the exemption of government from responsibility for its own acts, and the acts of its officers deriving their authority from the sovereign power [citing authorities], whereas in the latter it is answerable for the acts of those who are, in law, its agents [citing authorities]. . . . The inquiry which is next presented is whether the powers under which the officers of the municipality acted were conferred for public purposes. If so,

it follows that the city is not liable for the acts of its officers, even though illegal, or of such a character as to subject the officers themselves to liability. The Act of 1805, incorporating the city of New Orleans, provides 'for the appointment of a mayor, recorder, and aldermen, and such subordinate officers, for preserving the peace and well ordering the affairs of the city, as the council shall direct.' Through all the changes of city government, this power has been continued, and the conclusion, therefore, that these powers are governmental, is strengthened by the fact that the Constitutions of 1845 and 1852 both provide that 'the citizens of the city of New Orleans shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the modes of election which shall be provided by the legislature. . . . art. 128. So that the right of regulating the police of the city of New Orleans does not rest alone upon legislative permission, but is authorized by the constitution itself. Under these sanctions, watchmen are appointed as a necessary branch of the police of the city. *Their duties are the preservation of public order and tranquillity, and the city, in appointing them, exercised a governmental function, conferred upon it, in its public or municipal character, for public purposes, exclusively, and is not, therefore, liable for the acts of its officers.*" Underlining mine.

It is to be specially noted that article 128 of the Constitution of 1845, just cited, or its equivalent, has existed in all the constitutions of this state, except that of 1868. *State v. Shakespeare*, 41 La. Ann. 178. The present constitution and the city charter of 1882 both recognize the city of New Orleans as one of the political divisions of the state, and as one of the arms of sovereignty for governmental purposes. In the case of *Egerton v. Municipality No. 3 of New Orleans*, 1 La. Ann. 487, decided in 1846, the supreme court of Louisiana said: "It is a remarkable fact . . . that the people of Louisiana, in convention assembled, have twice considered the local government of this great metropolis as too important to be placed among those subordinate institutions, and have recognized the city of New Orleans, in its corporate capacity, as entitled to peculiar political powers and privileges. The right of the citizens of the city of New Orleans to appoint the several public officers necessary for the administration of the police of said city, . . . and the right of the officers thus appointed to be commissioned as justices of the peace, and to exercise such criminal jurisdiction for the punishment of minor crimes as the legislature may vest in them, are secured and rendered permanent by article 128 of the State Constitution. Those political franchises stand upon the same ground as any other constitutional power, and the city of New Orleans and its officers are, for purposes of police and good order, and for the punishment of minor crimes and offenses, permanent functionaries of the government." Underlining mine.

This decision was rendered under the régime of the Constitution of 1845, and the

recognition of the local government of the city of New Orleans in the Constitutions of 1812 and of 1845, which the supreme court said was "a remarkable fact," has since then been emphasized by further recognition in the Constitutions of 1852 and 1879.

The *Stewart Case*, above cited, was affirmed, and its doctrine declared conclusive, in the case of *Lewis v. New Orleans*, 12 La. Ann. 190, which was a suit against the city of New Orleans for the value of a slave incarcerated in the parish prison by order of his master, the city deriving a pecuniary profit by receiving from the master a *per diem* compensation for keeping the slave incarcerated. The slave having fallen sick, and the master not being notified, the action was brought to recover the slave's value from the city, because of the gross negligence of the jailer, the agent of the city. It will be noticed that the legal aspects of the *Lewis Case* are almost identical with the present case. The supreme court held: "The power of the corporation to erect a police jail, to employ officers to superintend it, and to pass ordinances for its government, *is, in effect, a power granted for public purposes, and not private benefit or advantage.* . . . According to the principle announced in *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218, and which we consider conclusive upon the subject, the city cannot be held liable in the present case for the nonfeasance or misfeasance of the officers of the police jail." Underlining mine.

The doctrine of the *Stewart Case* was again affirmed in *Bennett v. New Orleans*, 14 La. Ann. 120. The court said: "It seems to be a well-settled principle in respect to the jurisdiction of courts that the sovereign cannot be sued without his consent. . . . This exemption from liability on the part of the government has been extended to municipal corporations vested with, and exercising portions of, the sovereign power, for the reason that such corporations are considered the representatives of the government, and that their exemption from suit is necessary to make the prerogative available to the government itself;" citing *Stewart Case* and other cases.

In the case of *Hove v. New Orleans*, 13 La. Ann. 482, the supreme court of Louisiana said: "The city is no general warrantor against the acts of individuals. . . . Its police may be applied to for the purpose of preventing injuries, *but if such police err in their judgment, or if injuries are occasioned because they are inefficient in the exercise of the powers with which they are vested, the city at large cannot be held responsible for acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented.*" Underlining mine.

In the case of *New Orleans, M. & O. R. Co. v. New Orleans*, 26 La. Ann. 478, the supreme court of Louisiana again recognized the doctrine that a municipal corporation possesses two classes of rights—public and private. In all that relates to the one class, it is merely the agent of the state, and subject to its control,—and that, as to the other class, it is the agent of the inhabitants of the place,—the corporators. The court adopted

the language of *Judge Dillon*, to the effect that municipal corporations possess a double character,—the one, governmental, legislative, or public; the other, in a sense, proprietary or private,—and that the distinction, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, and officers in the execution of corporate duties and powers.

The distinction, which is fully recognized by the supreme court of Louisiana, between the public and the private powers and obligations of municipal corporations, has been just as fully recognized by the highest courts of many of the states. I refer only to a few of the many cases which state the distinction:

The case of *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 877, was an action against the city of Cleveland for damages caused to property by a mob. There being no statute in Ohio similar to the Louisiana Act No. 51 of 1855, it was attempted to hold the city of Cleveland responsible by reason of its city charter, which provided that: "*It shall be the duty of the city council to regulate the police of the city, preserve the peace, prevent disturbances and disorderly assemblages.*" Underlining mine.

The supreme court of Ohio held that the duty intended was that properly appertaining to an administrative and legislative body acting in the government of a city,—the making regulations, by-laws, and ordinances for the purposes specified, to be enforced by the appointment of officers,—and that neither on general principles, nor from the effect of that enactment, was the city of Cleveland responsible for the destruction of property by a riotous assemblage, or for the neglect of the officers in not preserving the peace, and preventing such destruction. The court said: "It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property, and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace, and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence and business. As to the first, the municipal corporation represents the state,—discharging duties incumbent on the state. As to the second, the municipal corporation represents the pecuniary and proprietary interests of indi-

viduals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power. As to the second, the rules which govern the responsibility of individuals are properly applicable."

A demurrer to the petition was sustained.

The case of *Ulrich v. St. Louis*, 113 Mo. 188, decided by the supreme court of Missouri, was an action in which the plaintiff alleged that, while incarcerated in the workhouse of St. Louis, he was disabled for life by the negligence of the jailer. A general demurrer having been filed to the petition, the demurrer was sustained by the lower court, and the cause dismissed. The action of the lower court was sustained by the supreme court. In the course of its decision the court said: "The rule of law is well settled in this state that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation for the public good;" citing cases.

The court cited approvingly the language of Judge Dillon, as follows: "The police regulations of a city are not made and enforced in the interest of the city, in its corporate capacity, but in the interest of the public;" citing numerous cases.

In the case of *Rusher v. Dallas*, 88 Tex. 151, decided by the supreme court of Texas, it was held that a complaint, in a suit against a city, which alleges the arrest of the plaintiff by a city policeman for a supposed violation of a city ordinance, of which violation he was in fact innocent; that the arrest was made without a warrant or an affidavit; that unnecessary violence was used by the policeman; and that the policeman was incompetent, to the knowledge of the city,—states no cause of action. The court said, *inter alia*: "A distinction is made where the act is done in promotion of the interest of the city, in its special corporate rights, and when done in the interest of the public. Where a city has special powers granted by charter, other than those concerning the public good and government of its citizens, so that its officers' acts thereunder are the acts of agents, and not of public officers, the city may become liable; but not where the act is that of an officer in enforcing ordinances of social government, or a general law of the land."

In *Whitfield v. Paris*, 15 L. R. A. 783, 84 Tex. 481, decided by the supreme court of Texas, where a policeman appointed by the city to kill dogs negligently and recklessly discharged his gun at a dog, and seriously injured the plaintiff, a demurrer to the petition was sustained, and the action of the lower court affirmed by the supreme court. The court said: "The enactment of the ordinance referred to in the petition [an ordinance directing the killing of dogs by a policeman] was an exercise by the city of its police power. Its purpose was to secure the safety, health, and welfare of the public. The man whose act was complained of was not, therefore, a mere servant or employé, though the petition so denominates him. He occupied the attitude of a policeman engaged in the enforcement of an ordinance of the

city. In such a case the maxim, '*respondent superior*,' does not apply. Where a city acts as the agent of the state, it becomes the representative of sovereignty. It is not acting in the management of its private or corporate concerns, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public. Under such circumstances, it is not liable for the acts of its officers or employes engaged in the execution of its ordinances;" citing numerous cases.

In the case of *O'Rourke v. Sioux Falls* (8. Dak.) 19 L. R. A. 789, a demurrer was sustained to a complaint setting out that plaintiff had suffered great personal injuries by the firing of a cannon in the streets of the city in violation of a city ordinance. The complaint alleged that the city had appointed and continued in office a careless, inefficient, and negligent police force; that, with the full knowledge on the part of the members of the common council that it was to be done, the police officers permitted said cannon to be fired in the street after dark, and at a time when it could not be discovered by travelers on the street. The court said: "There are two kinds of duties imposed upon a municipal corporation, in respect to which there is a clear distinction: One is imposed for governmental purposes, and is discharged in the interest of the public; and the other arises from the grant of some special power, in the exercise of which the municipality acts as a legal individual. In the latter case, the power is not held or exercised by the municipality as or because it is one of the political subdivisions of the state, and for public governmental purposes, but as and because it is, as an individual might be, the grantee of such power for private purposes. In such case the municipality is on the same footing with a private grantee of the same power, and is, like him, liable for an injury caused by the improper use of such power. But where the power is conferred upon the municipality as one of the political divisions of the state, and conferred, not for any benefit to result therefrom to such municipality, but as a means in the exercise of the sovereign power for the benefit of the public, the corporation is not answerable for non-feasance or malfeasance by its public agents." Cases cited. Underlining mine.

Similarly, it has been held that a city is not responsible for the destruction of a building to stop the spread of fire (*Correas v. San Francisco*, 1 Cal. 452); that the city of New Orleans was not liable for the neglect of firemen in not extinguishing fires (*Fule v. New Orleans*, 25 La. Ann. 394); that a municipality is not responsible for neglecting to take precautions to prevent the spread of smallpox. Iowa Case; Field, Damages, p. 83, § 37. The cases cited are but a few of the adjudications on the subject, but they are amply sufficient to show that the distinction between the public and private duties and powers of municipal corporations is well established throughout the country.

But four cases have come under my observation in which actions have been brought against municipalities for loss of human life:

Bits v. Austin, 1 Tex. Civ. App. 455, in which the court of civil appeals of Texas held that a Texas statute which allows actual damages for the death of any person through the wrongful act, neglect, or default of "another" allows recovery only against natural persons, and not against corporations; *Atchison v. Twine*, 9 Kan. 356; *Dale County v. Gunter*, 46 Ala. 118; and *Luke v. Calhoun County*, 52 Ala. 115. The three cases last cited were brought under special statutes distinctly giving a right of action against a municipality or county for loss of life at the hands of a mob.

It is true, as Judge Dillon remarks, that it is sometimes difficult to determine whether a particular case comes under the operation of the governmental, or of the private, powers and duties of a municipal corporation. The difficulty naturally increases as particular cases approach nearer to the line which divides the two sets of powers and obligations. But the instant case presents no difficulty in that respect. It seems to me that it would be impossible to state an instance of public or governmental duty and power which would be plainer or more obvious than that which the instant case presents. I am perfectly clear that the duty, the nonperformance of which is here complained of, was a duty of sovereignty, transferred by the sovereign to the city of New Orleans, and that in its performance the city was merely the representative of the sovereign. I am equally clear that in the exercise of this governmental power the city officers, *quoad* their acts under that power, are virtually state functionaries, acting for and on behalf of the state. In my judgment, the same exemption as to liability exists in this case in favor of the city as would exist in favor of the state, if state officers, by the nonperformance of

duty prescribed by a state law appertaining to the governmental powers and duties of the state, had been guilty of the nonfeasance here complained of.

It may be that there are cases of extreme hardship where no redress can be had because of the malfeasance or nonfeasance of the officers of a municipality in the exercise of its governmental powers. The law of Canute the Dane making the vills responsible for the homicides committed within their limits, and King Alfred's law making the inhabitants of the tithings free pledges to the king for all offenses committed in their districts, may have been wise laws. It may be that every one should have an interest in preventing violence, and maintaining the public peace. But these are considerations which address themselves exclusively to the law-maker. The courts cannot legislate. They can but apply the law as they find it.

To summarize my conclusions:

1. Act No. 51 of 1855, providing that municipal corporations shall be liable for the destruction of "property" by mobs, does not sustain an action for the taking of human life.

2. The obligations of the city of New Orleans are of two kinds: The first consists of public or governmental duties; the second, of private or proprietary duties. As to the former the city is the representative of the sovereign, and enjoys the exemption of sovereignty from liability to suit. As to the latter, the city may be sued for tort, or on contract, as a private corporation might be sued.

3. The duty of the city, upon the nonperformance of which this action is founded, is a public, governmental duty.

Therefore, *the exception of no cause of action must be sustained, and the cause dismissed.*

WASHINGTON SUPREME COURT.

Watson ALLEN, *Respt.*,

v.

W. T. FORREST, Commissioner of Public Lands, *Appt.*

(..... Wash.)

The privilege of acquiring tide lands given to a certain class of persons by the Act of March 26, 1890, is not a vested right, but by subsequent statute may be taken away from one who has not availed himself of the privilege, but merely continued in possession of the adjoining lands, as he was when the privilege was created.

(May 19, 1894.)

A PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to enjoin defendant from entering into a contract

for the sale of certain tide lands, to which the plaintiff claimed an inchoate right. *Reversed.*

The facts are stated in the opinion.

Messrs. W. C. Jones, Atty-Gen., and Semple & Hale, for appellant:

It is assumed that the ownership of the tide and shore lands in the state of Washington, and the power to deal conclusively therewith, is in the state, subject only to the supervisory power of the federal government to prevent the obstruction, impairment, or injurious modification of navigable waters.

Eisenbach v. Hatfield, 12 L. R. A. 633, 2 Wash. 236; *Harbor Line Comrs. v. State*, 2 Wash. 580; *State v. Harbor Line Comrs.* 4 Wash. 6; *State v. Harbor Line Commission*, Id. 816; *Shively v. Bowlby*, 153 U. S. 1, 38 L. ed. 331.

A consideration is the very life and essence of a contract.

Rapalje & Lawrence's Law Dict. article Con-

NOTE.—For a collection of authorities upon the subject of impairment of state contract, see note to *Henderson v. State Soldiers & Sailors Monument Comrs.* (Ind.) 13 L. R. A. 170, 24 L. R. A.

As to impairment of vested rights, see note to *Franklin County Grammar School v. Bailey* (Vt.) 10 L. R. A. 406.

tract; *Bouvier, Law Dict. article, Consideration, note 2*, and cases there cited; 2 Kent, Com. 449.

In this case the state, by its law of March 26, 1890, section 11, said that the improver or the upland owner, as the case might be, "shall have the right, for sixty days following the final appraisal of the tide lands, to purchase all or any part of the tide lands in front of the lands so owned," or the lands covered by his improvement.

Plaintiff has done nothing, he has paid nothing, he has suffered nothing. The state has made a proposal to him and he has not even accepted it by filing his application to purchase, describing his lands by metes and bounds, as he might have done at any time since March 26, 1890. There is no consideration moving to the state from him, and no agreement on his part to be bound under the law.

The law of March 26, 1890, is a mere tender, that can be withdrawn at any time before execution. The right given to remain upon the land is not a grant, but a mere license, and can be revoked without notice, by the legislature.

Doolittle v. Eddy, 7 Barb. 74; *Stone v. Sprague*, 20 Barb. 509.

A license cannot, under any circumstances, become irrevocable by estoppel, when the effect would be to create an interest in land.

2 Washb. Real Prop. 669; *Jackson v. Philadelphia, W. & B. R. Co.* 4 Del. Ch. 180.

Grants from the state, that are without consideration, must be construed against the grantee.

3 Washb. Real Prop. 190; 1 Washb. Real Prop. 84.

The state has, both by its constitution and laws, expressly guarded against giving title to tide lands in front of cities, until after the harbor lines have been located and the extent of reservations for state purposes known.

2 Kent, Com. 464; 1 Parsons, Cont. 448, 476.

A mere expectation of future benefits or interest founded upon the continuance of existing general laws is not a vested right.

Clarke v. McCreary, 12 Smedes & M. 347; *Merrill v. Sherburne*, 1 N. H. 218, 8 Am. Dec. 63; *Cooley*, Const. Lim. 883, 845.

A grant of a mere license, or gratuity, which imposes no new duty or additional burthen and is without consideration, is revocable at the will of the legislature.

Philadelphia & Gray's Ferry Pass. Co's App. 103 Pa. 123; *Derby Turnp. Co. v. Parks*, 10 Conn. 522, 27 Am. Dec. 700; *Gregory v. Shelby College Trustees*, 2 Met. (Ky.) 589; *State v. Morris*, 77 N. C. 512.

So long as the contract remains executory it may be revoked by the legislature, if not founded on an executed consideration.

Bishop's Fund Trustees v. Rider, 18 Conn. 87; *Chincelamouche Lumber & Boom Co. v. Com.* 100 Pa. 433; *Slack v. Maysville & L. R. Co.* 13 B. Mon. 1.

An incomplete voluntary gift creates no right which can be enforced.

Dorsey v. Packwood, 53 U. S. 12 How. 126, 13 L. ed. 921; *Stone v. Hackett*, 12 Gray, 227; *Re Webb's Estate*, 49 Cal. 546; *Crooks v. Crooks*, 84 Ohio St. 610; *Wadhams v. Gay*, 73 Ill. 416; 42 L. R. A.

Carhart's App. 78 Pa. 100; *Young v. Young*, 80 N. Y. 486, 86 Am. Rep. 684.

An executory agreement, supported by a meritorious, as distinguished from a valuable or pecuniary, consideration, cannot be enforced either at law or equity.

Re Wilbur v. Warren's Estate, 104 N. Y. 192; *Re Hudson*, 54 L. J. Ch. 811, 83 Week. Rep. 819.

It makes no difference if the efforts of the plaintiff to accept are defeated by defendant.

Crocker v. New London, W. & P. R. Co. 24 Conn. 249.

Claimants under the pre-emption laws of the United States have no vested right and no contract rights until the processes of acquisition have matured.

Priddy v. Whitney, 76 U. S. 9 Wall. 187, 19 L. ed. 668; *Hutchings v. Low*, 82 U. S. 15 Wall. 86, 21 L. ed. 82; *Campbell v. Wade*, 182 U. S. 84, 88 L. ed. 240.

A state law reducing pay of state offices held by appointment for a year, and removing such officer, is constitutional—an appointment is not a contract.

Butler v. Pennsylvania, 51 U. S. 10 How. 402, 18 L. ed. 473.

The provision of the Act of 1822 which enacted that no property of the society of the New York hospital should be subject to be taxed by virtue of any law of this state, did not constitute a contract, but was a spontaneous concession and therefore subject to modification and repeal.

People v. New York City & County Tax Comrs. 47 N. Y. 501.

It was not the purpose of the provision of the United States Constitution to impose on the courts the duty of trammeling the states in the exercise of their general political powers, or of stamping their municipal regulations for the time being, with the seal of irrevocability.

People v. Roper, 35 N. Y. 629.

Exemption from taxation is not a vested right.

Christ Church v. Philadelphia County, 65 U. S. 24 How. 800, 16 L. ed. 603.

A state law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States, unless it also violates the obligation of a contract.

Satterlee v. Matthewson, 27 U. S. 2 Pet. 413, 7 L. ed. 469.

Public grants are to be construed strictly.

Charles River Bridge Proprs. v. Warren Bridge Proprs. 36 U. S. 11 Pet. 420, 9 L. ed. 773; *Jackson v. Lamphire*, 28 U. S. 8 Pet. 289, 7 L. ed. 632; *Beaty v. Knowler*, 29 U. S. 4 Pet. 165, 7 L. ed. 818; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514, 7 L. ed. 939.

Messrs. Arthur, Lindsay & King, for respondent:

The limitation upon the power of the state to pass any act impairing the obligation of contracts applies as well to contracts to which the state is a party, as to contracts solely between individuals.

Davis v. Gray, 88 U. S. 16 Wall. 208, 21 L. ed. 447; *United States v. New Orleans*, 103 U. S. 858, 26 L. ed. 395.

In the following cases, where the sanctity of

their contract rights were, severally, asserted by the parties concerned and fully sustained by the courts, not an element of contract can be found, in any or either of them, that is not found ingrained in the relations established between this respondent and the state of Washington, by the Act of March 26, 1890. In each case, as in the case at bar, the contract set up had its origin in an act of the legislature. In each case the state promised certain things conditioned upon the other party doing certain other things. In no one of the cases was there any contemporaneous promise or agreement by the party asserting a contract, to do or perform anything whatever. The party asserting a contract went ahead and did that which the requirements specified by the other party contemplated, or entered upon their performance and then asserted his or their contract to the agreed equivalent, and in each case was sustained in such claim.

Fletcher v. Peck, 10 U. S. 6 Cranch, 87, 8 L. ed. 162; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *St. Tammany Water Works Co. v. New Orleans Water Works Co.* 120 U. S. 64, 80 L. ed. 563; *Montgomery v. Kasson*, 16 Cal. 183; *People v. Board of Auditors*, 9 Mich. 326; *Cooley*, Const. Lim. 5th ed. 845.

Dunbar, Ch. J., delivered the opinion of the court:

The plaintiff, claiming right to purchase certain tide lands under the Act of March 26, 1890, brought his action against the defendant, W. T. Forrest, commissioner of public lands, to restrain him from entering into a contract with one Eugene Sample, who had made application under the Act of March 9, 1893, entitled, "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract; providing for liens upon tide and shore lands belonging to the state; granting rights of way across lands belonging to the state," etc. The complaint set up the necessary qualifications of the plaintiff under the Act of March 26, 1890. Defendant demurred to the complaint. The demurrer was overruled, and the defendant, resting upon his demurrer, refused to plead further. Judgment was awarded the plaintiff, and defendant appeals to this court.

The sole question to be determined is, Does the Law of March 26, 1890, entitled, "An act for the appraising and disposing of the tide and shore lands belonging to the state of Washington," constitute a contract between the state and the class of privileged persons mentioned in said act which the legislature cannot annul or change by a subsequent enactment? Or, in other words, did the said class of privileged persons obtain any vested rights in the tide lands of the state by reason of said enactment, and is the said Act of March 9, 1893, an impairment of the obligation of a contract between the state and the said privileged class of persons. It has been the uniform holding of this court that the ownership of the tide and shore lands is in the state of Washington, and the power to deal conclusively with them is in the state, subject only to the power of the federal gov-

ernment to prevent the obstruction, impairment or injurious modification of navigable waters. See *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632, and all subsequent cases on that subject. The attorneys for both appellant and respondent have prepared elaborate and painstaking briefs in this case, but it seems plain to us that the respondent obtained no vested rights whatever under the Act of March 26, 1890; that no contract whatever was entered into between the state and the respondent, but that his right to purchase under the conditions named in the act was simply a privilege which he had a right to exercise only while the law remained in force. We do not think that the cases cited by respondent in any manner sustain his contention. *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 8 L. ed. 162, is a long and exceedingly interesting case. It is true that the court there decided that when a law is in its nature a contract, when absolute rights have vested in that contract, a repeal of the law cannot divest those rights. This doctrine, we take it, will not be disputed anywhere. But in that case there was an actual grant of lands made by the legislature. The court stated that the lands in controversy vested absolutely in the grantees; that the grant, when issued, conveyed an estate in fee simple to the grantee, clothed with all the solemnities which the law can bestow. The court also held that the grant in that case was a contract executed, and that the fact that the legislature which had passed the prior act had been stimulated to do so by and through corrupt means would not justify a subsequent legislature in destroying vested rights which had grown up under the prior law, and which involved innocent purchasers. There is nothing in that case, we think, that in any way sustains the contention of respondent. In *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, it was decided that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon the condition of the performance of the service by the grantee, is a grant of a franchise, and vests in the grantee in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. It will be seen that this was an executed contract, and that the decision was based upon the fact that the grantee had performed his part of the contract. *St. Tammany Water Works Co. v. New Orleans Water Works Co.* 120 U. S. 64, 80 L. ed. 563, is the same kind of a case, and the decision is based upon the principle announced in *New Orleans Water Works Co. v. Rivers*, *supra*. *People v. Board of State Auditors*, 9 Mich. 326, was where, under an act to encourage the manufacture of salt in the state of Michigan, approved February 15, 1859, a bounty of ten cents per barrel had been offered to manufacturers, and afterwards, viz., on March 15, 1861, the law had been changed. It was held, on application for mandamus, that the manufacturers were entitled to the

bounty on a certain number of barrels of salt which had been manufactured before the passage of the Act of March 15, 1861. We hardly see how the law could have been construed in any other way, the only defense to the action being that the claim had not been presented until after the enactment of the new law. *Montgomery v. Kasson*, 16 Cal. 189, is a case brought under the grant of swamp lands. The court there held that the grant was a grant upon condition precedent. The grant was to certain individuals, on condition of certain drainage ditches and canals being constructed; but the case specially recites that the said grantees have, pursuant to said act, commenced the construction of said canals provided for by the said act. "It is a contract," says the court, "by which the state grants certain lands upon condition of work to be performed, the grant to take effect when the work is done. It is a contract by which valuable rights may be acquired absolutely upon the performance of the acts specified as the consideration moving to the state. The grantees, as appears from the evidence in the record, and as found by the referee, entered upon the performance of those acts in the fall of 1857. They then employed an engineer, and surveyed the line of the proposed canals, and in February following commenced the work of excavating one of the canals, and continued the same without cessation until June, 1869. They thus brought themselves within the terms of the first section, providing for the commencement of 'the canals or some one of them,' within one year after the passage of the act." Under this statement of facts the court holds that, by part performance of the contract, the grantees had acquired rights with which the legislature could not interfere by subsequent enactment. But the case at bar is altogether different. The respondent has done nothing. It is true that he has remained in possession of the lands and of the improvements, but he was in possession at the time of the passage of the law. He has made no application to purchase the lands. He has made no payments. It is not even known by the state that he desires to avail himself of the privilege which he had under the Law of March 26, 1890, to purchase. He has entered into no contract with the state, and could not be bound to the performance of any contract. He has made no agreement to bind himself or to do anything whatever in the premises. No action for specific performance would lie against him. There is no mutuality whatever and no other element of a contract between the respondent and the state. The ordinarily accepted definition of a contract is an agreement between two or more parties to do or not to do a particular thing. This case does not fall within this or any other definition of a contract.

It would be unfortunate indeed if the tide lands of the state were to be tied up, awaiting for an indefinite time the movement of a class of persons who, under the first law that was passed in relation to them, were privileged to purchase them under conditions expressed, and that the state should not be allowed to change the conditions of its pro-

posals at any time before the proposals were accepted by those in whose interest the law was enacted. Such a theory has never been sustained by the law in relation to lands of any character. On the contrary, it has been held in *Frisbie v. Whitney*, 76 U. S. 9 Wall. 187, 19 L. ed. 668, that occupation and improvement on the public lands, with a view to pre-emption, do not confer a vested right in the lands so occupied; and such a vested right under the pre-emption laws is only obtained when the purchase money has been paid, and the receipt of the proper land officer given, to the purchaser; that, until this is done, it is within the legal and constitutional competency of congress to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. And, adopting the opinion of *Attorney-General Cushing*, the court says: "Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no rights against the United States except such as the acts of congress confer; and these acts do not confer on the pre-emptor *in posse* any right or claim to be treated as the present proprietor of the land in relation to the government. . . . A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase land in preference to others. His settlement protects him from intrusion or purchase by others, but confers no right against the government." This, we think, is plainly analogous to the laws governing the sale of tide lands. A privilege was conferred upon the respondent by the Law of March 26, 1890. That privilege was accorded him in preference to others to purchase the tide lands and he would have been protected under the laws then in force against the intrusion or purchase by any other person, but no right was conferred upon him against the state. The case of *Frisbie v. Whitney*, *supra*, goes very far beyond the necessary holding in this case to reverse the judgment, for there it appears that something had been done by the applicant. The court says: "The argument is urged with much zeal that, because complainant did all that was in the power of any one to do towards perfecting his claim he should not be held responsible for what could not be done. To this we reply, as we did in the case of *Rector v. Ashley*, 78 U. S. 6 Wall. 142, 18 L. ed. 738, that the rights of a claimant are to be measured by the acts of congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they are hard or lenient." The same doctrine obtains in *Butchings v. Low*, 82 U. S. 15 Wall. 77, 21 L. ed. 83. There it was held that a party by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same, under the pre-emption laws, does not thereby acquire such a vested interest in

the premises as to deprive congress of the power to devise it by a grant to another party; that the power of regulation and disposition over the lands of the United States, conferred upon congress by the constitution, only ceases under the pre-emption laws when all the preliminary acts prescribed by those laws for the acquisition of the title, including payment of the price of the land, have been performed by the settler; that the legislation thus adopted for the benefit of settlers was not intended to deprive congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use. In *Campbell v. Wade*, 132 U. S. 84, 83 L. ed. 240, it was held that the statutes of the state of Texas providing for the sale of a portion of the vacant and unappropriated public lands of the state did not appear to confer upon a person making application under them for survey of a part of said lands, and paying the fees for filing and recording the same, a vested interest in such lands which

could not be impaired by the subsequent withdrawal of them from sale under the provisions of the later statute; and the doctrine of *Frisbie v. Whitney* and *Hutchings v. Low* was reaffirmed. It seems to us that under all authority, as well as on principles of sound public policy, it must be decided that the respondent obtained no vested rights under the Act of March 26, 1890, and that the Act of March 9, 1893, should not be construed as an impairment of any contract between the state and the parties who are privileged to purchase under the provisions of the act.

All the other questions raised in the brief are decided against the contention of respondent.

The judgment will therefore be reversed, and the cause remanded to the lower court, with instructions to sustain appellant's demurrer to respondent's complaint.

Anders, Stiles, Hoyt, and Scott, JJ., concur.

UTAH SUPREME COURT.

Dooly BLOCK *et al.*, *Respts.*,
v.

SALT LAKE RAPID TRANSIT CO., *Appt.*

(@ Utah, 31.)

1. The grantees of lots under the town site act of congress have the right and privilege to have a street on which the lots abut forever kept open.
2. The rights of abutting owners to use a street as a means of access to their lots and for light and air is the same where the fee of the street is held by a city in trust for the use of the public as where the fee is owned by the abutting owners.
3. The legislature in delegating power over streets to municipal corporations cannot authorize any action which will materially injure the property of abutters in the right of access to their property, and to light and air.
4. If the construction of an additional track for a street railway company would be an unnecessary obstruction to and interference with the ordinary use of the street, and the track privileges of an existing railroad company are sufficient for the business of two or more companies, they should all be obliged to use them in common.
5. An injunction to prevent the laying of an additional track for a street railroad in a street may be granted to abutters, where the track would constitute an unnecessary interference to travel, and an especial injury to the property rights of abutters.
6. Findings of fact in a chancery case are conclusive in the appellate court, unless they

are so manifestly erroneous as to demonstrate some oversight or mistake.

(June 5, 1903.)

APPEAL by defendant from a judgment of the District Court of Salt Lake County in favor of plaintiffs in an action brought to enjoin defendant from laying street railway tracks in the street in front of plaintiff's property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Williams & Van Cott and C. B. Jack for appellant.

Messrs. Bennett, Marshall & Bradley for respondents.

Bartch, J., delivered the opinion of the court:

The respondents are the owners of certain lots situate in Salt Lake City, and abutting on Second South street, between Main and Second West streets. Two of these lots, one on the north, the other on the south, side of Second South street, are one block west of Main street, are business property, and at the time of the trial of the cause business blocks were being erected thereon. The complaint, in substance, charges that the plaintiffs were respectively the owners of that portion of the street which lies between the center line thereof and the front line of the said lots, subject only to the ordinary use of the public for the purposes of travel; that the plaintiffs are entitled to the free and unobstructed use

NOTE.—The above case is in line with a marked tendency manifest in the later cases to abolish the distinction formerly maintained as to the rights of abutting owners when the fee of the highway was in them and when it was in the public. See *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 664.

24 L. R. A.

As to injury to abutter's easements by railroads in streets, see note to *Egner v. New York Cent. & H. R. R. Co.* (N. Y.) 14 L. R. A. 381.

As to what use of a street or highway constitutes an additional burden, see note to *Western R. of Alabama v. Alabama Grand Trunk R. Co.* (Ala.) 17 L. R. A. 474.

of the street as a means of access to the said premises; that by authority of Salt Lake City the Salt Lake City Railroad Company constructed on that street a double-track railroad, with wires, poles, and other appurtenances necessary to operate the same with electric power; that the same was being so operated, and afforded all necessary means and convenience to persons who might have occasion to travel on street railroads; that telegraph and telephone lines, and wires and poles for electric light, had been constructed on the street and that by reason of the several uses with which it had thus been burdened the ordinary use thereof for public travel and ingress and egress to the several premises had become impeded and embarrassed; that on the 6th day of May, 1890, and after the said street had been burdened as aforesaid, Salt Lake City, by its council, granted the defendant herein authority to construct and operate, by electric power, a street railroad on said street from First East to Seventh West street; that because of the obstructions already existing thereon, and because another railroad was not necessary for public convenience, the resolution granting the franchise to the defendant was unreasonable and void; that, in pursuance of the authority thus granted, the defendant commenced the construction of a railroad, and threatened to complete the same unless restrained; and that another railroad constructed thereon with its equipments and operation, in addition to the already burdened condition of the street, would greatly depreciate the value of the plaintiff's property, and injure its convenient use and enjoyment. The defendant, in its cross-complaint, in substance alleges that it owns and operates various lines of street railroads in the city and remote parts thereof, and in densely populated localities in the eastern portion of the city; that for public convenience it should have a line through the business portion of the city, to connect with railway depots and other parts of the city lying west of Main street; that defendant had no franchise connecting its eastern lines with the western portion of the city through the business part thereof, except the one on Second South street; and that in the granting of franchises the city has denied the right to parallel existing lines except in this instance. The trial court, in substance, found the above allegations of the plaintiffs and defendant to be true, and, among other things, found as facts that the plaintiffs are the owners of equitable easements in fee of rights of access, ingress, and egress to their respective lots in front thereof in the street, and entitled to the free and unobstructed use of that portion of said street as a means of access, such easements extending along the street from the first north and south street east of said lots to the first north and south street west of such lots, the same being subject to the ordinary use of the street by the public; that the fee of the street is in Salt Lake City, in trust for street uses proper; that prior to the granting of said franchise by the city there were constructed and in operation on that street a double-track street railroad, telegraph and telephone lines, wires and poles for electric

lighting, and the street had already become greatly obstructed, and access to plaintiff's property impeded and embarrassed; that because of the obstructions already existing upon the street the resolution attempting to grant the franchise to the defendant was unreasonable and void; that the two tracks in operation on said street were sufficient to satisfy the demands of public convenience, and there was no necessity for a third track; that its construction would greatly depreciate the value of plaintiffs' property, interfere with its convenient use and enjoyment, and they would thereby suffer irreparable damage; "that Salt Lake City, in granting the franchise to defendant, did not act within its lawful authority, nor exercise reasonable discretion for the best interests or convenience of the public; that the two tracks were constructed and are being operated in front of said lots by the Salt Lake City Railroad Company, and are sufficient to permit the passage of all street-cars necessary for public convenience, and between the third track, proposed to be constructed, and the sidewalk there would not remain sufficient space for the ordinary traffic of the street, free from unreasonable obstructions; that the defendant has electric street-car lines in operation in the eastern and western portions of said city, but has no other connecting line or franchise except the one on said Second South street passing through the business portion of the city, or reaching the depots of the several steam railroads, such connecting line being of great importance to the defendant, and necessary for the public travel; that the defendant company and the Salt Lake City Railroad Company can operate both of their railways together by means of the two tracks of the last-mentioned company now on that street, which tracks afford sufficient privileges for all the cars operated, or necessary to be operated, by both companies, for public travel and convenience; and that the construction and maintenance of a third track would be an unnecessary obstruction and interference with the ordinary use of the street, and the means of access to plaintiffs' premises would be unreasonably and materially abridged and injured. Upon this state of facts the trial court granted an injunction perpetually restraining the defendant from constructing and operating a third track on said Second South street. The defendant moved the court for a new trial upon the following grounds: First. "Insufficiency of the evidence to justify the findings of the court and decree in said case, and that the same were against law." Second. "Errors in law occurring at the trial, and excepted to by the defendant." From the order overruling this motion the defendant appealed to this court.

This leads to the inquiry as to whether or not the construction and operation of the third track upon that street by the defendant involves the taking of property of the plaintiffs, and as to whether the city council of Salt Lake City exceeded its limits of discretion and authority in granting the franchise to defendant. The plaintiffs contend that they are the owners in fee of the lots above mentioned abutting on Second South street,

and, as such abutting owners, they are entitled to so much of the bed of the street as lies immediately in front of the lots and to the center of the street, on which the proposed third track is to be built, subject only to the ordinary use of the same for the purposes of public travel, and that they are entitled to the use of said street, free from unreasonable obstructions, as a means of access, light, and air to their premises. The defendant maintains that the fee of said street is vested in the corporation of Salt Lake City, and that plaintiffs have no property therein, but are only entitled to the use thereof in common with the people of the city. The plaintiffs admit that the fee is in the city, in trust, however, for street uses proper, and subject to the equitable easements in fee of abutters. The lots and street in question are a part of a larger tract entered under section 2387 (U. S. Rev. Stat.), which provided that the corporate authorities might enter any portion of the public lands settled upon and occupied as a town site, "in trust for the several use and benefit of the occupants thereof, according to their respective interests." Plaintiffs' lots were represented on the original plat of Salt Lake City as fronting Second South street, which was platted in said plat, and when they were purchased under the forms prescribed by the town site act the grantees secured the right and privilege to have the street forever kept open. When land is settled upon and occupied as a town site, and lots are sold, the right of way over the streets in front of such lots is an appurtenance of necessity, and it requires no special grant in the deed. *Ashby v. Hall*, 119 U. S. 526, 80 L. ed. 469; *Salisbury v. Andrews*, 128 Mass. 336.

The rights of access, light, and air constitute the principal values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages and benefits which attach to them because of these easements. The right of the grantee to their use is precisely the same as his right to the property itself. Such privileges are easements in fee,—incorporeal hereditaments,—and form a part of the estate in the lots. They attach at the time the land is platted and the lots are sold, and will remain a perpetual incumbrance upon the land burdened with them. It follows that, when land is platted by the owner of the soil, and lots sold, bounded by a street designated and marked on the plat, the grantee acquires a right to the street in front of the premises as a means of access. 1 Hare, Const. Law, 376; Lewis, Em. Dom. § 114; *Story v. New York Elec. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Wyman v. New York*, 11 Wend. 487; *Child v. Chappell*, 9 N. Y. 246; *Schulte v. North Pacific Transp. Co.* 50 Cal. 592; *Denver v. Bayer*, 7 Colo. 113.

Nor does it matter, in this case, that the fee is in the city in trust for the use of the public, instead of in the abutting owner in trust for street uses. Equally in both cases the abutting owners are entitled to the use of the street as a means of access to their lots, and for light and air. If the fee is in the city, the rights of the abutter are in the na-

ture of equitable easements in fee; if in the abutter, they are in their nature legal. In either case the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements, and materially diminish the value of their property. When the lots of plaintiffs were sold under the town site act, above mentioned, it was, in effect, agreed with the grantees that they were entitled to the use of the street as a means of ingress, egress, light, and air. These rights were inducements to purchasers, became a part of the purchase, are appurtenances to the land which cannot be so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, in effect, property of which the owners cannot be deprived without due compensation. By implication, at least, the grantees also assumed additional burdens, for they must contribute of their own funds for the expense of sewer, gas, and water connections, and as well towards the cost of sidewalks, paving, and sprinkling in front of their lots. These are expenditures which devolve upon them as abutting owners, and, in addition to the relation of their lots to the street give them a special interest in the street in front of their premises, distinct from that of the public at large. Assuming such burdens, they may of right make any and all proper uses of the street, subject to proper and reasonable municipal control and police regulations. Lewis, Em. Dom. § 115; 2 Dill. Mun. Corp. 4th ed. §§ 556a, 556b; *McQuaid v. Portland & V. R. Co.* 18 Or. 237; *Haynes v. Thomas*, 7 Ind. 88; *Story v. New York Elec. R. Co. supra*.

The right of municipalities to grant franchises to private corporations for the construction and operation of street railways, when empowered by the legislature so to do, is not now, it seems, an open question, although streets were originally not designed for that purpose, but were mostly confined to the right of public travel in the ordinary modes. Enlightened public policy, advanced civilization, and a desire to subserve public interest, have induced courts to become more lax in the enforcement of strict technical rules and principles in this regard, and it appears now to be well settled by judicial authority that a reasonable portion of a street may be devoted for the purposes of a street railway, and that such is a proper use of the street.

Counsel for appellant contend that, subject to special constitutional restrictions, the legislature has plenary power over all public ways and streets. If this position be tenable, then, in the absence of special constitutional restrictions, the legislature may authorize municipalities to devote the entire width of a street to railroad uses, regardless of the property rights of abutting owners, without compensation for injury to their property. This theory does not appear to be sustained by the authorities. The legislature may delegate power over streets to municipalities, but in doing so it must recognize the property rights of private individuals. *Judge Dillon*, in his work on *Municipal Corporations* (vol. 2, § 656a), speaking of the nature

of streets, and legislative control, says: "Public streets, squares, and commons, unless there be some special restriction when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of abutting owners, full and paramount authority over all public ways and public places." It will be observed that the learned author distinctly recognizes "the property rights and easements of abutting owners," and, subject to these, the legislature "has full and paramount authority over all public ways and public places." Up to within a comparatively recent date, the current of judicial opinion drew a distinction between cases where the fee was in the abutting owner, subject to street uses proper, and those where the fee was in the municipality in trust for the use of the public. In the latter class of cases it was uniformly held that the power of the legislature to authorize the construction of a railroad on the street of a city was paramount, and that it could delegate such power to the local authorities. Of the exercise of this power the abutting owner could not complain, and had no right to compensation for injury to his easement caused by the appropriation of the street to such purposes. In the former class of cases he was entitled to compensation for the injury sustained by such appropriation. The case of *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624, supports this view. Mr. Justice Scott, in deciding the case, said: "A distinction has been taken where the municipality granting the right to lay the track owns the fee in the streets, and where the fee remains in the abutting owner, and it seems to us that it rests on sound principle, and is supported by the highest authority." That case was decided in January, 1878, and such, it must be conceded, was the weight of authority at that time. Then the cases turned upon the question whether the fee was in the public or in the abutter, in many of them without close inquiry as to the exact limitation of the fee; and it was almost universally held that if the fee was in the abutter, the legislature could not authorize a private corporation to construct a railroad on a public street without compensation to the abutter, and likewise it was almost universally held that, if the fee was in the public, the legislature could authorize the street to be used for such purpose without compensation to him. Since then the whole subject has undergone deliberate reconsideration, and the weight of recent judicial decision seems to abrogate the distinction and treat the easements of abutting owners as property rights forming part of the estate in the property, except in cases where the public owns the absolute fee of the street 34 L. R. A.

and the fee is not limited to street uses proper. In such cases the tendency is still to hold that the legislature, in the absence of special constitutional restraint, may authorize a railroad company to use the street of a city for its roadbed without compensation to the abutter. It might be observed, however, that even in this class of cases there seems to be no just or satisfactory reason why such a use of a street, which is specially beneficial to the grantee of the franchise, and causes a special injury to the abutter, should be within the absolute control of the legislature, without regard to the property rights of the abutting owner. Speaking of the nature of public streets and of the rights of the abutter and of the public, Judge Dillon (Mun. Corp. § 656a), observes: "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion thence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had, in common with the rest of the public, a right of passage. But it was also further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relation of his lot to the street in front of it; and that these rights, whether the bare fee of the street was in the lot owner or in the city, were rights of property, and, as such, ought to be, and were, sacred from legislative invasion as his right to the lot itself." In support of this view of the question he cites, among numerous other cases, *Story v. New York Elev. R. Co. supra*, which is the leading recent case in New York on this subject. In this case Justice Danforth, after an elaborate and exhaustive review of the authorities, concludes: "In whatever way, therefore, we view the plaintiff's case, the result is the same,—a right of property in the street, with which, until properly appropriated and compensation made, the defendant cannot interfere." 2 Dill. Mun. Corp. § 704; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Florida Southern R. Co. v. Brown*, 28 Fla. 104; *Mahady v. Bushwick R. Co.* 91 N. Y. 148, 43 Am. Rep. 661; *Burlington & M. R. R. Co. v. Reinhackle*, 15 Neb. 279; *Cincinnati & S. G. A. R. Co. v. Cummins*, 14 Ohio St. 523; *New York Elev. R. Co. v. Fifth Nat. Bank of New York*, 185 U. S. 493, 34 L. ed. 232; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 273, 19 L. ed. 74; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 789.

In this case the learned court found that the fee of Second South street is in Salt Lake City, in trust for street uses proper; and of

this appellant does not complain. Therefore, under the law as applied to this class of cases, plaintiffs have property rights in the street in front of their lots, and the street is not subject to the absolute control of the legislature, nor can the legislature confer such control upon the city council. While the legislature can authorize municipal authorities to permit private corporations to construct and operate street-railway lines upon the street, the authority thus conferred must be exercised within the limits of reasonable discretion, and not so as to materially injure the property of abutters. And this leads to a consideration of the power exercised in this case. Did the city council, in granting the franchise, act within the scope of its authority, and with a reasonable exercise of discretion? Section 840, 1 Comp. Laws Utah, 1888, authorizes Salt Lake City as follows: "To exclusively control, regulate, repair, amend, and clear the streets," etc., "and open, widen, straighten, or vacate streets," etc., "and prevent the incumbering of the streets in any manner, and protect the same from any encroachment and injury." If "to exclusively control the streets" were taken alone and construed literally, it might confer plenary power, and then, if this were not subjected to judicial control, the abutting owners could have no redress, though the injury to their property, caused by acts of the city council, might be very great, but it is also provided to "prevent incumbering of the streets in any manner, and to protect the same from any encroachment and injury;" and this is just what respondents ask for in this case. It is apparent from this section that the legislature intended to confer no power that would injuriously affect the property rights of abutting owners. Subdivision 5, § 889, *Id.*, referring to the powers of Salt Lake City, provides: "To direct and control the location of railroad tracks and depot grounds within the city, and regulate or prohibit the use of locomotive engines thereon, and may require the cars to be used within the inhabited portions thereof to be drawn or propelled by other power than that of steam." This is the statute law of this territory, relied on by counsel for appellant, as applicable to this case. Construed in the light of reason and justice, these enactments do not authorize the city council to grant a railroad franchise if the construction of the road will injure and materially depreciate the value of the property of abutters. When the railroad company has obtained, under the law of eminent domain or otherwise, in cases where the streets are already burdened to the extent that natural justice will allow, a right of way, then the council has the power "to direct and control" the location of the tracks.

According to the evidence, as appears from the record in this case, Second South street is one of the principal business streets running east and west, and at the date of the granting of the franchise to the defendant and of the trial of the cause there were in operation upon that street two railroad tracks, which were located in the center of the street, with a line of poles between them. There were also many electric light, telegraph, and telephone poles placed in line on each side

of the street about four feet from the sidewalk, and on these poles were stretched numerous electric wires. The two tracks in operation were constructed with T rails, which project several inches above the surface of the street, and render the crossing of the tracks with vehicles difficult and dangerous, the street not being paved. The appellant proposed to construct its track in a similar way on the north side of the present tracks, and to erect additional poles, which would still further obstruct the ordinary travel, and render the respondents' property less accessible for business purposes. The tracks already upon said street afford ample facilities to run all the cars necessary for public convenience; and the construction of the third track would be a serious impediment to the ordinary mode of travel, as it would not leave sufficient space between the outside rails and the gutter for vehicles to pass each other with safety. Where the track privileges of one company on a city street are sufficient for the business of two or more companies, they should all be required to use them in common. The construction of an additional track, under the circumstances of this case, would be an unnecessary obstruction to and interference with the ordinary use of the street, and a special injury to the property rights of the abutters, and on proper application a court of chancery may grant injunctive relief. In such a case an abutting owner need not stand by and see his property injured without having any means of redress. *Dill. Mun. Corp. § 661; Utine v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 54 Am. Rep. 661, 53 Am. Rep. 123; *Ogden City R. Co. v. Ogden City*, 7 Utah, 207; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186; *Story v. New York Elev. R. Co. supra*.

Counsel for appellant insist that the several findings of fact to the effect that the construction of the third track would be an unreasonable obstruction of the street, and that the granting of the franchise for that purpose by the city council was unlawful, and an unreasonable exercise of discretion, are not justified by the evidence. There appears to be some conflict in the evidence on this point, but, the learned judge having heard the evidence, and having had the opportunity to observe the manner and bearing of the witnesses while testifying, this court will not disturb the conclusions reached, especially since the record shows them to be fair and logical deductions from the testimony. Where a case is tried in a court sitting as a court of chancery, the findings of fact are conclusive in the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake. *Wells v. Wells*, 7 Utah, 68; *Ulman v. McCormic*, 13 Colo. 553; *Doe v. Vallejo*, 29 Cal. 386; *Coryell v. Cain*, 16 Cal. 567; *Coolidge v. Smith*, 129 Mass. 554.

The record reveals no material error committed during the conduct of the trial, and we are of the opinion that the act of the city council of Salt Lake City granting the franchise to the appellant was unlawful, as being an unreasonable exercise of discretion, and is therefore of no avail to it.

The judgment is affirmed.

Miner, J., concurs.

MICHIGAN SUPREME COURT.

Isaac J. BEAR *et al.*, Trustees of the Church of the United Brethren in Christ, at Salem, Michigan,

v.

Aaron HEASLEY *et al.*, *Appts.*

(36 Mich. 273.)

1. The constitution of a church recognized and acquiesced in as the organic law of the church for more than fifty years must be held to have been regularly adopted.
2. A new constitution of a church, making some changes on the subject of infant baptism, the washing of feet and secret societies, and adding a provision for lay delegation and the declaration of a belief in "depravity," "justification," "regeneration" and "adoption," "sanctification," and endless "punishment," made by the general conference of a church which had no authority to change the constitution, is illegal, although these matters had been previously included in the discipline of the church, which the general conference had power to change, excepting where it would change the confession of faith.
3. The decision of a general conference, which is the highest tribunal of a church, that a new constitution and confession of faith have become the fundamental belief and constitution of the society, is not binding upon the courts where it is clearly shown that the fundamental law of the church, requiring a request by two thirds of the whole society, before a change in the constitution can be made, has not been complied with, but that one general conference had appointed a commission to prepare a new constitution and submit it to a vote of the church and a succeeding general conference declared the constitution adopted although the affirmative vote of the church, while more than two thirds of the members voting, was much less than two thirds of the whole society.
4. Members of a church who adhere to the old constitution and confession of faith although constituting a small minority, are entitled to the church property where the majority by revolutionary action have adopted a new constitution and refuse longer to submit to the organic law of the association.

(Grant, J., dissent.)

(December 22, 1893.)

A PPEAL by defendants from a decree of the Circuit Court for Allegan County which granted an injunction restraining them from interfering with the property belonging to the society of the United Brethren in Christ in Salem, Allegan County, Michigan. *Reversed.*

The facts are stated in the opinions.

Messrs. Taggart, Wolcott & Ganson, with *Messrs. H. H. Pope* and *C. R. Wilkes*, for appellants:

The constitution of 1841 was the valid, organic law of the Church of the United Brethren in Christ.

Lamb v. Cain, 14 L. R. A. 518, 129 Ind. 486.

In *Philomath College v. Wyatt*, decided by the supreme court of Oregon, October 5, 1892, the court, in passing upon this question, whether the constitution of 1841 was organic law, says: The Church of the United Brethren in Christ is a voluntary unincorporated religious society. The validity and binding effect of the constitution . . . of a voluntary association, as respects its members, rests upon assent actual or implied—

Citing *Proitchett v. Schaefer*, 11 Phila. 166.

"The members having agreed to these terms, are bound by them if they do not conflict with law or public policy."

Ibid.; *Hyde v. Woods*, 2 Sawy. 655; *Innes v. Wylie*, 1 Car. & K. 257.

Article 4 of the constitution of 1841 reads: "There shall be no alteration of the foregoing constitution, unless by request of two thirds of the whole society."

Neither the word "request" nor the sentence of which it is a part is of doubtful meaning, and so subject to any rule of practical construction.

Cooley, Const. Lim. p. 70.

In the change of statutes by addition of words or sentences, the lawmaker is presumed to have some object in view.

Strong v. Daniels, 8 Mich. 470.

As a jurisdictional step, preceding amendment, that can be acted upon by general conference, the framers of this constitution intended to, and did, require that such amendment be sought ("requested") by two thirds of the "whole society."

This "request" of two thirds of the "whole society" must be obtained before legal action or amendment is made.

Roberts v. Cottrellville Highway Comrs. 25 Mich. 23.

If notice were required of an amendment, notice must be given.

Rottmann v. Hartling, 22 Neb. 875.

The whole object of the constitutional provision is evaded and perverted, if by the adoption of a certain method of securing a request those not requesting are to be counted as requesting, when they decline so to do.

To call a thing by a wrong name does not change its nature.

Burt v. Rattle, 81 Ohio St. 130.

To "request" is one thing; to "elect" to "vote," is an entirely different matter.

Where the constitution of a corporation provides the assent of a certain number necessary to do business, such assent must be obtained.

NOTE.—Prior decisions in this series upon the effect of the attempted adoption of a new constitution by the Society of the United Brethren in Christ are *Lamb v. Cain* (Ind.) 14 L. R. A. 518, and *Schlichter v. Ketter* (Pa.) 22 L. R. A. 161, both of which are opposed to the case here reported. The 94 L. R. A.

cases in line with this case are cited in the case either by counsel or court.

Upon the general question of the authority of civil courts over religious associations, see *note* to *Mount Zion Baptist Church v. Whitmore* (Iowa) 13 L. R. A. 192.

Ang. & A. Priv. Corp. § 512; *St. Mary's Church Corp.* 7 Serg. & R. 530.

Where the statute or charter requires a certain number of persons to be present to transact business, it is held they must all be so present, and if not their action is invalid.

Ang. & A. Priv. Corp. § 511; *Ex parte Rogers*, 7 Cow. 526.

It is only when an election is authorized by law that electors who represent the state or whole people are bound to attend, and if they do not, cannot be bound by the expression of those who do attend.

Wells v. Bain, 75 Pa. 89, 15 Am. Rep. 563.

Braden v. Stumph, 16 Lea, 581, involved the construction of a constitutional provision prohibiting a division of the county, "without the consent of two thirds of the qualified voters in such part taken off." The court cited *Bouldin v. Lockhart*, 1 Lea, 195; *Stuart v. Blair*, 8 Baxt. 141; *Combs v. Stumple*, 11 Lea, 26, and said under these decisions: "Positive approval by actual vote, and no mere tacit acquiescence with the results of election by those not voting," was sufficient.

See also *Hawkins v. Carroll County Suprs.* 50 Miss. 735; *State v. Timms*, 54 Wis. 318; *Harshman v. Bates County*, 93 U. S. 569, 23 L. ed. 747; *Cass County v. Johnston*, 95 U. S. 860, 24 L. ed. 416.

Under a statute requiring "a majority of the legal voters" to be favorable to the opening of establishments for the sale of refreshments on Sunday before they could be opened, the court thought it took a majority of all legal voters, not simply those voting.

State v. Winkelmeier, 35 Mo. 103. So also *State v. Sutterfield*, 54 Mo. 891.

Where a law provided that the taxable inhabitants by a "majority vote," may raise money for railroad purposes, it was held to mean all of the taxable inhabitants, not a majority of those voting.

People v. Fort Edward Trustees, 70 N. Y. 28. See also *State v. Anderson*, 26 Neb. 517; *Com. v. Wickersham*, 66 Pa. 134; *Enyart v. Hanover Twp. Trustees*, 25 Ohio St. 618; *Chestnutwood v. Hood*, 68 Ill. 182; *Boerett v. Smith*, 22 Minn. 53.

Under these decisions, in general or special elections, those voting are sufficient to elect or adopt that voted for, whether an official or a scheme of taxation. The doctrine of acquiescence is not accepted, however, by several of the cases.

There is a difference between an election had by such a society as that represented by the United Brethren in Christ, and by a county or township municipality or other election than those which we have pointed out.

The term "members of the society" or "two thirds the whole society," is much more definite, certain, and clear than "a majority of the electors," of any city or township.

No authority existed in general conference to call an election as such, and such action is impliedly prohibited by the constitution.

People v. Palmer, 91 Mich. 283.

Hochreiter's App., 98 Pa. 482, holds strictly to the binding force of a church constitution in its provisions for amendment.

When a conveyance is made to a society by name, for church purposes, the purposes and 24 L. R. A.

uses to which church property is put under the rules, doctrines, and fundamental law of such society or church are the purposes referred to, and such is the legal presumption. The authorities are ample holding the name sufficient to carry the creed into a trust.

Miller v. Gable, 2 Denio, 548; *Mannix v. Purcell*, 2 L. R. A. 753, 46 Ohio St. 140; *Baker v. Fales*, 16 Mass. 494; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 672.

A court of equity will enforce a trust as against a religious corporation or society, where such society is using the property for another and different purpose than that to which it was devoted.

Bowden v. McLeod, 1 Edw. Ch. 588, 6 L. ed. 257; *Schnorr's App.* 67 Pa. 188, 5 Am. Rep. 415; *McAuley's App.* 77 Pa. 897; *Kerr's App.* 89 Pa. 97; *Suttler v. First Reformed Dutch Church Trustees*, 42 Pa. 503; *Kniskern v. Lutheran Churches of St. John & St. Peter*, 1 Sandf. Ch. 439, 7 L. ed. 388.

Civil courts will not revise the decisions of churches or religious associations, upon ecclesiastical matters relating to church membership, management, or rules; but they will interfere with such associations when rights of property are involved.

Bird v. St. Mark's Church of Waterloo, 62 Iowa, 568; *Chase v. Cahnney*, 58 Ill. 509, 11 Am. Rep. 95; *O'Hara v. Stack*, 90 Pa. 477; *Atty-Gen. v. Geerlings*, 55 Mich. 567; *People v. Nappa*, 80 Mich. 485.

Philomath College v. Wyatt, (Or.) Oct. 5, 1892, in its reasoning and argument is far more satisfactory than that of *Lamb v. Cain*, 14 L. R. A. 518, 129 Ind. 486. See also *Mount Zion Baptist Church v. Whitmore*, 13 L. R. A. 196, 83 Iowa, 189.

We find no case of last resort except *Lamb v. Cain*, *supra*, where the adjudication or action of a church tribunal has been held an excuse for a civil tribunal making a decree justifying an abandonment of the constitution of such society, and that, where property rights were involved, the court could not compel parties to live up to such compact, if they would enjoy and control such property.

Watson v. Jones, 80 U. S. 13 Wall. 679, 20 L. ed. 686; *Harmon v. Dreher*, 1 Speers, Eq. 87, and *Dutch Church of Albany v. Bradford*, 8 Cow. 456, do not so hold, but only contain dicta from which it may be claimed such conclusion should be reached.

There are many cases holding ecclesiastical decisions binding when they involve only church rules and practices, and such is probably the general rule, and including these are cases where the right of removal or expulsion of pastor, church member, or church official is involved and property interests or rights are not directly litigated.

But see *O'Hara v. Stack*, *supra*.

To the same effect where such right is alone involved, but holding that civil courts can intervene where property rights are directly involved in the suit, are *Hochreiter's App.* 98 Pa. 482; *Chase v. Cheney*, *supra*. See note to same in 10 Am. L. Reg. by Chief Justice Fuller, of the United States Supreme Court; *Atty-Gen. v. Geerlings*, 55 Mich. 567; *Bird v. St. Mark's Church of Waterloo*, 62 Iowa, 568; *O'Hara v. Stack*, 90 Pa. 477; *Suttler v. First Reformed*

Dutch Church Trustees, 42 Pa. 508; *McAuley's App.* 77 Pa. 397; *Kerr's App.* 89 Pa. 97; *Bowden v. McLeod*, 1 Edw. Ch. 688, 6 L. ed. 257; *Ferraria v. Vasconcellos*, 81 Ill. 25; *Wilson v. Presbyterian Church of St. John's Island*, 2 Rich. Eq. 192; *Atty-Gen. v. Pearson*, 8 Meriv. 415; *People v. Nappa*, 80 Mich. 485.

There are many cases and authorities holding that action by a society or its tribunals, in violation of church constitution, are invalid, and that the branch of church adhering to the original constitution, not lawfully amended, is the church. Among these are—

Rottmann v. Hartling, 22 Neb. 375; *Philomath College v. Wyatt* (Or.) Oct. 5, 1892; *Cooley, Const. Lim. p. 78*; *Hochreiter's App.* 93 Pa. 492; *Schnorr's App.* 67 Pa. 188, 5 Am. Rep. 415; *Winebrenner v. Colder*, 43 Pa. 544; *McAuley's App. supra*; *Kerr's App.* 89 Pa. 97. Taft, *Circuit Judge*, in *Brundage v. Dardorf*, 55 Fed. Rep. 849, says: "The new and amended constitution changed materially the form of the church government."

Those voting at the unauthorized election had no power to represent or bind those who did not choose to vote. *Philomath College v. Wyatt, supra*; *Braden v. Stumph*, 16 Lea, 581; *Cooley, Const. Lim. 5th ed. 78*.

Messrs. John A. McMahon and Loyal E. Knappen, with *Messrs. W. B. Williams & Son*, for appellees.

McGrath, J., delivered the following opinion:

I agree with my Brother Grant that the constitution of 1841 was a valid instrument, and as such was binding upon the society. It had been acquiesced in, recognized, and accepted as the fundamental law of the society for nearly fifty years. Can there be any doubt upon this record that the majority has proceeded in utter disregard of the plain provisions of that constitution, and must the constitution-abiding members of this society be ousted from the possession of property held and occupied by them, and devoted to uses contemplated thereby? This is the issue. One of the objects of the constitution, as expressed by that instrument, is to define the powers and the business of the general conference. By that instrument that body is delegated certain powers, subject to the limitations and restrictions therein prescribed. The general conference is given power to make or repeal any rule of discipline, but it is expressly provided that no rule shall be passed "to change or do away with the confession of faith as it now stands," or that will infringe upon the rights of any as relates to the mode of baptism, the sacrament of the Lord's supper, or the washing of feet, or that will deprive local preachers of their votes at annual conferences; and it is expressly provided that "there shall be no connection with secret combinations," and that "there shall be no alteration in the foregoing constitution, unless by request of two thirds of the whole society." The question to be determined is not whether the action taken is or is not included within the scope of general powers conferred, or whether the authority may or may not be fairly implied, or whether the power is one which does or does not belong to or inhere in a body of

this character. Those questions are settled by the contract itself.

At a session of the general conference held in 1885 the bishops' address contained the following: "We need not to say to your honorable body that the subject of secret societies has become a most perplexing one to our Zion. This is well known to you all. Also, it is expected of you by the people whom you represent that under the blessing of God you will put this subject to rest, and bring peace to the church by wise regulations. To this end we recommend: First. In that it is admitted that our present constitution has not been as yet submitted to a vote of the whole society, you determine whether the whole subject under consideration is or is not yet in the hands of the general conference. Second. Should you determine that it is in your hands, then transfer the whole subject from the realm of constitutional law to the field of legislative enactment, which would be to expunge the whole question from the constitution, and bring it into the field of legislative enactment, to be handled as the church, through her representatives, may determine from time to time. Third. That you may limit the prohibitory feature of your enactment to combinations, secret and open, to which the church believes a Christian cannot belong. Fourth. Should you decide that this constitutional question is beyond your control, and in the hands of the whole society, then submit the above propositions, properly formulated, to a vote of the whole church, and let a two-thirds vote of those voting be the authoritative voice of the church on the subject."

In the report of the committee raised in 1885 the following occurs: "First. We find that the present constitution of the church was never submitted to the suffrage of the members and ministry of the church for ratification, either by popular vote or by conventional approval, though it purports to be the constitution of the 'members' of the denomination. Second. We find by reference to the records that throughout most of its history it has been the subject of question and differences of opinion as to its legality and binding force as an organic law. Third. We find also that the clause found in article 11, § 4, which says, 'No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands;' and article 4, which says, 'There shall be no alteration of the foregoing constitution unless by request of two thirds of the whole society,'—are in their language and apparent meaning so far reaching as to render them extraordinary and impracticable as articles of constitutional law. Fourth. From the facts and reasons thus indicated, we conclude that the constitution has acquired its force only by the partial and silent assent of the church, and that the general conference has a right to institute measures looking to the amendment, modification, or change of the constitution at any time when it is believed that a majority of our people favor a modification thereof. Fifth. It is the sense and belief of your committee that the constitution as it stands is not in harmony with the present wishes of our people, as has been

indicated in discussions, petitions, and elections during the past year. Sixth. For these reasons, and for the purpose of finally settling all questions of dispute and matters of disturbance to the peace and harmony of the church, so far as the confession of faith and the constitution are concerned, your committee would recommend the adoption of the following papers, namely: 'Whereas, our confession of faith is silent or ambiguous upon some of the cardinal doctrines of the Bible, as held and believed by our church; and whereas, it is desirable and needful to so amend and approve our present constitution as to adapt its provisions more fully to the wants and conditions of the church in this and in future time: Therefore . . . the duties and powers of this commission shall be to consider our present confession of faith and constitution, and prepare such a form of belief, and such amended fundamental rules for the government of this church in the future, as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world: provided, (1) that this commission shall preserve unchanged in substance the present confession of faith so far as it is clear; (2) that it shall also retain the present itinerant plan; (3) it shall keep sacred the general usages and distinctive principles of the church on all great moral reforms as sustained by the word of God, in so far as the province of their work may touch them.

Resolved, that when, according to the foregoing provisions, the result of the vote of the church shows that two thirds of all the votes cast have been given in approval of the proposed confession of faith and constitution, it shall be the duty of the bishops to publish and proclaim said result through the official organs of the church, whereupon the confession of faith and constitution thus ratified and adopted shall become the fundamental belief and organic law of the church.'

In accordance with the action of the conference, the bishops published a letter, addressed to the church, on the work of the commission, in which the following occurs: "In the confession of faith three things were effected: First, some verbal changes and reconstruction of sentences for the sake of grammatical accuracy and definiteness of expression; second, a systematic arrangement of our present confession of faith, under distinct articles; third, the addition of five new articles, namely, of justification, of regeneration and adoption, of sanctification, of the Christian Sabbath, and of a future state. These changes secure correct grammatical construction, systematic arrangement, clearness of expression, and a fuller and more comprehensive view of the doctrines of the scriptures. We believe the utility of these changes is so apparent that they will be acceptable to you, and will receive your indorsement." In the address of the bishops at the session of 1889, the following occurs: "It is sadly known throughout the church that there has been for a time a growing friction along the line of what has been known as the organic law of the church. Two antagonistic views have obtained and found

ample advocacy in the past. The one is that, we have a valid constitution of absolute and unquestioned force, binding on all the members of the church, and also so bounding, restricting, and limiting the action of the general conference itself that it cannot legislate along certain lines, nor adopt certain measures, well defined in the limiting terms of the constitution, without being guilty of usurpation and revolution. The other view is that the general conference, being a constitutional body, has judicial powers, is capable of judicial action, and hence, being the highest authority known in the jurisprudence of the church, may by right adjudicate questions of dispute, interpret and construe law, as well as devise and formulate plans for the furtherance of its benevolent designs and its missions of mercy among men. It is furthermore held that the restrictions which have been supposed to form an impassable barrier to the authority of the general conference are so far reaching in their demands, and so ambiguous in their meaning, as to render them utterly untenable in a day of advanced thought and of expanding measures. It has been in a measure demonstrated that a feature of absolute immutability has been impressed on her constitution, so that its amendment, according to its own terms, is an utter impossibility. This absolutism in our system, this inflexibility of provision for amendment, is being regarded, in the light of recent experience, as exceedingly unfortunate."

The new confession of faith contains thirteen articles. The changes made are given below. The words in parentheses were in the old confession, but have been stricken from the new. The words in italics were not in the old, but have been added to the new.

"Article 1. We believe that this triune God created the heavens and the earth, and all that is therein, visible and invisible (and, furthermore, sustains, governs, protects, and supports the same); *that he sustains, protects, and governs these with gracious regard for the welfare of man, to the glory of his name.*"

"Art. 8. We believe in Jesus Christ; that he is very God and man; that he became incarnate by the power of the Holy Ghost (in the Virgin Mary), and was born of the Virgin Mary; that he is savior and mediator of the whole human race, if they, with full faith *in him*, accept the grace proffered in Jesus; that this Jesus suffered and died, . . . and will come again at the last day, to judge the (living) *quick* and the dead.

"Art. 4. We believe in the Holy Ghost; that he is equal in being with the Father and the Son; *that he convinces the world of sin, of righteousness, and of judgment*; that he comforts the faithful, and guides them into all truth.

"Art. 5. We believe that the Holy Bible, Old and New Testaments, is the word of God; that it (reveals) *contains* the only true way to our salvation; that every true Christian is bound to acknowledge and receive it (with the influence), *by the help of the spirit of God, as the only rule and guide* (in faith and practice, and that, without faith in Jesus Christ, true repentance, forgiveness of sins,

and following after Christ, no one can be a true Christian. We also believe that what is contained in the holy scriptures, to wit, the fall in Adam and redemption through Jesus Christ, shall be preached throughout the world).

"Art. 6. We believe in a holy Christian church (the communion of saints, the resurrection of the body, and life everlasting), composed of true believers, in which the Word of God is preached by men divinely called, and the ordinances are duly administered; that this divine institution is for the maintenance of worship for the edification of believers, and the conversion of the world to Christ. We believe in the resurrection of the dead, the future general judgment; and an eternal state of rewards, in which the righteous dwell in endless life, and the wicked in endless punishment.

"Art. 7. We believe that the (ordinance) sacraments, baptism (and the remembrance of the sufferings of our Lord Jesus Christ), and the Lord's supper, are to be (used in the church) *in use* and (should be) practiced by all (Christians) *Christian societies* (and that it is incumbent on all the children of God particularly to practice them), but the (manner in which they ought) *modes of baptism, and the manner of observing the Lord's supper*, are always to be left to the judgment and understanding of every individual. *Also the baptism of children shall be left to the judgment of believing parents.* The example of the washing of feet is to be left to the judgment of each one, to practice or not, (but it is not becoming of any of our preachers or members to traduce any of their brethren whose judgment and understanding in these respects is different from their own, either in public or in private. Whosoever shall make himself guilty in this respect, shall be considered a traducer of his brethren, and shall be answerable for the same).

"Art. 8. We believe that man is fallen from original righteousness, and, apart from the grace of our Lord Jesus Christ, is not only entirely destitute of holiness, but is inclined to evil, and only evil, and that continually; and that, except a man be born again, he cannot see the kingdom of heaven.

"Art. 9. We believe that penitent sinners are justified before God, only by faith in our Lord Jesus Christ, and not by works; yet that good works in Christ are acceptable to God, and spring out of a true and living faith.

"Art. 10. We believe that regeneration is the renewal of the heart of man after the image of God, through the word, by the act of the Holy Ghost, by which the believer receives the spirit of adoption, and is enabled to serve God with the will and the affections.

"Art. 11. We believe that sanctification is the work of God's grace, through the word and the spirit, by which those who have been born again are separated in their acts, words, and thoughts from sin, and are enabled to live unto God, and to follow holiness, without which no man shall see the Lord.

"Art. 12. We believe that the Christian Sabbath is divinely appointed; that it is commemorative of our Lord's resurrection from the grave, and it is an emblem of our eternal rest; that it is essential to the welfare of the civil

community, and to the permanence and growth of the Christian church, and that it should be reverently observed as a day of holy rest, and of social and public worship."

The old constitution provided that the general conference "shall consist of elders, elected by the members in every conference district throughout the society." The new constitution provides that the general conference "shall consist of elders and laymen elected in each conference district throughout the church. The number and ratio of elders and laymen, and the mode of their election, shall be determined by the general conference." The new constitution further provides that "the ministerial and lay delegates shall deliberate and vote together as one body; but the general conference shall have power to provide for a vote by separate orders, whenever it deems it best to do so; and in such cases the concurrent vote of both orders shall be necessary to complete an action." Section 10 of article 1 provides that "the general conference may, two thirds of the members elected thereto concurring, propose changes in or additions to the confession of faith: provided, that the concurrence of three fourths of the annual conferences shall be necessary to their final ratification." Section 1 of article 8 is as follows: "We declare that all secret combinations which infringe upon the rights of those outside their organization, and whose principles and practices are injurious to the Christian character of their members, are contrary to the word of God, and that Christians ought to have no connection with them. The general conference shall have power to enact such rules of discipline with respect to such combination as in its judgment it may deem proper." Section 1 of article 5 provides that amendments may be proposed by any general conference, two thirds of the members elected thereto concurring, which amendments shall be submitted to a vote of the membership, and a majority of all the votes cast shall be necessary to final ratification.

It is idle to say that there has been no change in the confession of faith. It will not be contended that the questions in respect to which either the confession of faith of the constitution of 1841 were silent or ambiguous, or in respect to which the additions, changes, or modifications were made by the commission, were in any sense new, or had their origin in the commission. These subjects had been discussed at the various conferences since the adoption of the constitution of 1841. The changes involved matters upon which eminent divines have differed, and which have been the subject of controversy for centuries; matters concerning which wide differences of opinion existed in the several conferences. The subjects of infant baptism, of the washing of feet, of natural, hereditary, and total depravity, of a lay delegation, and of secret combinations, had been frequently discussed. In 1853 a resolution defining natural, hereditary, and total depravity had been adopted by a vote of 28 to 19. A secret combination had been defined as "one whose initiatory or bond of union is a secret." In view of the multipli-

city of existing sects, all declaring a belief in the same scriptures, but differing in interpretation, how can it be claimed that there was no change in the confession of faith? Can it be said that articles may be added to a confession of faith, declaring a belief in "depravity," "justification," "regeneration and adoption," "sanctification," and "endless punishment," and that the confession has not been changed by the additions? It is no answer to say that in the revision matter was simply transferred from discipline to confession, for the confession was the paramount law. The general conference had the power to formulate rules of discipline, but it was restricted to rules which should not change the confession. If rules had been adopted which pertained to the confession of faith, and had the effect to change, add to, or vary the creed, they were illegally adopted, were without binding force, and had no place in either discipline or creed. The proponents of change had constantly been met with the point of order that such change was prohibited by the constitution, and as constantly by the ruling that the point of order was well taken. The record, including the proceedings of the conference, will be searched in vain for any determination by the general conference, or any committee thereof, or by the commission, that these modifications or alterations or additions to the confession of faith were immaterial, and did not add to or vary or change the confession. Indeed, an examination of the proceedings, of the report of the committee of 1885, and of the address of the bishops, leads inevitably to the conclusion that these changes were regarded and construed as material; and the constitution of 1841 as prohibiting their enactment. As early as 1845, a resolution was adopted by a vote of 15 to 8 declaring "that, in view of the constitution, this general conference has no right to revise, alter, or amend the confession of faith as it now stands." The commission of 1885 originated in a desire to settle disputed and vexed questions. The vote creating the commission stood 78 to 42. The utmost that can be said for the new confession and constitution is that these questions have been settled in accordance with the views of the proponents of change, and that the views of the opponents are no longer supported by the written articles. Nor has the highest court of judicatory of this society undertaken at any time to give to the clause of the constitution providing that the concurrence of two thirds of the whole society was necessary to the amendment any other meaning than that which its language clearly conveys. Indeed, it is evident from an examination of the proceedings of the general conference, from the report of the committee of 1885, and from the language of the bishops, that this article was understood, regarded, and interpreted to mean that the affirmative concurrence of two thirds of the whole society was necessary to amend the constitution. At a session of 1878 a motion was made that this clause be so interpreted as to mean two thirds of all that vote, but the motion was laid on the table. The following resolution was then passed: "Re-

solved, that the explicit rendering of article 4 of the constitution be submitted to the board of bishops, and that they be requested to publish the same in the Religious Telescope." It does not appear by the journals that the bishops ever reported, but by the record it appears that the matter was discussed by the bishops, but no conclusion was reached. A motion was made in 1849 to "expunge" the constitution, on the ground of illegality: but there were but two votes in the affirmative. It remained for the bishops, in 1885, to cut the knot. They recommended one of two courses, viz., that the constitution as a whole be disregarded, or to submit the new constitution to vote, and "let a two-thirds vote of those voting be the authoritative voice of the church." The bishops did not assume to interpret the constitutional provision in question but suggested an edict declaring the two-thirds vote of those voting to be the authoritative voice of the church. The commission did not undertake an interpretation, but found that the objectionable clauses "are in their language and apparent meaning so far reaching as to render them extraordinary and impracticable as articles of constitutional law." They further concluded that the constitution had acquired its force only by the partial and silent assent of the church, and that the conference had the right to institute measures looking to its amendment at any time when it is believed that a majority favor such amendment. A minority report was presented, but the majority report prevailed by a vote of 78 to 42. The bishops, in their address in 1889, use this significant language: "Certainly a church constitution should have some possible method of procedure by which it could be amended. That those who gave us the constitution intended to put it practically beyond the possibility of alteration or modification has never been insisted upon; and yet the church found itself in this very attitude when it came to meet a growing demand for more pious and equitable measures, arising from the exigencies of the times." This language is entirely inconsistent with any other interpretation of this constitutional provision than that insisted upon by the defendants. The constitution, as proposed in 1887, provided that "if, at any time after the passage of this constitution, it should be contemplated either to alter or amend the same, it shall be the privilege of any member in the society to publish such contemplation at least three months before the election of delegates to the general conference." This was changed, before adoption, so as to make it necessary for two thirds of the whole society to request a change before it could be granted. The purpose of this provision was not to take away from the general conference all power to act, but to prevent action until the request was made. Any amendment suggested would be subjected to the scrutiny of the conference. The request did not affect the amendment, but affirmative action by the conference on the request was necessary.

It was entirely competent for the members of this society to associate together under this compact; to formulate a summary of

their distinctive beliefs; to exclude therefrom all disputed questions; to regard certain matters as nonessentials, and to leave certain others to individual judgment; that as to these questions the articles should be silent; to protect the exercise of that judgment from criticism; and to surround the creed so formulated with such safeguards as they deemed proper and requisite. The creed so formulated was the basis of their association. To promulgate that creed, and protect themselves in certain observances, was the purpose of the society. To secure it from innovation was the object of the constitutional provision. They recognized the tenacity with which each member adhered to matters of belief as expressed, and the right to the exercise of individual judgment as to matters upon which no expression was given. The creed was agreed to, not only by reason of what it expressed, but also because of what it omitted; by reason as well of its concessions as of its requirements. They recognized the possibility of development and of agreement upon questions upon which no agreement was reached, and the right to change, but agreed that such development should be evidenced by the affirmative concurrence of two thirds of the whole society. It was not alone matters of administration and government that they aimed for protection in, but matters of belief; the underlying principles of the association; the thought which the society was formed to advance. They formulated and declared the church polity, and by the fundamental law prohibited a change of that polity unless in accordance with express provision made in the constitution itself. The relations between the members of this association is one of contract, and the confession of faith and constitution constitute the terms of the agreement, which is binding upon all. *Hyde v. Woods*, 2 Sawy. 655, 94 U. S. 528, 24 L. ed. 264; *White v. Brownell*, 2 Daly, 329; *Eddinghouse v. Worth Club*, 4 Abb. N. C. 800, 801, note; *Leach v. Harris*, 2 Brewst. (Pa.) 571; *Venable v. Ebenezer Baptist Church of Atchison*, 25 Kan. 177; *State v. Williams*, 75 N. C. 184; *Innes v. Wylie*, 1 Car. & K. 262; *Procheit v. Schaefer*, 11 Phila. 166; *Brine v. Board of Trade*, 2 Am. L. Rec. 368. In *White v. Brownell*, Van Vorst, J., says: "As this association is not organized in pursuance of any statute, nor the terms of membership fixed by the principle of the common law, it follows that the agreement which the members made among themselves on the subject must establish and determine the rights of the parties on the subject. The constitution of the association and its laws, agreed upon by the members, contain all the stipulations of the parties, and is the law which should govern. The members have established a law for themselves. The very existence of this body depends upon the faithful observance of its organic law by all its members. The court must regard the constitution and laws of this board as the contract by which all the members are bound. The court cannot make any other contract for the parties than they have solemnly made for themselves." An amendment of the constitution of a so-

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cietly must be adopted in accordance with the provisions of the constitution in force at the time of such adoption respecting such amendment; otherwise, it is invalid. *Hochreiter's App.* 98 Pa. 479; *Rottmann v. Bartling*, 22 Neb. 875; *State v. Swift*, 69 Ind. 505; *Leite v. Foraker*, 46 Ohio St. 677, 6 L. R. A. 422.

It is urged, however, that the judgments of ecclesiastical tribunals in matters of faith and discipline, and the general polity of the church, are binding upon civil courts. In the present case there has been no judicial determination of any matter of faith, or discipline, or general polity adverse to defendants. As already suggested, there has been no adjudication that the confession of faith has not been changed. There has been no attempted interpretation or construction of the constitutional provision in question, other than that insisted upon by the defendants; indeed, the "apparent meaning" of that provision has at all times been recognized. The edict adopted by the conference before the vote was had betrays the construction given to this provision. The conference openly and notoriously disregarded this plain and express provision of a contract binding as well upon conference as individuals. The action taken cannot be raised to the plane of judicial action. It was a breach of compact, and revolutionary. Even those voting in the affirmative cannot be presumed to have intended to violate the fundamental law requiring an affirmative expression from two thirds of the whole society, or to give any other construction to the provision in question than that for which the defendants contend. The constitution negated the authority to amend in any other manner than that indicated. Can it be insisted that less than two thirds of the society, acting in a legislative capacity, could not amend, but that a less number could accomplish the same result, under the guise of an adjudication, without semblance of authority? The constitution relegated the subject-matter to the society,—to the legislative power. This is not a case of the excommunication of a member who has submitted himself to the authority of an organization having power, either express or implied, to deal with that question. Here we have an express limitation of power. The only authority to which the membership of this society have submitted themselves with respect to the matter in question is the affirmative expression of two thirds of the whole society. Church judicatories cannot usurp legislative powers. The creation of judicial tribunals and their investment with authority is one of the functions of the sovereign power.

But it is insisted that the decision of the conference that the new constitution and confession of faith had become the fundamental belief and constitution of the society is binding upon this court. The question here involved is one of ownership of property. These proceedings are instituted to recover possession and control of that property. In this class of cases the conclusive effect of church authority, acting within the scope of its powers, is fully recognized by all the cases, and it is as well settled that civil

courts will not review the decisions of ecclesiastical judicatories upon the merits; but the proposition that the judgments of church judicatories as to their own powers or jurisdiction, or the lawfulness of their methods, is conclusive, is not sustained by reason or the weight of authority. In *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95, it was expressly held that civil courts will not interfere with churches or religious associations when rights of property or civil rights are involved. It was held, however, that, where there is no other right involved than a clerical office, the decision of an ecclesiastical court as to its own jurisdiction under the canons of the society is conclusive. *Watson v. Jones*, 80 U. S. 18 Wall. 679, 20 L. ed. 666, involved the powers of the general assembly of the Presbyterian Church. The constitution of that body provides that "to the general assembly also belongs the power of deciding all controversies respecting doctrine and discipline; of reproofing, warning, or hearing testimony against any error in doctrine or immorality in practice, in any church, presbytery, or synod; . . . superintending the concerns of the whole church; . . . of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of manners, and the promotion of charity, truth, and holiness, through all the churches under their care." In all of the cases in which any question as to the authority of the general assembly under this constitutional provision has been raised, it has been held that the authority was practically unlimited. *State v. Parrie*, 45 Mo. 198. Mr. Justice Miller concedes that the doctrine of the English courts is opposed to the proposition announced by him. The English cases are collated and considered by Mr. Justice Fuller in a note to *Chase v. Cheney* (Ill.) 10 Am. L. Reg. N. S. 813. In the cases cited by Mr. Justice Miller, the question of the power, authority, and jurisdiction of the tribunals whose acts were under consideration are fully considered and discussed, and the respect paid to those tribunals is predicated upon authority conferred. In *Gibson v. Armstrong*, 7 B. Mon. 481, the court discusses at length the general and unlimited powers of the conference, and says: "There seems to be due from the tribunals of the civil government to those of the church at least so much respect as to require that the acts done by the latter in the name of the church should be deemed valid under its law, and the dependent right should be determined accordingly until those acts were reversed by the church, or at least until they are conclusively demonstrated to be against its law." In *Harmon v. Dreher*, 1 Speers, Eq. 87, Dreher had been declared no longer a minister of the society. The court says: "That the synod was armed with judicial authority for trying and determining cases against delinquent ministers and churches appears from the constitution itself, which is the rule for all who have accepted of it, and which expressly provides for such procedure." *Shannon v. Frost*, 8 B. Mon. 257, arose out of a controversy in a Baptist so-

ciety, which had no constitution and acknowledged no ecclesiastical authority, the voice of the majority of the congregation being of necessity the voice of the church.

In *Den v. Bolton*, 13 N. J. L. 236, the court says: "The sentence of suspension appears to have been a judgment of a competent court within its jurisdiction, having authority over the party and the subject, liable to an appeal to a higher tribunal by any one aggrieved, from which, however, no appeal was taken, and to which, therefore, we are bound, sitting in another judicatory, to give respect and effect. The jurisdiction of the class in such case is, I think, fully sustained by the constitution. Here are, then, the sentences of a competent tribunal, in the exercise of its constitutional jurisdiction, deposing the elders and deacons, as well as the ministers, from their respective offices." In *Ferraria v. Vasconcellos*, 23 Ill. 456, it was held that, after individuals or organized bodies have entered into a contract or agreement, it requires the assent of the contracting parties to abrogate the agreement, and no reason is provided on this principle why a church which, by compact, has become a portion of the presbytery, should have the voluntary right to withdraw from the organization without mutual consent. In *State v. Parrie*, 45 Mo. 198, it was expressly held that the general assembly of the Presbyterian Church possessed unlimited jurisdiction in relation to the matter in dispute. In *German Reformed Church v. Com.*, 3 Pa. 283, Siebert was excommunicated by the consistory. The articles gave him a right to appeal to the classis, and from thence to the synod. He did not avail himself of either, and the case is put upon the ground that, until final adjudication by the church judicatories, the relator was without remedy by mandamus. The court says: "Whatever is concluded in such [final] judicatory by a majority of votes is valid and binding unless it can be shown to be contrary to the word of God and the constitution of the church." In *McGinnis v. Watson*, 41 Pa. 9, the court finds that "the act of the synod is binding upon the congregation composing it as members so far as the act is in accordance with its own laws;" that "in none of these matters has the synod transcended its usual authority." They say: "We might have determined this case by saying that there is nothing in the plaintiff's evidence that says that the action complained of, judged by the constitution and usages of the seceder church, was brought about by any excess of authority on the part of the presbyteries and synod; but we have preferred to treat the case as if the burden of proof was on the defendants, and show affirmatively that the proceeding is in harmony with the authority usually admitted to belong to those bodies." In *Schnorr's App.*, 67 Pa. 138, it was held that, in church organizations, those who adhere to the regular order of the church, local and general, though a minority, are the church congregation. The title to the church property of the divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws,

usages, customs, and principles which were accepted among them before the dispute began are the standards for determining which party is right. Mr. Justice Sharswood, in that case, says: "If the opinion of Lowrie, Ch. J., in *McGinnis v. Watson*, may seem to controvert any of these positions, and to hold that a congregation may change a material part of its principles or practices without forfeiting its property, on the ground that to deny this 'would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life,' and because the guaranty of freedom to religion forbids us to understand the rule in this way, I ask leave most respectfully to enter against it may dissent and protest. I do so the more fully because it was entirely extrajudicial to any question in the case. Courts, which have the supervision and control of all corporations and unincorporated societies or associations must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please raising from their own means another fund, and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land." In *Kerr's App.*, 89 Pa. 97, the court held that the resolution adopted by the church synod was *ultra vires*; that a decree of the church judicatory is binding only where it is affirmatively shown that it has acted within the scope of its authority, and has observed its own organic forms and rules.

In a note to *Gartin v. Penick* (Ky.) 9 Am. L. Reg. N. S. 210, 231, Mr. Redfield says: "We do not understand that any such presumption in favor of the jurisdiction of these church judicatories exists, as in the case of the superior court of general jurisdiction in the state or nation; but, on the contrary, everything requisite to create the jurisdiction must be proved affirmatively by any who claim the benefit of their action, as in the case of courts of limited and summary powers within the state, or of all foreign courts, as church courts surely may be regarded. But, when this is shown, we suppose the judgment of church courts and assemblies are as conclusive as those of any other tribunal. It is like the case of a reference or arbitration. . . . But, as we have before said, the mere decision of a court of summary jurisdiction, or of an arbitration, or a foreign court is not even *prima facie* evidence of its binding obligations upon the parties. Something more must be shown, because the law does not pronounce in favor of the jurisdiction or of the regularity of the proceedings. These must be shown before any decision becomes obligatory. The case of an arbitration will well illustrate the whole subject. The

submission must be shown, or, in the case of an ecclesiastical court, that the person and the subject-matter come within the range of its control." Mr. Redfield further discusses the question in a note to *Chase v. Cheney* (Ill.) 10 Am. L. Reg. N. S. 808, and to the same case is appended a note by Mr. Fuller, where the whole subject is ably and exhaustively discussed. Mr. Fuller says: "There can be no question, we apprehend, that an ecclesiastical court must be considered one of special and limited jurisdiction. . . . If such a court be a domestic one, whose judgments can only appear by its record, the jurisdiction of the court, both in regard to the subject-matter and the parties, must appear upon the record, and unless it do so appear, the judgment cannot be upheld. It must be further conceded, in regard to ecclesiastical courts in this country, that they must, as to civil tribunals of the state or nation, stand upon the same basis as foreign courts." It has been expressly held by this court that the provision of the Federal Constitution that full faith and credit shall be given in each state to the records and judicial proceedings of every other state does not preclude an inquiry into the jurisdiction of courts; and if, in fact, the subject-matter of a suit was not within the jurisdiction of the state from which the court derives its authority, its judgment is a nullity, and may be so treated everywhere. *People v. Danell*, 25 Mich. 247, 12 Am. Rep. 280; *Wright v. Wright*, 24 Mich. 180; *McKean v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 333. In *Connitt v. Reformed Prot. Dutch Church of New Prospect*, 54 N. Y. 551, the classis had dissolved a pastoral relation. An appeal was taken to the particular synod, and then to the general synod, where the decision was affirmed. The court expressly finds that the classis had jurisdiction to make the decision, and dissents from the view expressed in *Chase v. Cheney* and *Watson v. Jones*,—that the decision of an ecclesiastical tribunal as to its own jurisdiction is conclusive upon the civil courts. In *Earle v. Wood*, 8 Cush. 430, the court, after discussing the powers conferred upon the yearly meeting by the constitution and usages of the society, finds that "the yearly meeting has a final and controlling jurisdiction in all matters of faith and religious duty, of administration and discipline, as well of manners and conduct, of all Quakers within its limits." In *Watson v. Avery*, 2 Bash. 332, 349, Mr. Justice Hardin, speaking for the court, says: "If it be true, as insisted for the appellees, that the inferior courts and people of the church are bound to accept as final and conclusive the assembly's own construction of its powers and submit to its edicts as obligatory, without inquiring whether they transcend the barriers of the constitution or not, the will of the assembly and not the constitution, becomes the fundamental law of the church. But the constitution, having been adopted as the supreme law of the church, must be supreme alike over the assembly and people. If it is not, and only binding on the latter, the supreme judicatory is at once a government of despotic and unlimited powers. But we hold

that the assembly, like other courts, is limited in its authority by the law under which it acts; and, when rights of property which are secured to congregations and individuals by the organic law of the church are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract or the fundamental law of a voluntary association." See also *Gartin v. Penick*, *supra*; *Associate Reformed Church Trustees in Newburgh v. Theological Seminary Trustees at Princeton*, 4 N. J. Eq. 77; *State v. Trinity Church in Trenton*, 45 N. J. L. 280; *Rottmann v. Bartling*, *supra*; *Com. v. Green*, 4 Whart. 608; *Green v. African M. E. Soc.*, 1 Serg. & R. 254; *Runkel v. Winemiller*, 4 Harr. & McH. 429, 1 Am. Dec. 411; *Brocius v. Reuter*, 1 Harr. & J. 551, 2 Am. Dec. 534; *Thompson v. Catholic Cong. Soc. in Rehobotha*, 7 Pick. 160; *Harrison v. Hoyle*, 24 Ohio St. 254.

The edicts and declarations of the conference contravened the organic law of the society, and were *ultra vires*. It has been frequently determined that the title to church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs, and principles which were accepted among them before the dispute began are the standard for determining which faction is right. *McGinnis v. Watson*, *Schnorr's App.* and *Ferraria v. Vasconcellos*, *supra*. Mr. Justice Strong, in his valuable work on the Relations of Civil Law to Church Polity (pages 45, 59), says: "Cases sometimes arise in civil courts in which it becomes necessary to determine which part of a divided church is entitled to the church property."

In such a case, . . . courts of law will inquire which party, or which division, adheres to the form of church government, or acknowledges the church connection designated in the conveyance, and adjudge the right to that party. . . . That property the civil courts will adjudge to the members, however few in numbers they may be.

This rule . . . necessitates an inquiry into the constitution and discipline of the church . . . to enable the court to discover which of the contending parties adheres to the order. . . . Civil courts will not permit the diversion of a trust.

When property is held, charged with a trust for the use of a church receiving and maintaining certain religious doctrines, it occasionally happens that its members depart from the faith, and embrace other and contrary doctrines, while still claiming to hold the church property. In such a case, if the property can be retained by them, it is diverted from the use to which it was first settled.

Such a perversion the civil law will not allow. It will interpose its strongest arm to arrest it. . . . Courts of law will institute all inquiries necessary to determine who were the real beneficiaries intended, and prevent the diversion of the property to any other uses; and in so doing they will, if necessary, investigate the doctrines held, or the religious belief of the members, . . .

24 L. R. A.

to identify the persons for whose use the grant or gift was originally intended." The defendants are in possession. They adhere to the old constitution and confession of faith. Neither has been lawfully changed. The adherents of the new constitution refused longer to submit to the organic law of the association, and have in effect formed a new society. When the conference trampled upon the compact, its jurisdiction ceased to be legitimate. The right to the property does not depend upon numbers, nor upon the fact that the members of the conference whose conduct was revolutionary were able, by force of numbers, to hold the opera house in which the conference convened, and force those who insisted upon the integrity of the fundamental law to acquiesce or depart. The question is, Which of the two factions adheres to the confession of faith and constitution in force when the dispute began,—Which remains loyal to the compact of association? The inquiry is not, Who went out of the opera house? but, Who remained in the church, subject to its organic law?

The decree below must be reversed, and the bill dismissed.

Grant, J., delivered the following opinion:

Complainants claim in their bill that they constitute the legal board of trustees of the Church of the United Brethren in Christ at Salem; that the defendants, who are in possession of the house of worship and other church property, claim to be the legal trustees, exclude them from the possession and use thereof,—and they pray that defendants may be enjoined from interfering with them in the possession, use, and enjoyment thereof. Although the church originated nearly a century and a half ago, it appears to have had no written confession of faith until 1815, when its general conference, held in Pennsylvania, adopted one. This confession of faith was recognized and adhered to as containing the fundamental doctrine of the church until 1839, when the defendants claim that it was changed. The church had no written constitution until 1837, when a general conference held at Germantown, Ohio, formulated and unanimously adopted one. The members of that conference doubted their authority to adopt a constitution, and therefore the conference issued a circular to give notice to the church throughout the Union that "we intend to present a memorial to the next general conference, praying them to ratify the constitution now adopted." The conference met quadrennially, and when it assembled in 1841, it appears to have entirely ignored the constitution of 1837, and the validity of its adoption, and adopted another, which is one of the subjects of this controversy. The regularity of the adoption of this constitution was early questioned by some members of the church. It is too late, however, to now question it, since it was recognized and treated as the organic law of the church for nearly fifty years. This constitution recognized the confession of faith as it then stood, and provided that "no rule or ordinance shall at any time be passed to

change or do away with it." One section provided, "There shall be no connection with secret combinations." Article 4 provided, "There shall be no alteration of the foregoing constitution, unless by request of two thirds of the whole society." It provided for a general conference, to consist of the bishops, and of elders elected by the members of every conference district throughout the society. All ecclesiastical power to make or repeal any rule of discipline was vested in this conference. The discipline, which was early adopted, made it the duty of the general conference "to examine the administration of each annual conference, whether it has strictly observed the rules and preserved the moral and doctrinal principles of the discipline in all its transactions." At the general conference of 1885, the following resolution was adopted: "Resolved, by the general conference of the United Brethren in Christ here assembled, that the general conference of our church is, and is hereby declared to be, the highest judicial authority of our church." It is conclusively established by this record that the general conference is the highest judicatory of the church, and is intrusted with the general supervision of its affairs both temporal and spiritual. In all matters, therefore, in which it has jurisdiction, its judgments are binding upon the church, its clergy, and its members, and will not be reviewed by the civil courts.

Disputes arose in the church as to certain articles of the constitution, and as to the meaning of certain portions of the confession of faith, and as early as 1869 the division of sentiment was clearly defined, and those who favored a change in the constitution became known as "Liberals," and those opposed as "Radicals." In 1885 the bishops, in their address to the general conference, called attention to these matters, and a committee was appointed to consider them, and make a report thereof to the conference. This committee made the following report:

"To the General Conference: Your committee to which was referred the confession of faith, constitution, and section 8 of chapter 10 of the discipline, beg leave to report that we have given these subjects much and most prayerful attention, and now submit the result of our deliberations:

"First. We find that the present constitution of the church was never submitted to the suffrage of the members and ministry of the church for ratification, either by popular vote or by conventional approval, though it purports to be the constitution of the members of the denomination.

"Second. We find, by reference to the records, that throughout most of its history it has been the subject of question and differences of opinion as to its legality and binding force as an organic law.

"Third. We find also, that the clause found in article 2, § 4, which says, 'No rule or ordinance shall at any time be passed to change or do away with the confession of faith, as it now stands,' and article 4, which says, 'there shall be no alteration of the foregoing constitution, unless by request of two thirds of the whole society,' are, in their

language and apparent meaning, so far reaching as to render them extraordinary, and impracticable as articles of constitutional law.

"Fourth. From the facts and reasons thus indicated, we conclude that the constitution has acquired its force only by the partial and silent assent of the church, and that the general conference has a right to institute measures looking to the amendment, modification, or change of the constitution at any time when it is believed that a majority of our people favor a modification thereof.

"Fifth. It is the sense and belief of your committee that the constitution, as it stands, is not in harmony with the present wishes of our people, as has been indicated in discussions, petitions, and elections during the past year.

"Sixth. For these reasons, and for the purpose of finally settling all questions of dispute and matters of disturbance to the peace and harmony of the church, so far as the confession of faith and the constitution are concerned, your committee would recommend the adoption of the following paper, namely:

"Church Commission. Whereas, our confession of faith is silent or ambiguous upon some of the cardinal doctrines of the Bible, as held and believed by our church; and, whereas, it is desirable and needful to so amend and improve our present constitution as to adapt its provisions more fully to the wants and conditions of the church in this and future time; therefore, resolved, by the delegates of the annual conference of the Church of the United Brethren in Christ, in general conference assembled, that a church commission, composed of twenty-seven persons, and consisting of the bishops of the church, and ministers and laymen appointed and elected by this body, an equal number from each bishop's district,—provided, that the Pacific district shall have two members besides its bishop,—be and is hereby authorized and established. The duties and powers of this commission shall be to consider our present confession of faith and constitution, and prepare such a form of belief, and such amended fundamental rules for the government of this church in the future, as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world: provided (1) that this commission shall preserve unchanged, in substance, the present confession of faith, so far as it is clear; (2) that it shall also retain the present itinerant plan; (3) it shall keep sacred the general usages and distinctive principles of the church on all great moral reforms, as sustained by the word of God, in so far as the province of their work may touch them: provided, further, that in the final adoption, as a whole, of a confession of faith and constitution, for submission to the church by the commission, a majority vote of all the members composing the commission shall be necessary. Resolved, that this commission shall meet at such time and place as the board of bishops may appoint, and is expected to complete its work by January 1, 1886. The commission shall also adopt, and cause to be executed, a plan by which the proposed confession of faith and consti-

tution may receive the largest possible attention and expression of approval or disapproval by our people, including all necessary regulations for taking, counting, and reporting the vote. Resolved, that when, according to the foregoing provisions, the result of the vote of the church shows that two thirds of all the votes cast have been given in approval of the proposed confession of faith and constitution, it shall be the duty of the bishops to publish and proclaim said result through the official organs of the church, whereupon, the confession of faith and constitution, thus ratified and adopted, shall become the fundamental belief and organic law of this church: provided, further, that the adoption of the constitution as aforesaid shall in no wise affect any legislation of this general conference for the coming quadrennium."

The committee presented a supplementary report recommending the adoption of the following law in reference to secret combinations: "A secret combination, in the sense of the constitution, is a secret league or confederation of persons holding principles and laws at variance with the word of God, and infringing upon the natural, social, political, or religious rights of those outside its pale. Any member or minister of our church found in connection with such combinations shall be dealt with as in other cases of disobedience to the order and discipline of the church in case of members, as found on page 23 of discipline, in answer to the third question of section 8, chapter 4, and in case of ministers, as found in chapter 6, § 13, p. 65." These reports were signed by 11 of the committee.

Two members filed the following minority report: "(1) The constitution we now have in the discipline, and have had for forty-four years, is the constitution of the Church of the United Brethren in Christ, and every member legally received into the church, for years, has consented to be governed by the same. It was declared legal, also, by the general conference of 1849, and to it our legislation has conformed, and under its directions our officers have been elected, and the general conference formed according to its provisions. (2) This constitution makes no provision for the general conference to alter or change it without first securing the consent of the members of the church by a two-thirds vote, as required in article 4 of the constitution, and to take any other method would not be legal. (3) It is our view that this question as to the constitution should be determined before we revise section 8 of chapter x."

After a long discussion, the conference adopted the majority report by a vote of 78 to 42, and the supplementary report by a vote of 76 to 38. The commission was duly appointed, entered upon its work, and prepared what is termed a "Revised Confession of Faith," and the "Amended Constitution." It also prepared a plan of submission, by which the confession of faith, as a whole, was to be submitted to a vote of the church. Ballots were to be written or printed in the following form: "Confession of Faith,"—

after which were to be written or printed "Yes" or "No," according to the wish of the voter. The amended constitution was to be submitted as a whole to the vote of the church, with the exceptions that the clauses as to lay delegation and secret combinations were to be submitted separately. The vote was to be taken during the month of November, 1888. The publishing agent at Dayton, Ohio, was to furnish each presiding elder, the three months before the time of voting, the necessary number of tickets and return blanks. The pastor, leaders, and stewards of each society were to constitute the local board of tellers. Any member incapacitated, by age or affliction, to attend the meetings, and any minister absent on his charge, might send their ballots with his name signed on the back thereof. The local boards of tellers were to make returns to the general board of tellers, which was provided by the commission. The election was fixed to take place at the same time as the election of delegates to the quadrennial conference of 1889. The commission, upon the completion of its work, in 1885, caused the proposed revised confession of faith and the amended constitution to be published in their church papers. Many thousands of copies were published in pamphlet form, and circulated among its members. The matter was thoroughly discussed both in the press and the pulpit of the church. Every means possible appears to have been taken to enlighten the members upon the issues involved. There was evidently no lack of knowledge or information on the part of the clergy and the members of the church as to when and how the vote was to be taken. There is no doubt but that the matter entered largely into the election of delegates to the general conference, and that they were elected to a considerable extent at least in accordance with the view they entertained upon this subject. Charges of unfairness in the preparation and distribution of the ballots were made against those who were charged with the performance of this duty. These charges relate mainly to the form of the ballot, and to the failure to send ballots to all the presiding elders. While the conduct of the parties so charged is subject to some just criticism, still, we do not think it resulted in depriving any member of his vote. The Michigan conference resolved not to vote upon any proposition submitted. Four conventions were held in different parts of the country by those who were opposed to the adoption of the articles, and they recommended their members not to vote, but to present their views to the general conference by petition. The interest in the subject was general, and the bishops and clergy evidently spared no effort to impress their views upon the members of their several charges. But, in the view we take, it is unnecessary to now determine the questions arising upon the manner in which the vote was taken. The total vote on the confession of faith was 54,880, the majority for it being 47,760. The total vote upon the amended constitution was 54,344, and the majority for it being 47,026. The total vote on lay delegation was 54,459,

the majority for it being 43,191. The total vote on secret combinations was 54,392, the majority for it being 39,696. The total vote for delegates to this conference was between 58,000 and 59,000.

The commission made due report of their action and of the vote cast to the general conference, which assembled May 9, and continued in session till May 22, 1889. The conference referred this report to a special committee of seven to examine it, and determine whether the commission had acted in compliance with the instruction of the general conference, and whether the vote had been orderly and regular, and to recommend such action as it might deem proper to be taken in the premises. Two reports were made by this committee,—a majority report, signed by five, and a minority report, signed by two. The minority report objected to the regularity of the proceedings, and recommended the conference to submit such amendments of the constitution to the vote of the people as it might deem wise and prudent, which should be regarded as a petition for such proposed changes. Protests against the adoption of the proposed changes were presented, signed by 16,282. On May 13, 1889, the bishops issued a proclamation announcing that the revised confession of faith and the amended constitution had been adopted by the required two-thirds vote of the church. After a long and able discussion by the members of the conference, the new articles were declared adopted by the emphatic vote of 110 to 20. Upon the issuance of the above proclamation by the bishops, 15 of the 20 withdrew from the conference, met at another place, and solemnly proclaimed that they were the church of the United Brethren in Christ, and that the majority of the general conference had formed a new church. They therefore proceeded to elect bishops and to do business as though they were the regular, authorized, and legally constituted general conference of the church. The regular conference, after declaring the amended constitution adopted, proceeded with its business as the regularly organized body of the church. Complainants derive their authority from the latter body; the defendants, from the former. The defendants took possession of the property, and refused to the complainants any use thereof. The property in question was deeded to, and belongs to, the United Brethren in Christ; and the sole question is, Which of these contending parties represents the church, as trustees of the property in controversy? We have stated above the history of this unfortunate controversy, which has found its way from the ecclesiastical into the civil courts of several of the states, so far as we deem it necessary to an understanding and determination of the present suit.

1. It is contended on the part of the defendants that the revised confession of faith is a radical change from the old, and that by its adoption the faith and doctrine upon which the church was founded have been subverted and overthrown; that the members who constituted the majority of the conference became heretics to the true faith,—placed themselves outside the pale of the

church; that the conference no longer represented the church; and that the small minority which withdrew, and those who follow them, have kept the true faith, and are in fact the church. If this contention be sustained, it follows that the minority is entitled to the possession of the church property. It is the settled law of this country that the judgments of the judicial tribunals of church organizations upon matters of faith, discipline, and the general polity and tenets of the church, are binding upon the civil courts. *Connitt v. Reformed Prot. Dutch Church of New Prospect*, 54 N. Y. 551; *Earle v. Wood*, 8 Cush. 456; *Miller v. Gable*, 2 Denio, 548; *Watson v. Jones*, 80 U. S. 18 Wall. 679, 20 L. ed. 666; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518; *Schweiker v. Hussar*, 146 Ill. 399. The rule and the reason therefor are ably stated in *Watson v. Jones*, as follows: "In this class of cases, we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them. In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine, which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations, to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts, and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian Churches) has a body of constitutional and ecclesiastical

law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which, as to each, constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law, which should decide the case, to one which is less so." There can be no exception to this rule, except in a case where, even in the minds of laymen, no doubt can exist, and it is clear beyond controversy, that the fundamental principles of the church have been destroyed by the one party, and been adhered to by the other. In the present case the intention on the part of the so-called "Liberals" to adhere to the substance of the old confession of faith is manifest. The conference of 1885 resolved to make no departure in substance therefrom, and so instructed the commission in its work of revision. In the discussion which took place in the conference of 1889, the radicals do not appear to have attacked the confession of faith, as reported from the commission. One member of the conference, towards the close of the debate, said: "Is it not marvelous that not a brother on the other side of the house, from Brother Barnaby to Bishop Wright, has said a word against the work of the commission itself? They have not said anything against the confession of faith, as it has been formulated and presented to us. They do not say that it is any different from the old one, or that there is any heresy in it."

It corresponds with the old. It expresses it better, and in a more beautiful and orderly form, than the old one did. It also brings in some doctrines that were scattered through the discipline in various forms, and they are put in a new arrangement." The truth of this statement does not appear to have been questioned by any member of the opposition. Leading bishops of the church, and theologians of other churches, have testified that in their judgment there is no difference in meaning and substance between the two. It is moreover established by the evidence that the same doctrines which were taught before have been taught in the churches controlled by the liberals since the conference in 1889. That conference, composed of the bishops and learned divines of the church and being its highest judicial tribunal, and having the clear jurisdiction over the subject, has decided the question. What sense or reason is there in holding that the decisions of this ecclesiastical court upon a pure question of religious faith and doctrine may be viewed and overruled by a court composed exclusively of laymen? The churches of this country have wisely left the decision of these questions to their own tribunals, and the civil courts have wisely accepted them as binding and final. But it is insisted that property rights are involved, and that, therefore, the civil court must examine and determine the question. We cannot assent

to this contention. In these controversies, personal or property rights are usually involved. The one is as dear as the other. When a minister is charged with preaching heresy, both his personal and property rights are involved. In all such cases, when the issue depends upon whether the faith of the church has been subverted, the decision of the church judicatory which has jurisdiction of the question is conclusive. Civil courts will not interfere in these controversies, even in cases where rights of property are involved, except in the case of a clear and palpable violation of trust. No such violation has been established in this case on account of the adoption of the revised confession of faith, the validity of which has been established by the highest judicial authority of the church.

3. It is next contended by the defendants that the proceedings for amending the constitution were irregular and void, mainly for the reason that no request was made therefor by "two thirds of the whole society" as provided by the constitution; and that, even if the preliminary measures to secure the vote were legal, still the constitution failed of adoption, because two thirds of the members of the church did not vote for it. We do not think the question here involved depends upon the determination of the validity of the adoption of the amended constitution. If it be admitted that the amended constitution was not adopted, it does not follow that the minority of less than one eighth, which seceded from the conference, and their followers, constitute the true church, and are entitled to the possession of its temporalities, and the entire church property, aggregating in value about five millions of dollars. Clear, indeed, must be the case which will result in setting aside the cardinal principle which lies at the foundation of free government, in church as well as in state, viz., the right of the majority to rule. If ecclesiastical bodies, in their legislative capacity, commit unconstitutional acts, these acts may be set aside by the courts, and they be compelled to observe and act under the constitution legally adopted for their guidance. This is the rule in municipal government, and is equally applicable to church government. There is no more reason in holding that church officers, when acting illegally, do thereby cease to represent their church, and to constitute its legislative, executive, or judicial body, than there would be in holding that municipal officers, when so acting, thereby cease to be such officers, or to constitute the legal authority of the municipality. Both may be impeached or deposed, but, until they are, they are *de facto* and *de jure* officers of the organization which elected them. Courts may, by their decrees, keep such officers within constitutional limits, but will not declare them outside the pale of the church, and turn the organization over to the minority, because the majority has committed an error in determining that a law has been properly enacted, or its constitution regularly adopted. The conference of 1885, which proposed the amendments, was a constitutional body, regularly elected. So,

also, was the conference of 1889, which ratified them. As already shown, there has been no departure from the religious principles upon which the church was founded, and its faith is still the same. It is important, we think, in this connection, to note wherein the old and amended constitution agree and wherein they differ. Both declare that the general conference shall enact no rule or ordinance which shall change or destroy the confession of faith, or the itinerant plan, or which shall deprive local preachers of votes in the annual conferences. Both hold the right of appeal inviolate, declare against human slavery, provide for the same conferences, the same methods of electing bishops; and the amended constitution makes no change whatever in the officers of the church, in their rights and duties, or in the general form of government. The clauses in regard to the ownership of church property are identical in language. The main changes are in the provision for lay delegation in the general conference, and in the amendment in regard to "secret combinations." The amended article on this subject reads as follows: "We declare that all secret combinations which infringe upon the rights of those outside their organization, and whose principles and practices are injurious to the Christian character of their members, are contrary to the Word of God, and that Christians ought to have no connection with them. The general conference shall have power to enact such rules of discipline with respect to such combinations as in its judgment it may deem proper." Evidently this article on secret combinations is the chief one which has caused the dissensions and divisions in this church. We are not concerned, however, in interpreting the meaning of this article in the old constitution; nor in determining wherein, if at all, it differs from the one in the amended constitution. It is not now essential. Both the conferences of 1885 and 1889 acted in entire good faith, and in the belief that their proceedings were constitutional. They have been sustained by the courts of last resort of several of the states, and by the learned circuit judge who, in the present case, wrote an able and exhaustive opinion. *Schlichter v. Keiter*, 156 Pa. 119, 23 L. R. A. 161; *Lamb v. Cain*, *supra*. Grant that the action of the conference was illegal in declaring the amendments adopted, it is, indeed, a startling proposition that by this act the conference destroyed its identity, ceased to represent the church, seceded from it, and thereby became a new and different church. The proposition finds no principle in law, equity, or good sense upon which to stand. The 15 who left the regularly constituted conference became the seceders, and not those who remained in it. If the defendants are right in their contention, it would follow that, if the conference had been a unit in declaring the amended constitution adopted, in which event its action would have been no more blinding than now, the members of any local church might have seized the church property, on the ground that they were the sole representatives of the true church, and that all the others were

heretics. The minority in this case have mistaken their remedy. They should have pursued a legal and orderly course, which was clearly open to them. They should have protested, and, failing in this, have applied to the proper courts to determine the validity of the proceedings to adopt the amended constitution; and, if such course found them void, they would hold the old constitution in force, and compel the officers of the church to recognize and act under it. This proposition seems to us so clear that we deem further argument unnecessary.

This disposition of the case renders it unnecessary to enter upon the discussion and adjudication of the regularity of the proceedings. It follows that the complainants derive their authority from the regularly organized conference, that they are the representatives and trustees of the church, and as such are entitled to the use and possession of the property. Decree should be affirmed, with costs.

Montgomery, J., did not sit. The other Justices concurred with McGrath, J.

Rehearing denied July 10, 1894.

Grove H. WOLCOTT

v.

Lydia PATTERSON, *Pf. in Err.*

(.....Mich.....)

A married woman may make herself chargeable with the value of services

NOTE.—Liability of wife and husband for legal services to her in a divorce suit.

I. Husband's liability.

1. Doctrine of.
2. Necessaries.
3. Husband not liable.

II. Liability of the wife.

1. In general.
2. Wife's promise to pay.
 - a. Prior promise.
 - b. Subsequent promise.
 - c. Under state statutes.
3. English decisions.

I. Husband's liability.

Upon the question of the husband's liability for the costs and expenses of the wife in divorce proceedings, the courts cannot be said to be unanimous. In some cases where he is held liable, his responsibility is placed upon the ground of an implied promise arising out of the wife's power to bind the husband as his agent, and upon the ground that such expenses are necessities.

The husband, however, has been relieved from liability upon these doctrines in some states, and it will also be found that his liability has been denied where the proceedings have been instituted by the wife without lawful or reasonable cause, and also in cases where she has ample estate.

1. Doctrine of.

The liability of the husband for the contracts of his wife is imposed by reason of his assent thereto,

rendered upon her employment to secure a divorce from her husband, although the suit is discontinued.

(May 18, 1894.)

ERROR to the Circuit Court for Jackson County to review a judgment in favor of

plaintiff in an action brought to recover upon defendant's alleged promise to pay for certain services rendered to her by plaintiff as an attorney at law. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. John D. Conely**, for plaintiff in error:

or approval of them, or because the law of marriage has imposed upon him the duty of supplying her with necessities during the marriage, until she has relinquished or forfeited a right to claim them by her own voluntary act, misconduct, or crime. *Shelton v. Pendleton*, 18 Conn. 417.

Upon these principles it must rest. *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175.

The wife's authority, where it exists, arises from the relation, if not as an incident essential to its preservation, certainly as a consequence of its continued existence, and not as a power reserved for its destruction. *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120.

It has been held, however, that according to common-law principles, he is liable to the legal adviser whom his wife may employ in prosecuting such a suit. *Williams v. Monroe*, 18 B. Mon. 514.

The legal mind must, in the end, rest upon his implied promise as the only just ground of a jurisdiction, which is almost everywhere exercised. *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27.

The obligation to support implies the right of protection from the wrongs of all persons, and the necessary means to enforce such remedies as the laws provide, and where the husband violates the law and his sacred obligations towards his wife, he should afford her facilities for vindicating her rights in a court of justice. *Newman v. Newman*, 69 Ill. 167.

Inasmuch as ordinarily, the husband possesses and controls their joint earnings, and the wife, without pecuniary means, would be utterly powerless in a litigation with the husband, the law, from a sense of propriety and justice, implies a promise of the husband to pay the fees of the attorneys, necessary to the protection of the interests of the wife. *Porter v. Briggs*, *supra*.

Upon such implied liability the attorney is entitled to recover for his services when he acts in good faith, without collusion or oppression, and where the suit is not the mere vindication of a right. *Preston v. Johnson*, 65 Iowa, 286.

In actions for divorce, the husband is liable to the wife's attorney for reasonable fees earned in conducting the litigation in behalf of the wife, and it cannot be considered an open question. *Clyde v. Peavy*, 74 Iowa, 47. In this case the wife employed counsel, and, in connection with such employment, authorized him to engage an assistant counsel if he was of opinion that one was necessary.

The suit brought by the wife must, however, be reasonable and justifiable. *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 229.

And such fees must be reasonable and necessary. *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27.

The amount allowed always depends largely upon the circumstances of the case, and the pecuniary resources of the parties. *McCurley v. Stockbridge*, *supra*.

In *Porter v. Briggs*, *supra*, the husband was held liable for the services of an attorney in divorce proceedings instituted by the husband, in which the wife was found innocent.

Where a nonsuit was granted in the court below, upon the ground that the husband could not be chargeable for the services of an attorney in bringing a suit against him without his consent, on appeal the court held that although this was undoubtedly true as a general principle, yet such a
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suit by a wife for a divorce must be excepted from its operation owing to the necessity of the case. *Sprayberry v. Merk*, 80 Ga. 81, 78 Am. Dec. 687.

In such a case, the wife is *sui juris*, having a clear right to institute and conduct that kind of a suit independently of her husband's consent, and such right is practically denied to her, if she can command no means of paying the necessary agents to conduct the suit, and therefore she may charge the common funds of herself and husband in his hands. *Sprayberry v. Merk*, *supra*, where the action was amicably settled before trial.

Yet only with the real value of such services as she may procure, and not with the price which she may fix on them by her contract. *Sprayberry v. Merk*, *supra*.

In case of a divorce *a mensa et thoro* it has been held that her attorney may sue the husband except where the cruelty complained of was not actual, but only statutory, cruelty. *Peck v. Marling*, 23 W. Va. 708.

Where, however, the basis of such divorce was cruelty or inhuman treatment, or a reasonable apprehension of bodily hurt on her part, whether she has a separate estate or not, and whether he has much, or little or no property, in a contract only implied from the fact that the services were rendered by her attorney she can never be sued by him for his fees, the husband being responsible, and the law implying that he was looked to by the attorney for payment. *Ibid*.

His liability arises out of the incidental power of the court to provide for enabling the wife to prosecute or defend the suit, whenever a proper case shall be presented. *Thompson v. Thompson*, 3 Head, 527.

All the powers of the court on the subject of divorce are given by statute, and the court is not authorized either to decree temporary alimony or award costs. *Wing v. Hurlbut*, 15 Vt. 607, 40 Am. Dec. 695.

During the pendency of an action for divorce, the court has power to require the husband to pay such sums for the support of the wife, and to enable her to carry on the action, as in its discretion might be deemed necessary and proper under section 2361 of the Revised Statutes of Wisconsin. *Clarke v. Burke*, 65 Wis. 359, 56 Am. Rep. 631.

Upon the construction of this statute, however, the attorneys would not be entitled as a matter of right, but only in the sound discretion of the court, it being competent for the court to refuse the costs of prosecuting such an action. *Clarke v. Burke*, *supra*.

It has been stated that upon general principles, independent of statute, the husband, whether the plaintiff or defendant, is obliged to pay the expenses incurred by the wife in prosecuting or defending a divorce, and that he certainly is obliged to pay where she has established her claim to it. *Meltzer v. Meltzer*, 1 Pars. Sel. Eq. Cas. 78. To the same effect, *Graves v. Cole*, 19 Pa. 171.

The husband has been held liable for the wife's attorney's fees in proceedings unsuccessfully prosecuted by the husband against the wife for divorce, upon the ground that she was a common drunkard. *Conant v. Burnham*, 183 Mass. 503, 43 Am. Rep. 532.

The wife's attorneys were allowed to recover against the administrator of the deceased hus-

A husband was liable at the common law for the services of a solicitor in divorce proceedings brought by the wife upon the ground of cruel treatment, the husband not being absent from the realm and being of abundant means.

Turner v. Rooks, 10 Ad. & El. 47; *Brown v.*

Ackroyd, 5 El. & Bl. 819; *Bice v. Shepherd*, 19 C. B. N. S. 832; *Ottaway v. Hamilton*, L. R. 8 O. P. Div. 898; *Spragberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *Porter v. Briggs*, 33 Iowa, 166, 18 Am. Rep. 27; *Preston v. Johnson*, 65 Iowa, 285; *Glenn v. Hill*, 50 Ga. 94; *Langbein v. Schneider*, 27 Abb. N. O. 228.

band's estate, the divorce suit pending at the time of his death, the court stating that in that state it had never been otherwise than that the husband had been required to pay reasonable counsel fees, for services rendered the wife in suits for divorce. *McCurley v. Stockbridge*, 62 Md. 422, 50 Am. Rep. 329.

So the husband has been held liable in an action before a justice of the peace for services rendered the wife in divorce proceedings, prosecuted by the husband, in which the wife made an application to the court for alimony *pendente lite* and counsel's fees, but before the same were decreed the husband withdrew his action. *Gossett v. Patten*, 23 Kan. 240.

In *Preston v. Johnson*, 65 Iowa, 285, where the husband was sued for the wife's attorney's fees, the following question was certified for determination by the court. "In an action at law against a husband, and on an implied promise to pay for professional services rendered for his wife, in an action by her for divorce, does the necessity for such services, or the implied promise therefrom by the husband to pay for same arise when the verified allegations of the wife with sufficient corroborated testimony entitle the wife to a divorce, or to establish such necessity for professional services on an implied promise to pay for the same by the husband, as to require that the truth of the allegations, sufficient to entitle the wife to a decree, must be established by a preponderance of the testimony?" The court held that under the facts as stated in the question, the necessity arose; and further that the attorney was not bound to establish the divorce of the wife before recovery, the proceeds being commenced in good faith upon a verified statement of facts, which if true, would entitle the plaintiff to a divorce; and in such a case it matters not that the suit is dismissed.

The 32d section of the Revised Statutes of Kentucky, p. 207 (chapter on Costs) provides that in suits for alimony and divorce the husband shall pay the costs of each party, unless it appears that the wife is in fault and has ample estate to pay the same.

The above provision has been applied to all cases for divorce and alimony without exception. *Ballard v. Caperton*, 2 Met. (Ky.) 412.

There must be a concurrence of the two conditions, in order to exempt the husband from the liability thus imposed. *Ibid.*

And they must be made to appear in the cause, and though it may be made to appear that the wife is in fault, yet if it be not also made to appear that she has ample estate to pay the costs the husband is bound to pay them. *Ibid.*

So if she has the estate and is not at fault, the husband is liable. *Ibid.*

In all such cases, the husband is bound to pay the costs of each party, including the reasonable compensation to the attorneys of the wife, no matter what the result of the suit may be, or by what cause it may have been terminated, unless the two conditions mentioned in the statute appear. *Ibid.*

And it is not necessary, under the statute, that the suit should be brought regularly to a hearing and be terminated by judgment. *Ibid.*

So the death of the wife before trial will not avoid the husband's liability. *Ibid.*

Such fees being fixable and ascertainable by the court, even after the wife's death. *Ibid.*

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Yet, in Kentucky the husband is only liable under the above section of the revised statutes. *Williams v. Monroe*, 18 B. Mon. 514.

It has been held, however, that the effect of the provision of the statute was not to entitle the wife to a judgment against the husband for her costs in the classes of cases mentioned. *Nikirk v. Nikirk*, 3 Met. (Ky.) 422.

In *Nikirk v. Nikirk*, *supra*, it was held, upon the construction of the above statute, that as the law exempts the wife from liability to the officers of the court for their costs, the object of the statute was to give to the latter a right to look to the husband, who was required "to pay the costs of each party" except in the two cases which it provides for.

The principles established in *Ballard v. Caperton*, *supra*, were approved of in *Meyer v. Meyer*, 3 Met. (Ky.) 238, and in *Williams v. Monroe*, *supra*, the doctrine was said to be well settled, that the husband will be chargeable for the expenses thus rendered necessary by his own misconduct toward the wife.

2. Necessaries.

Counsel's fees have been looked upon and considered in the light of necessities, for which the husband would be liable, as upon an implied contract, in Massachusetts, New Hampshire, and Wisconsin, while the contrary has been held in Alabama, Connecticut, Illinois, Iowa, and West Virginia.

The decisions upholding the husband's liability as for necessities do so upon the ground that such fees are an absolute necessity for the relief of the wife, and make the liability dependent upon the necessity of the case.

The cases holding the contrary doctrine look upon such fees as a matter of favor and privilege, and not of necessity, and refuse them upon the ground that it was not meant to provide for the future condition of the wife as a single woman, or as the wife of another.

They further hold that the wife, in such a case, could not be considered as acting as the agent of the husband under his authority.

The duty of providing necessities for the wife is strictly marital and is imposed by the common law in reference only to a state of coverture and not of divorce. *Clarke v. Burke*, 55 Wis. 359, 55 Am. Rep. 631.

By that law a valid contract of marriage was and is indissoluble, and therefore by it the husband could never have been placed under obligations to provide for the expenses of its dissolution. Such an event was a legal impossibility. *Ibid.*

Necessaries are to be provided by a husband for his wife to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man. *Ibid.*; *Shelton v. Pendleton*, 18 Conn. 423.

To dissolve the bonds of matrimony between husband and wife on her request, or to resist the husband's petition for that purpose, can only be considered as necessary for her safety or preservation, so as to enable her to procure professional assistance therefor on his credit and at his costs. *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 665.

In *Couant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532, the defense was put upon the broad ground

It may be that after a chancery court has made an allowance the common-law remedy is suspended while the chancery suit is pending.

Crittenden v. Schermerhorn, 89 Mich. 661, 88 Am. Rep. 440.

But a husband was liable even when the di-

vorice proceeding was in the ecclesiastical court. Suit in a common-law court against the husband by a proctor for his services in the ecclesiastical court was sustained.

Ottaway v. Hamilton, *supra*.

The husband is liable notwithstanding the proceedings were discontinued by the wife.

that such services were not necessities but the court held that legal services did not fall within such universal and general exclusion of the term "necessaries," there being times when such services were absolutely essential for the relief of the wife's physical or mental distress.

They have been deemed necessities, where the conduct of the husband has rendered them necessary for the personal protection and safety of the wife. *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120.

Her authority is implied, because of the marital relation, and depends upon the necessity of the expenditures for her support or protection as wife. *Ibid*.

In *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 518, the husband was sued for legal services rendered to the wife, in an action commenced by him in which he was defeated. The court held the husband liable upon the ground that such services were necessities; and further that inasmuch as the husband was present during a part of the time that the services were rendered, he was liable upon an implied promise to pay.

But in *Pearson v. Darrington*, 32 Ala. 227, 255, it was held that counsel's fees in a divorce suit were not necessities, and that the law would imply no contract by the husband to pay for the same.

It cannot be said that divorces, to the extent allowed by law, are matters of necessity, but rather matters of privilege and favor. *Shelton v. Pendleton*, 18 Conn. 417.

They are not regarded in law as necessities, for furnishing which an implied contract arises against the husband. *Cooke v. Newell*, 40 Conn. 586.

Necessaries are to be provided by a husband for his wife to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man. *Shelton v. Pendleton*, *supra*.

The duty of providing necessities for the wife is strictly marital, and is imposed by the common law, in reference only to a state of coverture, and not of divorce. *Ibid*.

The same conclusions were arrived at in *Dow v. Eyster*, 79 Ill. 254.

In *Johnson v. Williams*, 3 G. Greene, 97, 54 Am. Dec. 491, where it was contended that they were necessities, according to the technical legal meaning of the word, the court held that recovery could not lie upon that ground, the wife not binding the husband as his agent, not acting under his authority with his concurrence, express or implied, and that the husband was not liable as for necessities; neither was he liable upon the wife's authority to employ counsel as his agent in the absence of proof that she had authority, or his concurrence in her acts.

If she sues for a divorce *a vinculo matrimonii*, though she succeed in her suit, her attorney cannot sue for his fees in such suit, as necessities furnished to the wife, the obtaining such a divorce because of his misconduct rendering it distasteful and offensive for her to live with him as a wife, being a very different thing from food and raiment, or protection of her person from his cruelty. *Peck v. Marling*, 22 W. Va. 708.

The obtaining of such a divorce by a wife from her husband for any of the reasons mentioned in the West Virginia statute cannot be regarded as necessary in the only sense in which that word is

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used, when the wife is authorized by law, without her husband's consent, or even against his protest, to charge him with necessities. *Ibid*.

It can hardly be well conceived how the common dissolution of a marriage can be necessary for the protection of a woman as a wife. *Ibid*.

But where a wife has employed an attorney to obtain a divorce from her husband for actual cruelty, and there is reasonable apprehension of violence when the suit is brought, or the apprehension of violence is established by her success in such suit, she may charge her husband without his concurrence, with her attorney's fees, and the attorney may sue the husband therefor, the fees being regarded as necessities to her actual protection, in the same manner as such fees are considered necessities, when her husband is bound over to keep the peace. *Ibid*.

In *Langbein v. Schneider*, 27 Abb. N. C. 228, the husband was sued to recover for advice given, and professional services rendered to the wife, relative to the institution of an action by her against the defendant for a separation, where, before the service of the papers, the parties became reconciled. The court held that there was no doubt that it was well settled law that the wife had an implied agency to bind her husband for her necessities, when he fails to supply them, and relying upon the English cases and two Georgia cases, held the husband liable.

3. Husband not liable.

The right of action against the husband for such services rendered for the wife has been denied in many cases where her attorney has been allowed to recover for services rendered to the wife, in prosecutions against the husband for breach of the peace, or for the purpose of protecting her from personal violence. *Clarke v. Burke*, 65 Wis. 350, 56 Am. Rep. 631.

There is no right to such expenses at common law. *Ibid*.

Such costs and expenses could only have been had in a divorce action, if at all. *Ibid*.

Upon this theory, the right of action at law against the husband, in favor of attorneys who have rendered services for the wife, in actions of divorce, has frequently been denied. *Ibid*.

It is not the policy of the law to imply from the marital relation any authority in the wife to bind the husband for the expenses of such proceedings. *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120.

By the common law, a valid contract of marriage was and is indissoluble, and the refore by it the husband could never have been placed under obligation to provide for the expenses of a dissolution, such an event being a legal impossibility. *Shelton v. Pendleton*, 18 Conn. 417.

A wife, in that capacity, can no more bind her husband by her acts, than a third person can do so although an agency or assent may be, and often is more readily presumed from the acts and conditions of a wife than in ordinary cases. *Ibid*.

An action at law cannot be maintained by a solicitor prosecuting or defending an action for divorce for the wife against a husband. *Dow v. Eyster*, 79 Ill. 254.

If, under the settled practice of the court, the husband has not been held bound by any application from the statute, to furnish directly to the wife the means to procure a divorce, he cannot be

Preston v. Johnson, Glenn v. Hill, and Langbein v. Shngider, supra.

The common-law right is not limited to the statutory rights and remedies under the divorce acts.

Ottaway v. Hamilton, and Rice v. Shepherd, supra.

compelled to do so indirectly by any inference from the same statute. *Morrison v. Holt, supra.*

Neither will the subsequent husband of the wife be liable for such costs, as it is not a personal debt of hers. *Musick v. Dodson, 76 Mo. 524, 43 Am. Rep. 780.*

And the husband's liability is not increased by reason of the fact that the wife's petition contains a claim for the custody of the minor children. *Shelton v. Pendleton, 18 Conn. 417.*

In *Cooke v. Newell, 40 Conn. 590*, the court looked upon the case of *Shelton v. Pendleton, supra*, as having settled the law in Connecticut.

In the above case, the suit was prosecuted by the husband against the wife, and was successfully defended by her attorneys. *Cooke v. Newell, supra.*

The proper practice is to apply to the court for its order upon the husband, for an allowance for counsel's fees and alimony. *Ibid.*

An attorney cannot maintain an action against the husband, but must apply to the court in which the proceedings were had, for an allowance for his services as part of the costs of the action in the divorce suit. *Williams v. Monroe, 18 B. Mon. 514.*

The reason is, that it is never necessary for her safety as wife to obtain divorce from him, and when divorced absolutely, he is no longer under a duty to provide for her support and protection. *Ibid.*

Where the services are unnecessary, or where the wife is able to pay for them, or where an allowance has been made for them, and probably where the wife is in the wrong, such an action cannot be maintained. *Gossett v. Fatten, 23 Kan. 340.*

The husband is not liable, upon general principles of law, where the suit is without any just or reasonable foundation, and where the cause is prompted by motives of malice or oppression towards the husband. *Thompson v. Thompson, 8 Head. 527.*

Neither is he liable where the verdict of a jury demonstrates the fact that the husband is without blame, the suit by the wife without foundation, the proceedings not being meritorious. *Newman v. Newman, 69 Ill. 157.*

Nor where the wife, as actor, has voluntarily and understandingly dismissed her suit; more especially where the ground of dismissal is, the probability that the suit was unadvisably instituted and cannot be maintained. *Thompson v. Thompson, supra.*

When the wife is plaintiff in such a case, and has either discontinued it or been defeated, and judgment been rendered against her, neither she nor her attorneys can have any claim upon him for the costs or expenses of her fruitless, and probably causeless, prosecution. *Phillips v. Simmons, 11 Abb. Pr. 237, 20 How. Pr. 342.*

So where the action for divorce was dismissed without prejudice, the court held that the husband was not liable. *Ray v. Adden, 60 N. H. 82, 9 Am. Rep. 173.*

In the above case the court stated that it never was understood that counsel should recover his services against the husband in such a case, else the courts would not have been making orders of allowances to the wife to enable her to make her defense. *Ibid.*

The same conclusion was reached where the parties to a divorce suit condoned each other's of-
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The rule at the common law was that the wife might seek protection from cruelty, and the fair and reasonable charges for solicitor's fees be recovered by the solicitor against the husband.

Turner v. Rooks, Brown v. Ackroyd, Rice v. Shepherd, and Ottaway v. Hamilton, supra.

fenses, voluntarily abandoned the action, and asked that the same be dismissed, even though the court had adjudged and decreed the defendant to pay the same. *Reynolds v. Reynolds, 67 Cal. 176.*

In such a case the attorneys had but to gather up their briefs and retire, and the court should at once dismiss the case and make no further order. *Ibid.*

After the divorce proceedings have been amicably arranged between the parties, the wife's attorney has no power to procure an order against the husband for the payment of fees, such order being only obtainable during the pendency of the proceedings. *McCulloch v. Murphy, 45 Ill. 256.*

Where the wife's attorney sued for professional services in prosecuting a libel for divorce, which was dismissed, the parties going together again, it was held that the husband was not liable. *Morrison v. Holt, 43 N. H. 473, 30 Am. Dec. 120.*

In such a case it is not sufficient for the plaintiffs, in order to charge the defendant, merely to show that his misconduct occasioned the proceedings, but it must be shown that they were necessary for the personal protection and safety of the wife. *Ibid.*

Where the wife employed four counsel, it was held that they were not necessary, one competent counsel, or one professional firm, being sufficient, and that the attorneys in such case must look to their client alone for their fees. *Dugan v. Dugan, 1 Duv. 239.*

In *Shelton v. Pendleton, 18 Conn. 417*, the plaintiffs, the attorneys for the wife, in successful divorce proceedings against the husband, sued the latter for their fees, and as there was no request or assent by the defendant to their employment, the court held the claim unsustainable.

Where it was sought to charge the husband for counsel fees, in a justice's court, for the purpose of enabling the wife to prosecute her suit, it was held that such action would not lie, as it was an incident to the wife's right to temporary alimony, which was only cognizable by a justice of the superior court. *Glenn v. Hill, 50 Ga. 94.*

And where the wife filed a bill which was answered with a denial and by way of cross-bill, the proceedings finally terminating in the husband's favor, it was held that the court had no power to require the husband to pay the same. *Newman v. Newman, 69 Ill. 157.*

Again, where the husband was sued for professional services of the wife in a suit for divorce, brought by her against the husband, in which the court decreed a payment of alimony, and of a certain amount for counsel fees, with which order the husband complied and the divorce was granted, the court held that the court's action in that respect was final and conclusive, and that the husband having acted up to the order, was not liable for a subsequent action brought for the recovery of the fees. *Dow v. Eyster, 79 Ill. 254.*

In *Sherwin v. Mahen, 78 Iowa, 457*, the question was whether an attorney, who in good faith renders professional services for the wife in a divorce proceeding against her husband, could recover against the husband upon an implied promise to pay, and the court held, the grounds of complaint not being true and the action unnecessary for the protection of the wife, that the husband was not liable for the fees and advances made by the attorneys.

The wife was not liable at the common law. *Wilson v. Burr*, 25 Wend. 886; *Cook v. Walton*, 38 Ind. 228; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Whipple v. Giles*, 55 N. H. 139.

The only statute that has any bearing is How. Anno. Stat., § 6297, which provides that

It was contended in that case that the rule as announced in *Johnson v. Williams*, 3 G. Greene, 97, 54 Am. Dec. 491, was overruled in *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27, but the court held that the very language of the case was decisive of the question, and that it was not overruled, and reference to the opinion in the latter case was not in conflict with the court's conclusion therein announced, while the reasons upon which it was based might be admitted to conflict with the court's views.

In the above case, the court held that the case of *Clyde v. Peavy*, 74 Iowa, 47, did not controvert the rule of a general liability of the husband for fees in such cases, the point of dispute therein being that the plaintiff was not employed by the wife, and that if he rendered services it was as assistant counsel, and that the assistance was unnecessary. *Ibid*.

In a suit brought to recover counsel fees against the husband, whose suit against the wife was dismissed, the court held the husband was not liable, having made no promise, except such as might be implied from the facts. *McCullough v. Robinson*, 2 Ind. 630.

Where, after the pendency for nearly two years of a suit for divorce by the wife, she dismissed her petition "without prejudice" and subsequently the court, upon motion, made a peremptory order upon the husband for payment of her attorney's fees, the court held that the husband could not be made liable for such costs, and that the court erred in making such order, the wife being in fault and having an estate ample for the payment of the same. *Dugan v. Dugan*, 1 Duv. 289.

In *Coffin v. Dunham*, 8 Cush. 404, 54 Am. Dec. 799, the court refused to compel the husband to pay the wife's counsel fees in a divorce suit, stating that the action was without precedent, and contrary to the practice and course of decisions in that state.

Where, subsequent to a divorce the wife petitioned the court for alimony, and an amicable settlement was arrived at between the parties without the intervention of counsel, the court held that the wife's counsel had no equitable right to interfere upon the ground that such settlement defrauded him of his right to expenses. *Gregory v. Gregory*, 32 N. J. Eq. 424.

In the above case, the husband in a letter to the wife requesting an amicable arrangement in the matter, closed by saying, "My father always said 'Steer clear of the lawyers.' I repeat it to you," and his advice seemed to have had the desired effect.

Where the wife's action was abandoned the parties becoming reconciled, the court held there was no possible ground for maintaining the action, as the wife could not be considered the agent of the husband with authority to commence an action against him, perhaps without cause, and afterwards discontinue it and thereby make him liable for her attorney's fees. *Phillips v. Simmons*, 11 Abb. Pr. 267, 20 How. Pr. 342.

In *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695, it was sought to recover the wife's costs and attorney's fees in defending the husband's petition in divorce, and in prosecuting a cross-petition against him the court held that the husband was not liable.

If, however, the divorce was obtained by the 24 L. R. A.

actions may be brought against a married woman in relation to her sole property.

The bill in this case asked for permanent alimony. This is in no sense separate property. "It is not an estate nor separate property of the wife. It is an allowance for the nourishment of the wife, resting in discretion

wife by reason of desertion or abandonment, the husband cannot be made liable for the fees. *Peck v. Marling*, 22 W. Va. 708.

In *Clarke v. Burke*, 65 Wis. 359, 56 Am. Rep. 631, an action was brought against the husband to recover fees in a suit brought by the wife against the husband for divorce. The court stated that if the attorney could recover, it was because he had a valid claim against the husband as a matter of right, there being no express promise or agreement on the husband's part to pay for the services rendered, and there was no claim that the wife had any express authority to bind her husband to make such payment.

II. Liability of the wife.

1. In general.

As to the liability of the wife, the authorities are not unanimous, some have held that if credit is given to the wife she alone is liable, others base her responsibility in a decree a *vinculo matrimonii* upon her implied promise, and the same has been held in a decree a *mensa et thoro* where they lived apart owing to abandonment and desertion.

Some cases hold such service chargeable against her separate estate, and enforceable in equity, while in others she is held relieved by reason of her common-law disability.

It is well settled, and for good reasons, that if the credit be in fact given to the wife alone, the presumption of the contract obligatory upon the husband, expressed or implied, is repelled, and in such a case the plaintiffs must be considered as relying upon the honor of the wife, or as having acted gratuitously. *Shelton v. Pendleton*, *supra*.

In such cases the presumption repels no assent or authority by the husband to their employment, and they are employed by the wife for her sole purpose in opposition to her husband's interest, and credit was given in reality to the wife alone. *Ibid*.

When the attorney is employed by the wife to obtain a divorce, she living separate and apart from her husband, the husband not being liable for the costs in a divorce a *vinculo matrimonii*, the wife is liable upon her implied promise to pay, the services being rendered at her request and for her benefit. *Peck v. Marling*, 22 W. Va. 708.

If the wife obtained a divorce a *mensa et thoro*, while living separate and apart from her husband, and the basis of the suit was abandonment and desertion, she would be as liable to such a suit, as she would be if the divorce sought was one a *vinculo matrimonii*, no matter whether she had or had not a separate estate, and whether the contract was express or implied. *Ibid*.

With a reasonable compensation for the services of the attorney, a married woman may charge her separate estate. *Viser v. Bertrand*, 14 Ark. 267.

In regard to her separate estate, the wife may have rights independent of and adverse to those of her husband, which will be protected, and her liabilities in respect to such estate will be enforced in equity. *Ibid*.

To deny to her the power of binding her estate for the retainer of competent professional aid, so far as from being an advantage, it would disarm her in a contest already unequal, and require her to come into court defenseless save as an object of sympathy. *Ibid*.

In *Lamy v. Catron* (N. M.) Jan. 21, 1890, it was held

variable and revocable." It is essentially temporary, conditional and dependent.

Guenther v. Jacobs, 44 Wis. 854.

It remains subject to the continuing authority of the court over it, to be exercised from time to time.

Ibid.; How. Anno. Stat. § 6248.

It is not separate property.

Guenther v. Jacobs, *supra*; *Romaine v. Chauncey*, 14 L. R. A. 712, 129 N. Y. 566.

Mr. Mark S. Wolcott for defendant in error.

that where the wife had ample estate of her own, she might charge it with the necessary counsel's fees to enable her to either prosecute or defend a divorce action to which she was a party, and that where she had done so in the employment of a solicitor, the court had power in the divorce proceedings, as an incident thereto, to decree such necessary fees against her separate estate as an allowance to the solicitor, so far as such fees were actually necessary, being limited to the fair value of the services rendered.

At common law a married woman is wholly incapable of making any contract whatsoever, which will bind her personally, or create against her a personal debt or obligation. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780.

In *Musick v. Dodson*, *supra*, the plaintiff brought action against the wife to recover his fees in successfully prosecuting a divorce suit against the husband, and the court held she was not liable.

The failure to render such judgment where the divorce is not granted does not operate to the prejudice of the wife, as she cannot be held liable for any of the costs of the proceedings. *Nikirk v. Nikirk*, 8 Met. (Ky.) 432.

A married woman retaining counsel in a suit for divorce is not liable in an action for his fees. *Wilson v. Burr*, 25 Wend. 386.

It is no longer the subject of dispute that while a wife may employ attorneys to prosecute or defend her in an action for divorce, she is not able to bind herself, or her property, to pay for the services of such attorney. *McCabe v. Britton*, 79 Ind. 224.

If, however, credit has been given to the husband, the attorney cannot recover against the wife upon her contract. *Peck v. Marling*, 23 W. Va. 708.

2. Wife's promise to pay.

a. Prior promise.

The question, whether or not a married woman can bind herself by a simple contract, to pay a lawyer's fees in a suit for divorce against her husband, must depend upon whether or not there is a sufficient consideration upon which to base the promise to pay, and if there is not such a consideration, a promise is a mere *nudum pactum*, by which she is not bound. *Peck v. Marling*, 23 W. Va. 708.

The wife is liable upon her express promise upon which credit was given solely to her. *Ibid.*

Such a promise will bind her when made before the dissolution of the marriage, if at the time it was made she lived separate and apart from her husband, such a promise being binding upon her in a court of law, as though it were made while she was a *feme sole*. *Ibid.*

And though her husband might be responsible for her attorney's fees, if the divorce suit was one *a mensa et thoro* based upon his cruelty, still she might be bound, if when living separate and apart from her husband she employed the attorney to bring such suit, and expressly promised to pay his fees, so that she alone was looked to by him for payment. *Ibid.*

If however the wife has given a written guarantee for such costs, she would be liable even though her husband might still be looked to, the fact that the services were rendered at her instance and for her benefit being a sufficient consideration. *Ibid.*

In *Cook v. Walton*, 38 Ind. 228, the wife's action against her husband for divorce was refused and the attorney brought suit for his service against

the wife. The court held that she was not liable during the marriage, and that the divorce act did not in terms, or by any fair implication, relieve a married woman from the disability of coverture, so far as to enable her to make a contract that would bind her personally in relation to a suit by her for a divorce, even though she might bring that action in her own name.

So where the wife, as defendant, promised to pay the fees of an assistant attorney out of the alimony awarded her by the court, it was held that such promise had no binding effect, neither could it be made a lien on her judgment. *McCabe v. Britton*, 79 Ind. 224.

b. Subsequent promise.

Upon the question of the effect of a subsequent promise of the wife to pay such fees the authorities are divided.

It has been held that professional services in divorce proceedings may be recovered against a married woman, where there is an express promise to pay made by her after the decree dissolving the marriage. *Viser v. Bertrand*, 14 Ark. 267; *Peck v. Marling*, 23 W. Va. 708.

The previous services being for her benefit and at her request, constituting a moral obligation sufficient to uphold the promise made after removal of the disability. *Wilson v. Burr*, 25 Wend. 386.

The contrary has, however, been held to be the case in Missouri and Indiana.

Such a promise being a mere moral obligation and not a good consideration, there being no original liability or obligation to pay. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780.

If the wife could not, during the existence of marital relations with her husband, bind herself personally, then as a matter of course there could not be any consideration for the promise made by her, after the divorce was obtained, to pay for such services, and the subsequent promise would be *nudum pactum*. *Ibid.*

In *Putnam v. Tennyson*, 50 Ind. 456, the wife sued the defendants, her attorneys, to recover money collected and received by them for alimony in a suit in which she was divorced from her husband, and which upon demand they refused to pay, claiming that she owed them for services in such proceedings, and insisting upon her promise to pay made subsequent to the divorce. The court held, the indebtedness accruing during her coverture, that the contract was void and that the promise made after divorce to pay the amount was without consideration and invalid, but such subsequent promise if founded on a further consideration would be valid.

In the above case *Chief Justice Pettit* dissented from so much of the opinion as held that a married woman who employs an attorney to bring and prosecute a suit for divorce, and who renders services and accomplishes the end, was not liable for the costs, because she was a married woman, upon the ground that she was authorized by law to bring and prosecute her suit, and that she could not do so without resorting to the employment of an attorney as a necessary means, and for the value of his services she must be liable. *Putnam v. Tennyson*, *supra*.

c. Under state statutes.

The question as to the wife's liability for such fees under the statutes of the different states does not seem to have arisen in many states.

Montgomery, J., delivered the opinion of the court:

Plaintiff is an attorney at law, and recovered in the court below for professional services rendered to the defendant, who is a

married woman. A portion of the services related to the separate estate of the woman, who is shown in the record to have had considerable property in her own right. Included in the bill of particulars was a charge of \$100 for

In *Whipple v. Giles*, 55 N. H. 120, it was held that the General Statutes of New Hampshire, chap. 164, § 13, giving the wife power to sue and be sued in her own name, upon contracts relating to her separate property, did not apply, either in terms or by implication, to contracts outside of such property, and the court therefore dismissed a suit brought by an attorney to recover fees in a libel, instituted by her against her husband for divorce.

So in New York the statute allowing the suit in her name (2 Rev. Stat. 144, § 39), does not remove the common-law inability of a *feme covert* to contract. *Wilson v. Burr*, 25 Wend. 386.

Under sections 12 and 15 of chapter 66 of the Code of West Virginia, however, the incapacity of a married woman to make a contract binding on her in a court of law is entirely removed when she makes such contract while living separate and apart from her husband; and when living separate and apart from her husband she has the same capacity to make a contract, which shall be binding on her in a court of law, as she would have if she were a *feme sole*, and if work and labor is done for her at her request by a third person, a court of law will imply a promise by her to pay a reasonable compensation therefor in the same manner as if she were a *feme sole*, and in respect of which she could be made liable at law. *Peok v. Marling*, 22 W. Va. 708.

3. English decisions.

In *Shepherd v. Mackoul*, 3 Campb. 326, it was said that the husband's liability depended upon the necessity of the proceedings taken by the wife, and that if such proceedings were uncalled for, the wife could not make him liable for the expenses incurred thereby.

To entitle a solicitor to recover the costs from the husband, or to prove for them against the husband's estate, he must, in the absence of actual success, be able to show that he made proper investigation and inquiry into all the circumstances of the case before he commenced the proceedings. *Re Hooper*, Baylis v. Watkins, 38 L. J. N. S. Ch. 300, 10 Jur. N. S. 114, 9 L. T. N. S. 741, 12 Week. Rep. 324.

In the above case, it was questioned whether previous inquiries and the existence of reasonable grounds, would entitle the attorney to recover from the husband if the wife failed in the suit. *Ibid*.

The case of *Ottaway v. Hamilton*, L. R. 8 C. P. Div. 393, 47 L. J. C. P. 725, 88 L. T. N. S. 925, 26 Week. Rep. 783, decided that a solicitor, employed by a wife to take proceedings against her husband to obtain divorce, might sue the husband for "extra costs" that is, costs reasonably incurred by him beyond the costs taxed and allowed by the court, as between party and party.

In *Brown v. Ackroyd*, 5 Ell. & Bl. 819, 25 L. J. Q. B. 193, 2 Jur. N. S. 233, the wife, from reasonable apprehension of personal violence, left her husband's house and for the purpose of protecting herself sued for divorce *a mensa et thoro*. It was held that the law gave her authority to pledge her husband's credit for the expenses of the prosecution, the question as to the husband's liability being, whether at the commencement of the proceedings, there was such reasonable ground for anticipating ill treatment as to make the divorce necessary for the wife's protection.

Where there has been cruelty, a divorce *a mensa et thoro* may be necessary for the protection of the wife, and as she has no means of her own she will lose this protection, unless she can pledge her husband's credit. *Brown v. Ackroyd*, *supra*.

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In *Williams v. Fowler*, McClell. & Y. 263, it was held that an action on the case would lie against the husband for the reasonable costs of proceedings at law or in equity, instituted by an attorney against him on behalf of the wife, who had been forced to leave the house by extreme ill-treatment, the parties having agreed to a separation, and the husband having tendered the attorney the rent of a cottage occupied by the wife, and undertaken to pay the costs if reasonable.

Where, pending proceedings for divorce by the wife against the husband, an amicable arrangement was arrived at, the wife's attorneys were held entitled to recover their costs against the husband. *Stocken v. Patrick*, 29 L. T. N. S. 507.

In *Butler v. Butler*, L. R. 15 Prob. Div. 32, where the queen's proctor intervened, it was held that the husband would not be ordered to give security for the wife's costs incidental to such proceeding.

The legal expenses incurred by a deserted wife preliminary and incidental to a suit for restitution of conjugal rights were held necessities for which the husband was liable, and for which she could recover, either against him or against his executors, upon the implied authority. *Wilson v. Ford*, L. R. 8 Exch. 68, 37 L. J. Exch. 60, 17 L. T. N. S. 605, 16 Week. Rep. 432.

In *Wilson v. Ford*, *supra*, the wife's attorney was also allowed to charge the husband with his fees, with respect to advice given the wife concerning a verbal promise of a settlement, made at the time of marriage, as to the best means of dealing with tradesmen who had supplied her with necessities, and with the landlord who was threatening to distrain for rent.

In *Rice v. Shepherd*, 12 C. B. N. S. 332, 6 L. T. N. S. 432, it was held that the husband was liable to an action at the suit of the wife's attorneys, for costs necessarily incurred by her in filing a petition for judicial separation, on the ground of cruelty, although the petition was not proceeded with, and the course prescribed by the practice of the divorce court for obtaining the wife's costs has not been pursued, such costs coming under the description of a necessary, and the English divorce acts did not take away the right of action at common law.

The common-law right of such an attorney to sue the husband as for necessities supplied to the wife is not limited to the statutory rights and remedies for costs given to the wife under the English divorce acts. *Ottaway v. Hamilton*, L. R. 8 C. P. Div. 393, 47 L. J. C. P. 725, 88 L. T. N. S. 925, 26 Week. Rep. 783.

The cost of a suit justifiably instituted by a married woman against her husband for a divorce, or a judicial separation, are necessities for which she may pledge her husband's credit. *Stocken v. Patrick*, 29 L. T. N. S. 507.

Suits for divorce, or any reference to a marriage settlement, are not the necessary means of preservation and safety, and professional charges in such cases do not come within the principles of *Shepherd v. Mackoul*, 3 Campb. 326, and cannot be deemed necessities.

In *Re Hooper*, Baylis v. Watkins, 38 L. J. Ch. N. S. 300, 10 Jur. N. S. 114, 9 L. T. N. S. 741, 12 Week. Rep. 324, it was held that the costs of a solicitor, employed by a married woman in proceedings on the wife's behalf, against the husband for a decree of judicial separation, are not necessities for which the husband is liable, unless there was great probability of ultimate success.

R. W.

retainer and services in a divorce suit brought by defendant against her husband. This proceeding was not carried through to a determination, but was discontinued by Mrs. Patterson before a decree. Substantially the only question presented by the record is whether a married woman may, in this state, make herself chargeable with the value of services rendered upon her employment to secure a divorce from her husband. It is contended by the defendant that the husband is liable for such services, and that the wife is not. The authorities are not uniform upon the question, but we think the weight of authority negatives such liability on the part of the husband. See Schouler, *Husb. & Wife*, § 106, and cases cited in note. In some of the states the liability of the husband is asserted. *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *Porter v. Briggs*, 88 Iowa, 166, 18 Am. Rep. 27; *Langbein v. Schneider*, 27 Abb. N. C. 228; and in these jurisdictions it is held that the wife is not competent to charge herself with such expenses. *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Cook v. Walton*, 38 Ind. 238; *Whipple v. Giles*, 55 N. H. 189. See, however, dissenting opinion of Pettit, *Ch. J.*, in *Putnam v. Tennyson*, 50 Ind. 461. We think the cases which deny the husband's liability are more consonant with the holdings of this court that one who supplies the wife with goods apparently suitable to her situation in life does so at his peril, and can only recover if the husband has failed to supply necessities. *Clark v. Cox*, 82 Mich. 204. Is the wife competent to contract for such services? The

wife may exhibit her bill for divorce in her own name. 2 How. Anno. Stat. § 6283. And in section 6285 it is provided that "in every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency, and it may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered or in the power of the court, or in the hands of a receiver." The statute clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such cost by an order for expense money to be paid by her husband. *Ross v. Ross*, 47 Mich. 185. It has also been held in this state that a married woman is competent to assert her rights either as plaintiff or defendant, and where a suit is brought against her as defendant, is bound to do so. *Wilson v. Coolidge*, 43 Mich. 112.

It would seem to follow logically that, having the power to bring suit, and being in such suit responsible for costs, she must be held competent to contract for the services of an attorney to represent her rights. We think the right to contract for such services is necessarily incident to and included in her right to bring the suit. In this view, there was no error committed to the prejudice of the defendant, and the judgment should be affirmed with costs.

The other Justices concurred.

TEXAS SUPREME COURT.

SAN ANTONIO & ARANSAS PASS R. CO., *Plff. in Err.*,

v.
Fanny LONG *et al.*

(.....Tex.....)

1. The nature of the aid furnished by the one for whose wrongful killing a recovery is sought to the plaintiff in the action need not be set out in the complaint.
2. A witness cannot give an opinion as to the probability of continued aid from a parent to a child as a basis for damages for the wrongful killing of the parent.

NOTE.—There are many authorities holding that the damages to be recovered for the wrongful killing of another must be proportionate to the loss sustained, see note to *Morgan v. Southern Pacific Co.* (Cal.) 17 L. R. A. 71, and the logical conclusion would be that if the pecuniary value of the continuance of the life to plaintiff was in the aid furnished toward living expenses, no loss could be shown if a considerable sum was received by plaintiff as legatee or distributee of decedent.

The application of such conclusion which is made in the above case is, however, somewhat novel. If the recovery is based on loss of probable future accumulations, as in the case of *Howard v. Delaware & H. Canal Co.* (C. C. D. Vt.) 6 L. R. A. 75, the present receipts because of the death would not, however, be of such material importance.

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3. A recovery for the death of another cannot be had by one who receives from the estate of the deceased property greater in value than all the prospective benefits that would have accrued to him had death not ensued, where the statute creating the right of action gives damages only for the pecuniary loss, and provides that each beneficiary of the class of relatives specified shall recover separately for his own special injury.
4. The will of the deceased may be put in evidence to show that the plaintiff has sustained no loss by the death of the testator, where the action is based on a statute allowing a recovery for the pecuniary loss sustained by such death.
5. An instruction that recovery can be had only for the loss of such pecuniary benefits as would have resulted "from the mental or bodily labor" of the deceased is wrong, where the prospective benefits were from the income of the property of the person killed.

(June 14, 1894.)

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Bexar County in favor of plaintiffs in an action brought to recover damages for the alleged wrongful killing of plaintiff's mother. *Reversed.*

The facts are stated in the opinion.

Messrs. Houston Bros. for plaintiff in error.

Messrs. Denman & Franklin, for defendants in error:

The demurrer and exceptions to plaintiffs' petition were properly overruled as the allegations therein show that by the death of plaintiffs' mother they suffered pecuniary loss.

Houston & T. C. R. Co. v. Croser, 57 Tex. 801; *Missouri Pac. R. Co. v. Kindred*, Id. 498 and 593, and cases cited; *Chicago & A. R. Co. v. Carey*, 115 Ill. 115; *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, and cases cited.

The court did not err in refusing to permit the will of the deceased to be introduced, as the same was immaterial to any issue in the case.

Defendant cannot set off, either in offset or in diminution of damages resulting from its tort the values of the devise or inheritance from the deceased to plaintiffs. Such a defense is opposed to public policy. Besides, the undisputed evidence showed that deceased managed her property, reinvested her income, collected her rents, and was a careful business woman, and that she devoted her surplus income to support of plaintiffs, and they, therefore, suffered a pecuniary loss, by these gifts, and an increase of the deceased's property by her labors being cut off by her death. This caused them a direct pecuniary loss not compensated for by an inheritance of the property owned by their mother when killed by defendant. This loss they were authorized to consider by the charge of the court, but could not consider under the special charges asked.

Pym v. Great Northern R. Co. 2 Fost. & F. 619; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15; *Kellogg v. New York Cent. & H. R. Co.* 79 N. Y. 72; *Terry v. Jewett*, 78 N. Y. 338, 17 Hun, 395; *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 90, 18 L. ed. 591; *Texes & P. R. Co. v. Levi*, 59 Tex. 675; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 230, 57 Am. Rep. 382; 8 Sutherland, Damages, pp. 269, 284; Thompson, Carr. p. 471; Patterson, Railway Accident Law, pp. 474-494; Tiffany, Death by Wrongful Act, §§ 159, 167, 172, 176, and notes under each section; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 324; *Pittsburgh, C. & St. L. R. Co. v. Thompson*, 56 Ill. 133.

Generally as to measure of damages:

Gulf, C. & S. F. R. Co. v. Compton, 75 Tex. 667; *Galveston v. Barbour*, 62 Tex. 174, 50 Am. Rep. 519; *International & G. N. R. Co. v. Ormond*, 64 Tex. 490; *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297; *Brunswick v. White*, 70 Tex. 504.

Gaines, J., delivered the opinion of the court:

The plaintiffs in the trial court (the defendants in error in this court) are the sons and daughters of Mrs. M. C. Long. They brought this suit, under the statute, to recover damages for injuries resulting to them from the death of their mother, which was alleged to have been caused by negligence of the defendant, the San Antonio & Aransas Pass Railway Company. The petition alleged that the youngest of plaintiffs was twenty-four years old on the day of the ac-

cident which resulted in Mrs. Long's death. The allegations of the petition with reference to the damages were as follows: "Plaintiffs aver that said M. C. Long, during her lifetime, aided in the support and maintenance of each one of plaintiffs, cared for them in time of sickness, and at other times, and that her house was their home whenever they desired to make it such, and that each had every reasonable expectation that if said M. C. Long had lived she would have continued to aid and assist in the support and maintenance of each of them, as aforesaid; and they aver that by her death each of them has been deprived of her motherly care and assistance, and her said support and maintenance, all in their damage in the sum of fifteen thousand dollars (\$15,000)." These allegations were specially excepted to, substantially upon the ground that they were vague and indefinite. The court overruled the exceptions, and we think there was no error in that ruling. It is contended that the petition should have averred specially the nature of the aid extended by Mrs. Long, in her lifetime, to each of the plaintiffs. The fact that the deceased, during her life, contributed to the support of her children, is evidence to be considered by the jury in determining the pecuniary loss sustained by them by reason of her death; and it may be that in a case like this, in which the children are all adults, and no longer abide under the parental roof, some evidence of a like character or effect is necessary in order to justify a recovery of damages. Such facts are not in themselves substantive facts which justify a judgment, and, being mere matters of evidence, are not required to be pleaded either in detail, or with any great degree of particularity.

The following answer of Fannie Long, one of plaintiffs, was permitted to be read from her deposition, over the objection of the defendants: "Said M. C. Long did aid in the support of all her said children. Her house was a home for any and all of them whenever they desired to make it so. Fannie Long, Emma Long, and Edward Long lived with her, when not absent from home. She also furnished Emma Long money for her support, and to pay for medicine and medical attention when needed. She also aided in the support of said Florence Bartow by remitting money to her at different times. She aided Arthur Long the same way. She also aided Edward Long with money, and also assisted him in the support of his children, by giving them presents of clothes, etc. She was a woman of simple tastes and habits, and was always ready to aid her children with her means whenever they needed aid." The answer was properly admitted. It was an issue in the case whether or not plaintiffs had suffered any pecuniary loss from the death of their mother. The testimony tended, in a general and somewhat imperfect way, to support the plaintiffs' case upon that issue, and therefore it was not irrelevant. It was the defendants' right to have more specific answers upon cross-examination, and the record shows that they availed themselves of this right. We are also of opinion that there

was no error in admitting the testimony of Fannie Long to the effect that her mother had an income from the rents of property and interest on loans, and that she devoted it to the support of herself and children.

The plaintiffs were also allowed to read in evidence to the jury the following question and answer from the deposition of the same witness: "If you say that she (meaning M. C. Long) did aid in the support of her children, please state whether they had any expectations that she would continue such support during her life. If yea, state the facts, if any, upon which such expectations were based." Answer: "Each of said children had the expectation that said M. C. Long would continue to aid them, if she had lived. This expectation is based upon the fact that she was a kind and affectionate mother, and had aided them during her life." So much of the question is sought to elicit the opinion of the witness, and so much of the answer as gave that opinion should have been excluded. The case comes within neither of the well-defined exceptions to the rule that the opinion of a witness is not admissible. The witness should have been confined to a statement of the facts, and the jury should have been left to draw their own conclusion.

The only witness who testified as to the family relations of the plaintiffs and the deceased, and as to the facts affecting the amount of damages, was Miss. Fannie Long. In addition to the portions of her testimony which have already been set out, she deposed, in substance, that the deceased left surviving her neither father nor mother, and that the plaintiffs (two sons and four daughters) were her only children; the deceased mother, at the time of her death, had property amounting in value to \$18,500; and that the income of her property was about \$1,850. All of this except about \$250, which was used in her own support, she devoted to the assistance of her children. She was cross-examined on that subject, but was unable to give either the date or amount of any donation, or the amount in the aggregate, that any one received in any one year. One received remittances of money, the children of another were given clothing, and others occasionally lived with her at her expense. All the children were of full age at the time of their mother's death. Three of them only resided permanently with her. Such was the substance of the testimony upon the question of damages. Such being the evidence adduced by the plaintiffs upon the question of the amount of damages, the defendant offered in evidence the will of Mrs. M. C. Long, duly probated, in which she devised and bequeathed all of her estate to her four daughters. To the reading of the will in evidence, the plaintiffs objected, and their objection was sustained, and the evidence excluded. This action of the court raises the serious question in this case, and it is one which is of first impression in this court. In an action for injuries resulting in death, can the defendant show, for the purpose of reducing the damages, that the plaintiffs have received, by devise or descent, property from the estate of the deceased? If such evidence

be admissible in any case of like character, it was certainly admissible in this case. The authorities are not numerous, and the expressions of the courts are in an apparent conflict upon the question. Among the cases relied upon in support of the negative is that of *Illinois Cent. R. Co. v. Barron*, 73 U. S. 5 Wall. 90, 18 L. ed. 591. The defendant asked the court to charge the jury "that if the persons for whose benefit this action is brought have received, in consequence of the death of said Barron, and out of his estate inherited by them from him, a pecuniary benefit greater than the amount of damages which could, under any circumstances, be recovered in this action, then as a matter of law, they have, by the death of said Barron, sustained no actual injury for which compensation can be recovered in this action." Upon error to the Supreme Court of the United States, that court held, in effect, that the charge was properly refused. The trial court had, however, charged the jury, among other things, as follows: "In this case the next of kin are the parties who are interested in the life of the deceased. They were interested in the further accumulations which he might have added to his estate, and which might hereafter descend to them. The jury have the right, in estimating the pecuniary injury, to take into consideration all the circumstances attending the death of Barron,—the relations between him and his next of kin, the amount of his property, the character of his business, the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had. There is a possibility, in chances of business, that Barron's estate might have decreased, rather than increased, and this possibility the jury may consider. The jury may also take into consideration that he might have married, and his property descended in another channel. And there may be other circumstances which might affect the question of pecuniary loss, which it is difficult for the court to particularize, but which will occur to you. The intention of the statute was to give a compensation which the widow, if any, or the next of kin, might sustain by the death of the party, and the jury are to determine, as men of experience and observation, from the proof, what that loss is." It is apparent, we think, that evidence had been admitted of property received by inheritances by the beneficiaries from the estate of the deceased, and the case cannot be considered as a decision upon the question of the admissibility of such evidence. The court do not even discuss the charges given and refused, but in course of their opinion says, in a general way: "The statute in respect to this measure of damages seems to have been enacted upon the idea that as a general fact the personal assets of the deceased would take the direction given them by law, and hence the amount recovered is to be distributed to the wife and next of kin in proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived, and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his

wife and next of kin. In case of death by the injury the equivalent is given by a suit in the name of his representative." The suit was brought under the statute of Illinois which made the widow and next of kin the beneficiaries of the recovery, and directed that the amount recovered should be divided among them "in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate." The court seems to proceed—in part, at least—upon the theory that the damage which the statute is intended to compensate is the loss which accrues to the widow and next of kin of the deceased, as distributees of his estate, by reason of his premature death; such loss being the difference between what the deceased actually left and what he would have left, had not his life been cut short by the wrong of the defendant. That difference would seem to be his probable future savings, had he lived. The proportion in which the recovery is to be distributed tends to indicate that this was the leading consideration in providing the right of action; for if the loss of any individual benefits, capable of pecuniary estimation, which would probably have accrued to any beneficiary during the life of the deceased, was to be compensated, it would seem that the statute would have provided that such beneficiary should recover such compensation for himself alone. It must, however, be conceded that the decision of some of the courts upon similar statutes recognize the rights of minor children, at least, to recover for the loss of individual pecuniary benefits which would probably have inured to them by the continuance of the life of their parent. *Tilley v. Hudson River R. Co.* 24 N. Y. 471, 29 N. Y. 253, 86 Am. Dec. 297; *Terry v. Jewett*, 78 N. Y. 838.

Under the statutes of New York, the recovery is for the benefit of the next of kin, and is to be there also apportioned as under the statute of descent and distribution. It is worthy of remark that under such a statute the recovery may go to remote collateral kindred, who have no interest whatever in the life of their relative, except the prospective shares they may receive, as distributees of his estate, upon his dying intestate. Where such is the loss to be recompensed, it is no answer to the plaintiff's demand to say to him that he has not been damaged, because he has received a pecuniary benefit from the death of the deceased. His ground of complaint is not that he has been deprived of receiving anything, but that the amount which has come to him is less than it would have been if the life of the deceased had been prolonged.

There would seem to be an important difference between statutes which give the right of action to the next of kin, as such, and the statute of this state which undertakes to confer compensation upon the husband or wife and the children and parents of the deceased only, and which requires that the jury shall determine separately the amount to be recovered by each of the beneficiaries. Where the right of action is given for the benefit of the next of kin, and the sum recovered is to be apportioned as under the

statute of descent and distribution, it would seem that the leading purpose is to give compensation for some loss suffered by them all in common; that is to say, the damage which has accrued to them, as next of kin, by reason of the loss of a prospective increase in the amount of the estate to be distributed. Our statute excludes from its benefits the collateral kindred, and its leading purpose seems to be to compensate only such near relatives of the deceased as may be dependent upon him for support, or other aid of pecuniary value, or such as may have been the recipients of such aid or support. It may be that, in statutes of the one class, special injury to one beneficiary may be considered and compensated, though it is difficult to see why the recovery for such loss should be distributed in a fixed proportion among all; and it may be, also, that under our statute the loss of a prospective increase of inheritance may be an element of damages. But, under the latter, each beneficiary recovers for his own special injury. The damages must be actual, and for loss of a pecuniary nature. Nothing is given by way of solace. Under such a law, we cannot see how it can be maintained that one has been damaged by the death when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him, had the death not ensued. Let us suppose that a wealthy son contributes to his aged parent a fixed sum, say \$100, annually, and that, from the wrongful act of another he dies, leaving such parent, by his will, a legacy of \$10,000. Can it be reasonably asserted that the parent has suffered any pecuniary loss by the death of the son? But we need not go outside of this case for an illustration. If there was any great disparity in the aid extended by Mrs. Long in her lifetime to each of her children, the evidence does not disclose it. By her will she left her property, amounting to nearly \$20,000 in value, to her daughters, and gave her sons nothing. If her sons shared equally in her bounty with her daughters during her life, can it be said that their loss is no greater than that of the daughters? It seems to us absurd to say so. It will not do to say, as some of the courts have said, that to permit a defendant, in a case of this character, to show that the plaintiff had received a pecuniary benefit resulting from the death of the deceased, would enable a wrongdoer to protect himself against the consequences of his wrong. Except for willful misconduct or gross negligence, exemplary damages are not allowed by the statute. In other cases, actual damages only are given, and the recovery is free from any element whatever of a penal nature. The argument is a legitimate application of the principle that a wrongdoer cannot take advantage of his own wrong. Its main support rests upon a sentiment,—a consideration which should not be resorted to in order to change the provisions of the written law. The statute is intended, in case of mere ordinary negligence, to give compensation for a pecuniary loss; and the question is, What is the amount of its loss, if any? This is a practical question, and it

should, in every such case, be tried and determined in a reasonable and practical manner.

The English statute known as "Lord Campbell's Act," upon which most, if not all, of the statutes of a like character in this country have been modeled, is, in respect to the beneficiaries, very nearly the same as the statute in this state. The action is for the benefit of "the husband, wife, parent and child" of the deceased, and the jury are to apportion the damages among the beneficiaries. The only substantial difference is that Lord Campbell's act provides that under the term "parents" shall be included "grandparents." In an action brought under that act, Lord Campbell himself, who presided at the trial, instructed the jury that in assessing the damages they should take into consideration the amount received by the beneficiaries on an accident insurance policy held by the deceased. *Hicks v. Newport, A. & H. R. Co.* cited in note to *Pym v. Great Northern R. Co.* 4 Best & S. 408. Speaking of this case, Baron Bramwell, in *Bradburn v. Great Western R. Co.* L. R. 10 Exch. 1, says: "As to the case of *Hicks v. Newport, A. & H. R. Co.* that was an action under Lord Campbell's Act, and the ruling is quite correct. The statute has laid down no rule as to the mode of calculating the damages to be given in respect of the right of action which it created. The rule was first laid down by this court, and that rule was that the damages were to be a compensation to the family of the deceased, equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put, by the death of his relative, into possession of a large estate, there was no loss,—he was a gainer by the event; and, similarly, whatever comes into the possession of the family who have suffered by the death of their relative, by reason of his death, must be taken into the account." In *Grand Trunk R. Co. v. Jennings*, 13 App. Cas. 800, it is said "that all the circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the decision of the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their lordships that money provisions made by a husband for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in the reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half." This is from a decision of the 24 L. R. A.

privy council in a case arising under the Canada statute, which is the same as Lord Campbell's Act. But neither the expressions in the case last cited, nor in *Bradburn v. Great Western R. Co.*, *supra*, are authoritative. The point was not involved in either case, and yet they are entitled to weight, as the opinion of very eminent judges. The court of the exchequer chamber took substantially the same view of the question, as is shown by the case of *Pym v. Great Northern R. Co.*, *supra*. On the other hand, there are several decisions which hold that proof that a beneficiary has received money from a policy of insurance on the life of the deceased cannot be received for the purpose of reducing the damages. *Althorpe v. Wolfe*, 22 N. Y. 355; *Sherlock v. Alling*, 44 Ind. 184; *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 239, 57 Am. Rep. 383; *Western & A. R. Co. v. Meigs*, 74 Ga. 857. Statutes giving damages for injuries resulting in death necessarily deal with probabilities; so that where there is a policy on the life of the deceased, payable to the beneficiaries under the statute, the probability is, or may be, that, if the deceased had continued to live, beneficiaries would ultimately have received the insurance money. Hence, they have gained nothing by the premature death, except an acceleration of the payment. Perhaps sound principles would require the jury to take into consideration the use of the money during the period of acceleration. *Grand Trunk R. Co. v. Jennings*, *supra*. But, however that may be, the case is very different where the only aid which the beneficiaries have received from the deceased, during his life, has been a part of the income of his property, and where, upon his death, the title to the corpus of such property absolutely vests in them; and we are therefore of the opinion that, in a case involving similar facts, they should be admitted in evidence, to be considered by the jury. We conclude that the court erred in excluding the will of Mrs. Long, and that for this error the judgment must be reversed.

There are other questions presented by the writ of error, but we need not consider them either at length or in detail. They were correctly disposed of by the court of civil appeals. There is, however, one point which we desire to notice. It is insisted that the court should have charged the jury, in effect, that the plaintiffs were entitled to recover only for the loss of such pecuniary benefits to them as would have resulted "from the mental or bodily labor" of the deceased. The object of the refused charge was to exclude from the consideration of the jury prospective benefits which might have accrued to the beneficiaries from that portion of the income of the deceased which proceeded from her property. From what has already been said, it is apparent we think that the charge was correctly refused. The contention of plaintiffs in error seems to be based upon the case of *Pennsylvania R. Co. v. Butler*, 67 Pa. 335, in which the court, in their opinion, says: "After an attentive examination and

review of all the cases which have heretofore been decided, we are of the opinion that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be received,—in this instance, the children of the decedent,—without any *solatium* for distress of mind; and that loss is what the deceased would probably have earned by his intellectual and bodily labor, in his business or profession, during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure." The rule thus announced is doubtless correct as applied to the facts of the particular case, and it may be applicable generally under the statute of Pennsylvania. It does not apply, under the statute of this state, to a case like the present, in which the prospective aid was mainly, if not wholly, from the income of property, and in which, upon the death, some of the beneficiaries take by bequest all the estate, and others get none.

In conclusion, we will say that while the damages in actions of this nature are necessarily indeterminate, and while much must be left, in almost every case of the kind, to the sound sense of the jury, it does not follow that the plaintiffs need not prove with a reasonable degree of certainty the date from which their compensation is to be assessed, when it is practicable to do so. Where the beneficiaries are adults, and the loss of prospective benefits is based upon assistance in the way of money, or other things of value, received in the lifetime of the deceased, it is certainly within the power of each beneficiary to show by his own testimony, with some degree of accuracy, the amount of the benefits so received; and it would seem that his failure to testify specifically to the facts ought to be deemed a circumstance against him, sufficient to justify the trial court in setting aside the verdict, provided it be apparently excessive.

The judgment of the Court of Civil Appeals and of the District Court is reversed, and the cause remanded.

MEXICAN NATIONAL R. CO., *Plff. in*

Err.,
v.

JAMES MUSSETTE.

(36 Tex. 708.)

1. Obligations of sureties on appeal bonds are not contracts within the constitutional protection against impairment of obligation, as they are not based on consent of adverse litigants, but are assumed by the makers of such bonds which are permitted and thereby the right to appeal secured under the provisions of positive law.

NOTE.—For a view of the rights and obligations given and imposed by an appeal bond which is widely different from the view above taken, see the report of the case of *Schuster v. Weiss* (Mo.) 19 L. R. A. 182, which is cited and distinguished in the above case.

24 L. R. A.

2. Holding an appeal bond executed as security for an appeal to the appellate court, which then had jurisdiction in such cases, to be valid after the transfer by statute of such jurisdiction to another court does not impair the obligation of a contract, as the bond is made in view of the known power to change the jurisdiction.

3. An appeal bond executed in accordance with the law in force at the time does not become inoperative by a transfer of the appellate jurisdiction to a different court.

4. Whether an engineer leaving an engine standing under steam, holding a train on a steep grade, ought to have foreseen that an ignorant fireman left in charge might unintentionally or inadvertently put it in motion, is a question for the jury.

5. The negligence of an engineer having supervision over his fireman as well as locomotive, in leaving his engine under steam, where it was holding a train on a steep grade, may be deemed the efficient cause of an injury resulting from the inadvertent or intentional act of the fireman in setting the engine in motion.

6. The right of an employe to recover for negligence of a corporation in hiring an incompetent servant over the protest of some of its officers is not affected by failure of another employe to give notice of subsequent neglect and unfitness of such servant.

(May 24, 1904.)

ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Webb County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from the employment by defendant of an incompetent servant. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Nicholson, Dodd & Mullalley, and Denman & Franklin for plaintiff in error.

Messrs. W. Showalter, Herbert Walcott, and Fisher & Townes for defendant in error.

Stanton, Ch. J., delivered the opinion of the court:

This cause was appealed to the supreme court prior to the organization of courts of civil appeals; and, as was proper at the time, the appeal bond was conditioned as the law then required. On organization of courts of civil appeals, the cause, in accordance with the requirements of the law, was transferred for decision to the court of civil appeals having jurisdiction of cases tried in the county in which it was. The judgment of the district court was affirmed by the proper court of civil appeals, and, on application, this court granted a writ of error, under which the cause is now here. Defendant in error moves to dismiss the writ of error on the ground that the court of civil appeals had not jurisdiction over the cause, because no bond had been executed conditioned as bonds are now required to be perfect appeals to a court of civil appeals; from which it is ar-

gued that this court has not jurisdiction, be cause a court of civil appeals had not jurisdiction to render a judgment from which writ of error would lie. It is contended that this court ceased to have jurisdiction when courts of civil appeals were organized; and that no court of civil appeals could acquire jurisdiction without a new bond, executed in compliance with the law applicable to bonds given in cases originally appealed to such court; and it is further urged that the bond, executed in accordance with the law in force at the time, became inoperative for any purpose when courts of civil appeals were organized. It is further contended that "the lawmaking power could not change the contract of the sureties to the appeal bond, and impair its obligation, by imposing new burdens, and requiring the sureties to perform the judgment of a tribunal other than the one they agreed to be bound by; [that] sureties have the right to stand upon the very contract they have made, and any change therein made without their consent, and certainly if to their prejudice, will discharge them and destroy the bond as a bond." These propositions are asserted in the motion in many forms.

The appeal bond in question was executed after the amendments to the constitution now in force were declared adopted, but before the organization of courts of civil appeals which were required by that amendment to be organized. At the time the appeal bond in question was executed, the statute required such bonds to be conditioned that principal and sureties, "in case the judgment of the appellate court shall be against him, that he shall perform its sentence, judgment or decree, and pay all such damages as said court may award against him." Rev. Stat. art. 1404. The bond was conditioned, "in case the judgment of the supreme court shall be against it, . . . it shall perform its judgment, sentence, or decree, and pay such damages as said court may award against it," etc. This bond was sufficient at the time it was given, and, had the cause been reached and disposed of by this court before courts of civil appeals were organized, would have authorized judgment against principal and sureties in accordance with its terms. The amendments to the constitution, among other things, provided that "until the organization of the courts of civil appeals and criminal appeals, as herein provided for, the jurisdiction, power, and organization and location of the supreme court, the court of civil appeals and the commission of appeals shall continue as they were before the adoption of this amendment." Const. art. 5, § 6.

After the organization of courts of civil appeals, the jurisdiction theretofore exercised by the supreme court was taken from it, and conferred in substance on these courts. While the amendments to the constitution did not, in terms, direct the causes pending in supreme court to be transferred to courts of civil appeals when organized, such was its effect, for the supreme court from that time was deprived of jurisdiction to decide them, and these courts alone were clothed with that power. So standing the jurisdic-

tion of the courts, the legislature directed that "all causes that may be pending in the supreme court of Texas, when the civil courts of appeals shall have been organized, shall be transferred by said supreme court to the court of civil appeals to which it would be returnable under the law organizing such courts, and shall be decided under the same rule as obtained when any such appeal was perfected. . . . That all bonds and obligations theretofore given in said cause to abide the judgment, sentence, or decree of said court, or to pay the costs of said court, shall be deemed and held to apply to said civil court of appeals as if hereafter given under the provisions of this act." Act April 18, 1892, § 4. In providing for writs of error from this court to a court of civil appeals, the statute declares that "a certified copy of . . . the bond given in the lower court, if any," shall accompany the petition; and that, "if plaintiff in error has given no bond, then the supreme court in granting the writ shall specify what bond shall be given, and the plaintiff in error shall file said bond in the trial court to be approved by the clerk of said court, and a certified copy thereof shall be at once transmitted to the supreme court." This is the only instance in which this court is required to have writ of error bond made. If a party who prosecutes an appeal or writ of error to a court of civil appeals executes bond for that purpose on that bond, he can prosecute writ of error to this court (Rev. Stat. art. 1011b), and this court can render such a judgment in that case as the court of civil appeals should have rendered, which may go against sureties as well as principal on appeal or writ of error bond.

In view of this legislation, there can be no doubt of intention to give to courts of civil appeals jurisdiction over causes pending in supreme court when those courts were organized, and to authorize them to render judgments on appeal and writ of error bonds filed in those cases to take them to the supreme court as fully as though such bonds were given to perfect appeals or writs of error to those courts. It would be within the power of the legislature to permit appeals and writs of error to be prosecuted to courts of civil appeals, and writs of error to be prosecuted from those courts to the supreme court, without any bonds whatever, and, under existing legislation, it is clear that the court of civil appeals had jurisdiction over this cause, and that this court has; for, if the bond could not be enforced against principal or sureties, the right to have adjudication by both courts without other bond is given by law. To hold otherwise would be, in effect, to hold that litigants have power to deprive the state of power to regulate its judicial system, and to fix the jurisdiction of its courts. Those decisions which deny the liability of sureties on appeal bonds, when, under a change in the law, jurisdiction is given to a court other than that named in the bond, or having jurisdiction when bond was executed, all concede the jurisdiction of the new or substituted court. *Re Garesche*, 85 Mo. 469; *Oranor v. Reardon*, 39

Mo. App. 306; *Schuster v. Weiss*, 114 Mo. 158, 19 L. R. A. 182. Some of these cases, however, held that in such cases sureties on appeal bonds are not liable. The decisions are based on the general rule that the contract of a surety is not to be extended by implication beyond its terms, but to construe such obligations in connection with laws in force when they are entered into and in view of the fact that every person must know that the power of the people to change the jurisdiction of the courts of the state may be exercised at any time, and cannot be controlled by contracts made or obligations assumed by individuals, does not violate that rule. All instruments creating obligations not based on agreement of parties, but upon statutes, such as appeal bonds, are made in view of and in subordination to the fact, known to all, that the people may change the jurisdiction of existing courts, create others, and confer upon them such jurisdiction over cases arising before such legislation, or then pending, as may seem for the best interests of all, and it ought not to be held that principal or surety to an appeal bond contemplated, in event of such change pending appeal, that their obligation should become inoperative; for the substance and spirit of such an undertaking is that the obligors will discharge the obligation fixed by their bond whenever the duty to discharge it, by satisfying the obligation, is declared by a court having jurisdiction over the cause on appeal, whether jurisdiction to determine the cause existed when the bond was given or was afterwards conferred. What court should decide the cause on appeal was not a matter which parties could control by contract, for neither the one nor the other could thus secure a right which would prevent change in jurisdiction of courts, or creation of new courts with jurisdiction before conferred on others. Some of the cases before referred to seem to hold that such obligations as sureties on appeal bonds assume are contracts within the constitutional safeguards which deny to state legislatures power to pass laws whereby the obligation of contracts will be impaired; but, it seems to us, such is not the character of such obligations, for they are not based on consent of adverse litigants, but are assumed by the makers of such bonds, which are permitted, and thereby right to appeal secured under the provisions of positive law. The assent of persons for whose protection such bonds are executed is not essential to obligation, and their dissent can have no effect on the right of adverse parties and their sureties to assume obligation by compliance with the statute. Obligations which the Constitution of the United States and of this state protect from impairment are such as exist by reason of contract, which never exists without consent or agreement of parties, either express or implied, and it cannot be implied when the party in whose favor the obligation arises has no power to prevent it. *Fletcher v. Peck*, 10 U. S. 6 Cranch, 186, 3 L. ed. 177; *Green v. Biddle*, 21 U. S. 8 Wheat. 92, 5 L. ed. 570; *Garrison v. New York*, 88 U. S. 21 Wall. 203, 22 L. ed. 614; *Lobrano v. Nelligan*, 76 U. S. 9 Wall. 296. 24 L. R. A.

19 L. ed. 696; *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 395, 13 L. ed. 449.

It would not be contended that parties, by the execution of appeal bonds and other acts necessary to perfect an appeal, could acquire right to have their causes determined by courts then having jurisdiction over such appeals; for, if such a right could be thus acquired, parties would have power to permit the exercise by the people of a power recognized and secured by the constitutions. None of the decisions assert such a proposition, but all concede that it cannot be maintained when they admit that legislation is valid, as to parties to an action, which takes from a court jurisdiction to decide a case pending before it on appeal, and confers jurisdiction over it upon another court to which the cause is required to be transferred.

That the laws in question are, in a restricted sense, retroactive, is true; but as they affect only the remedy, and deprive neither party of substantial right, they are not violative of the constitution unless they impose obligations not contemplated when the appeal bond was executed. It is clear that it was intended by the parts of the amendments to the constitution and statutes before referred to to confer upon courts of civil appeals jurisdiction to hear and determine causes pending in the supreme court, and undecided when those courts were organized, and to make parties to appeal bonds filed in such causes liable under judgments rendered by those courts or by this court on writ of error, just as they would have been had the causes been decided by the supreme court before the organization of courts of civil appeals; and the only question is whether, under the law applicable to sureties, they can be held so liable. As before said, the undertaking of the parties to the appeal bond must be read in light of laws existing when the bond was executed, and in view of the further fact that parties must be held to have contracted with knowledge of the right of the people to so change the jurisdiction of the courts of the state as to require the appeal to be decided in court or courts other than that having jurisdiction when the bond was executed. The law in force when the bond was executed required it to be conditioned "that such appellant, or plaintiff in error, shall prosecute his appeal or writ of error with effect, and in case the judgment of the appellate court shall be against him, that he shall perform its judgment, sentence or decree, and pay all such damages as said court may award against him." Under this statute, bonds which used the words "supreme court" instead of the words "appellate court," and *vice versa*, were held sufficient, and, if the words used in the statute had been inserted in the bond in question, there can be no doubt that they would be held to embrace any court which might entertain jurisdiction of the cause on appeal, whether existing at the time the bond was executed, or subsequently created. That the words "supreme court," used in the bond were intended to be used as the equivalents of the words "appellate court," used in the statute, cannot be doubted. The bond in

question, however, was executed after all the parties to it knew that the constitution had been so amended as to make it necessary that the cause should be decided by a court of civil appeals if it was not decided by the supreme court before those courts were organized; and that they executed the bond in view of that fact, and in order to secure right to decision of the cause on appeal by any appellate court which might be given jurisdiction to decide it, ought not to be questioned. We do not, however, wish to place the decision of the general question presented on the language of the statute in force when the bond was executed, nor upon the fact that the constitution had been amended before that time, but upon the broader ground that principal and sureties, when assuming such obligations, do so with intent they shall be given effect, and must be understood to agree to comply with their undertakings whenever their obligation to do so is declared by a court having jurisdiction over the case appealed, whether that be the court named in the bond, and having jurisdiction when it was executed, or a court subsequently clothed with such jurisdiction. The legislature has declared such to be their obligation, and there is no objection on constitutional grounds to such legislation, nor can it be said that any burden is thus placed upon sureties which was not fairly in contemplation when they voluntarily assumed the obligation. The motion to dismiss writ of error will be overruled.

On the day of his injury, defendant in error was conductor on a train belonging to plaintiff in error *en route* to the City of Mexico. The train consisted of nineteen cars, and was composed of both freight and passenger cars, the latter having from 80 to 100 passengers on board. The train being heavy, on reaching a steep mountain grade which extended about ten miles, it became necessary to place an extra engine at the head of the train and another at the rear, in order to propel the train to the top of the mountain. One Hobert was engineer in charge of the rear engine, which seems to have been a heavy and powerful engine, and with him was a Mexican fireman. When the train had ascended the mountain about eight miles, one of the engines in front became disabled, and, after causing the brakes to be set, the conductor went forward, cut off the front engines, and sent them to a station at the top of a grade for assistance. Soon after the train was stopped, the engineer in charge of the rear locomotive left it and came to the front of the train, leaving no person with his engine but the fireman, who knew nothing of its working or mechanism. When that engineer reached the front of the train, the conductor upbraided him for leaving his engine while on that grade, and directed him to return to it; but, about that time, the train began moving down the mountain, and it was observed that his engine was working and pulling the train after it. The conductor at once commenced doubling the brakes, passing over the cars from one to another towards the rear, and, while engaged in this, was thrown from the train, and injured, under such cir-

cumstances as to make the railway company liable to him if the engineer, Hobert, was an unsuitable man for the position in which he was placed, provided his absence from his engine was the proximate cause of the movement of the train down the grade. There was evidence tending to show that Hobert was a reckless engineer, and unsuited to the place, and that of this the officers of the railway company were informed when he was last employed over the protest of a trainmaster, who gave information, not only of his general reputation for carelessness, but of a wreck caused by him when formerly in employment of the company. It was shown that great caution on the part of those managing the train while it was on the steep grade was necessary, and that the orders to engineers prohibited their leaving their engines except at stations to receive orders. It further appears that some act of the fireman, during the absence of the engineer, put the engine in backward motion, after which a brakeman who was in the caboose climbed into the engine room, and, by reversing the engine and giving steam, stopped the train, but this was not done until plaintiff was injured and two passengers killed. The action was based on several acts of negligence charged against the company, but the charge of the court withdrew from the jury all of those except the negligence of the company in placing Hobert in charge of the engine, and his negligence in leaving his engine under the circumstances. The court clearly informed the jury what the issues in the case were, and as to the facts that would fix liability on the company, or prevent recovery by plaintiff. With others, the court gave the following instructions: "If the plaintiff has shown that the defendant failed to use ordinary care and diligence in employing the engineer who operated said pusher locomotive as is required under the charge above given; that he was a careless and reckless man, and that the injury complained of was occasioned as the direct or proximate result thereof, and that the same happened without the fault or contributory negligence of the plaintiff, as hereinafter charged, this in law would be such negligence on the part of defendant as would render the company liable, and you should so find for the plaintiff. An injury is the proximate result of an act when, without the act, the injury would not have been inflicted. It is for you to determine, from all the evidence before you, what was the proximate cause of the injury complained of; but unless you find that the defendant was negligent in employing the engineer, Hobert, and that he was careless and reckless, and thereby caused or contributed to the injury complained of, without any fault on the part of plaintiff, then you will find for defendant." It is urged that these charges authorized the jury to find for plaintiff if Hobert was a reckless, careless, and unsafe engineer, and employed by the company without the exercise of care to ascertain his fitness for the place, although the injury may not have resulted from his negligence. Neither of the charges seems fairly susceptible of the construction placed on them by counsel. The

first informed the jury that they should find for the plaintiff if, without negligence on his part, he received injuries which were the direct result of the engineer's carelessness, if the company failed to use ordinary care in employing him,—if, in fact, he was unfit for the position. Other parts of the charge informed the jury as to the risks assumed by employes, and as to the facts necessary to entitle one employe to recover for an injury resulting from the negligence of a coemploye. The jury could not have understood that they were instructed to find for plaintiff if the company had failed to use due care in employing the engineer, even if he was careless and reckless, unless they believed from the evidence that plaintiff's injury was the direct result of his careless or reckless act. The last charge above given places the matter beyond controversy, and the entire charge was such that the jury could not have placed that construction on it for which counsel contend. It is true that the court gave a charge, asked by defendant, which, if considered alone, ought not to have been given, and from that counsel contend that the jury must have placed that construction on charges complained of for which they now contend. The charge given at request of defendant could not legitimately have been given such effect, and, considered alone, ought not to have been given in view of the facts of the case.

It is contended that the negligence of the engineer in leaving his engine, under the circumstances, in charge of a fireman who knew nothing of its working or mechanism, contrary to the rules of the company, as matter of law was not the proximate cause of the injury, because the engine was put in motion by the fireman. It frequently becomes difficult to determine the proximate cause of an injury, but it is ordinarily a question of fact to be determined by the court or jury trying a cause, whose finding will not be reversed on grounds purely theoretical. The situation of the train when it was stopped on the mountain side was perilous, and the evidence clearly shows that the movement of the train might have been prevented or stopped after it began if the engineer had been at his post, and thus the injury been avoided; and we are of opinion that the negligence of the engineer having supervision over the fireman as well as the locomotive thus situated may be deemed the efficient cause of the injury, although the engine may have been put in motion by the fireman either inadvertently or intentionally. The rules of the company required the engineer to remain with his engine, evidently for the purpose of protecting it from the interference of the fireman or any other person, as well as to operate it as might become necessary for movement or safety of the train. That the rules of the company required him to remain with his engine evidences the opinion of the officers of the company that the exercise of due care required his presence there for the safety of its property, of employes, and of passengers. "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will

not excuse the first wrongdoer if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise. Whether, in any given case, the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury." *Lane v. Atlantic Works*, 111 Mass. 189; *Gonzales v. Galveston*, 84 Tex. 3; *Jones v. George*, 61 Tex. 846, 48 Am. Rep. 280; *St. Louis, A. & T. R. Co. v. McKinney*, 78 Tex. 298; *Weick v. Lander*, 75 Ill. 98.

The fireman may have been a competent person to discharge the duties for which he was employed, and if, while in the discharge of those, a fellow servant had been injured by his negligence, the railway company would not have been liable; but he was not employed to operate or have charge of the engine, of the working and mechanism of which he was ignorant. The engineer was employed for the latter purposes, and to emphasize his duty to care for his engine at all times the rules of the company required him to remain with it when on the road and under steam, except at stations when necessary to leave to get orders. Why did the rules of the company require this? The answer must be, in order to operate it when necessary, to care for it, and to prevent all other persons from interfering with it. Whether it ought to have been foreseen that an ignorant fireman might intentionally or inadvertently put it in motion, when under steam, and situated as was it, if he left the post assigned to him by his employer, was a question for the jury. An engine when under steam is too nearly a thing of life to be left in the hands of a person ignorant of its workings and mechanism, and if injury results from such negligence, even though there may have been one intervening act directly contributing to the injury, no court would be justified in holding that, in the ordinary course of events, such intervention ought not to have been anticipated, or at least thought not unlikely to occur. To have given the charges bearing on questions considered, asked by the defendant, would have been to take the case from the jury, which ought not to have been done under the evidence. It was the duty of the company to exercise diligence to ascertain the fitness of Hobert for the important and responsible position in which he was placed, and the failure of a fellow servant of the plaintiff to notify its officers of neglect on his part and of his unfitness for duty after he was employed the second time over the protest of some of its officers, based on the former misconduct that led to his discharge, could not affect the right of plaintiff to recover, and the court did not err in refusing to give the charge asked upon that subject.

There is no error in the judgment of the District Court or of the Court of Civil Appeals, and they will be affirmed.

IOWA SUPREME COURT.

H. J. GRISWOLD *et al.*, *Appts.*,

v.

ILLINOIS CENTRAL R. CO.

(.....Iowa.....)

1. The facts that the public are convenience by the facilities afforded by a warehouse erected by an individual on railroad property, that insurance companies have issued policies on it, and that the statutes make railroad companies liable for fires negligently set by them, do not show such a public interest in the subject-matter of a contract between its owner and the railroad company relieving the latter from liability for fire negligently set by it to the warehouse as to make its enforcement against public policy.

2. A statute prohibiting carriers from contracting to exempt themselves from liability does not apply to a contract by a railroad company with one to whom it grants permission to place a warehouse on its property relieving it from liability for loss by fire negligently set out by it.

3. A railroad company which has contracted for exemption from liability for loss by its negligence of a warehouse erected by a third person with its permission on its land is not required by public policy to reimburse insurers who issued policies on it in case they are required to pay a loss caused by its negligence.

(Robinson and Ktme, JJ., dissent.)

(October 19, 1892.)

APPEAL by plaintiffs from a judgment of the District Court for Buchanan County in favor of defendants in an action brought to recover the value of a certain elevator which was owned by plaintiff Griswold and stood on defendant's land and which was destroyed by fire negligently set out by defendant's servants. *Affirmed.*

The facts are stated in the opinions.

Messrs. R. W. Barger and E. E. Hasner, for appellants:

Public policy is that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good.

19 Am. & Eng. Encyclop. Law, p. 565; *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Greenhood*, Pub. Pol. p. 2; *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 38 L. ed. 414.

Public policy, in other words, is substantially that right existing in the state and which is conferred upon the state by the individual member of society in consideration of the state's obligations to him, by which the state is

made the umpire as to the kinds of contracts its citizens may make.

The contract in this case, by which the defendant seeks to protect itself against its own negligent act tortiously injuring the plaintiff, is against public policy. That the tendency of such contracts if permitted, would be to increase negligence, is too apparent for discussion.

Railway companies are required to equip their engines with the best well-known appliances to prevent the escape of fire therefrom, and a failure to do so is negligence.

St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 602, 15 Am. Rep. 357.

A contract limiting the liability of a wrongdoer for torts which may be committed upon the promisor is void.

Greenhood, Pub. Pol.; *Hayes v. Hayes*, 8 La. Ann. 463; *Roesner v. Hermann*, 8 Fed. Rep. 732; *Johnson v. Richmond & D. R. Co.* 86 Va. 975; *Cooley*, Torts, 2d ed. § 637.

Sections 1807 and 1808 of the Code of Iowa, expressly provide that a common carrier cannot limit by contract its liability for negligence.

They cannot make a contract that will exempt them from liability for negligence.

Rose v. Des Moines Valley R. Co. 39 Iowa, 246; *West v. Chicago & N. W. R. Co.* 77 Iowa, 654; *Reilly v. Franklin Ins. Co. of St. Louis*, 43 Wis. 449, 28 Am. Rep. 552.

A contract by a justice of the peace in consideration that the plaintiff shall bring all its suits before him, that he will not claim from the plaintiff costs which cannot be collected from the defendant, or that he will accept less fees than are allowed him by law, is against public policy and void.

Hawkeye Ins. Co. v. Brainard, 72 Iowa, 180; *Wilemin v. Bateon*, 63 Mich. 309.

If defendant did not make this lease as a common carrier, then it made it in violation of its charter, and the lease is *ultra vires* corporation.

6 Am. & Eng. Encyclop. Law, 529; *Cummins v. Des Moines & St. L. R. Co.* 63 Iowa, 397.

When the railway ceased to use or contract with reference to its right in this land as a common carrier and undertook to lease it out for profit to itself otherwise than as a common carrier, it lost all right in the land, and its lease for this reason was absolutely void because it had no interest in the land subject to lease.

Warren v. Lyons City, 22 Iowa, 351; *Cooley*, Const. Lim. 556, note 1; *Dill*, Mun. Corp. § 469, authorities cited in original brief for plaintiffs in this case.

A mortgage given as indemnity against a

NOTE.—The difficulty of the question raised in this case is shown by the fact that the court changed its opinion after reargument. It would hardly be claimed that such a contract between private individuals would be annulled by public policy while on the other hand a carrier who has his patron completely at his mercy is forbidden by public policy to contract for a limitation of liability for losses caused by his negligence. Between these extremes is a vast field of debatable ground, 31 L. R. A.

the public policy being exerted more and more as the advantage on one side grows stronger and being withdrawn in proportion as the parties are able to contract upon equal terms. There are many cases upon which opinions will differ but the trend of thought at present seems to be towards greater freedom of contracting power and less governmental interference as will be seen by consulting the notes to *State v. Loomis* (Mo.) 21 L. R. A. 739, and *Com. v. Perry* (Mass.) 14 L. R. A. 323.

criminal prosecution for larceny was an invalid contract.

Smith v. Steel, 80 Iowa, 788.

Public policy is best indicated by the immediate representatives of the people in legislature assembled.

Kellogg v. Larkin, 8 Pinney, 128, 56 Am. Dec. 161.

Section 1289 of the Code made the defendant absolutely liable for the fire if caused by its negligence.

West v. Chicago & N. W. R. Co. supra; *Ringle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 681.

The statute above referred to was enacted by virtue of the police powers of the state.

Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592.

Police is in general a system of precaution, either for the prevention of crimes or calamities.

Bentham, *Edinburg ed.* part 9, 157.

This police power of the state extends to the protection of lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the state.

Thorpe v. Rutland & B. R. Co. 27 Vt. 149, 62 Am. Dec. 625.

What would become of this police regulation, if parties could contract in advance that a recovery back should not be had, notwithstanding the statute.

Rodemacher v. Milwaukee & St. P. R. Co. supra.

All statutory provisions in the premises are presumed to be dictated by public policy, and, consequently, beyond the pale of private contract.

Seyk v. Millers Nat. Ins. Co. 3 L. R. A. 528, 74 Wis 67; *Mobile Fire Dept. Ins. Co. v. Coleman*, 58 Ga. 251; *Morris v. Penn Mut. L. Ins. Co.* 120 Mass. 508; *Holmes v. Charter Oak L. Ins. Co.* 131 Mass. 64.

Statutes dictated by public policy can neither be waived, changed by contract, nor evaded.

Scott v. Lloyd, 84 U. S. 9 Pet. 418, 9 L. ed. 178; *Mabee v. Crozier*, 22 Hun, 264; *Crane v. French*, 38 Miss. 580; *Torrey v. Grant*, 10 Smedes & M. 89; *Clark v. Spencer*, 14 Kan. 898, 19 Am. Rep. 96; *Boeler v. Rheem*, 72 Pa. 54; *Equitable L. Assur. Soc. v. Pettus*, 140 U. S. 226, 35 L. ed. 497.

The law declares that payment in part of any ascertained debt shall not extinguish it, although the parties agree that it shall do so.

Osborn v. Hoffman, 52 Ind. 439; *Smith v. Tyler*, 51 Ind. 512.

A party will not be allowed to contract or waive the benefit of homestead or exemption laws.

Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 46; *Kneittle v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Curtis v. O'Brien*, 20 Iowa, 876, 89 Am. Dec. 548; *Moxley v. Ragan*, 10 Bush, 156, 19 Am. Rep. 61.

A debtor cannot waive stay of execution by contract.

McLane v. Elmer, 4 Ind. 239.

A seaman cannot waive by contract his right to wages.

Kay, *Shipmasters & Seamen*, 626.

Parties cannot in advance contract not to resort to the courts for the redress of wrongs.

Bauer v. Samson, *Lodge K. of P.* 102 Ind. 262; *Dugan v. Thomas*, 79 Me. 231.

24 L. R. A.

Common carriers are insurers, and but for their contract would be liable for any accident, even though not the result of their negligence. And the courts, in the absence of statutes upon the subject, have laid down this doctrine: first, carriers may by contract limit their liabilities as insurers, but they cannot relieve themselves from the consequence of neglect and fraud.

Rosenfeld v. Peoria, D. & E. R. Co. 103 Ind. 121, 53 Am. Rep. 500; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 239, 57 Am. Rep. 382; *Pennsylvania R. Co. v. Wilson*, 8 Cent. Rep. 915; *Grogan v. Adams Exp. Co.* 114 Pa. 528, 60 Am. Rep. 860; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 541; *Empire Transp. Co. v. Wamsutta Oil Ref. & Min. Co.* 63 Pa. 14, 8 Am. Rep. 515; *Patterson v. Clyde*, 67 Pa. 500.

Carefulness and fidelity are essential duties of a carrier's employment, in respect to his servants as well as himself, which cannot be abdicated.

New York Cent. R. Co. v. Lockwood, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

Messrs. W. J. Knight, Frank Jennings, and Thomas F. Wright, for appellee:

It is not true that one party cannot agree with another, to indemnify and save such other party harmless, from damage caused by his want of care or negligence. In all contracts of insurance, where it is not otherwise specially provided, the insurer, in legal effect, agrees to indemnify and save harmless the assured, from damage caused by the assured's want of care and negligence of his servants.

Columbia Ins. Co. of Alexandria v. Lawrence, 35 U. S. 10 Pet. 507, 9 L. ed. 512; *Johnson v. Berkshire Mut. F. Ins. Co.* 4 Allen, 388; *Shaw v. Roberts*, 6 Ad. & El. 80.

The principle decided in *Warren v. K. & D. R. Co.* 41 Iowa, 484, seems decisive of this case against appellants.

Simmonds v. New York & N. E. R. Co. 52 Conn. 271, 52 Am. Rep. 597, is also in point.

Also *Bassett v. Connecticut River R. Co.* 145 Mass. 129.

Robinson, Ch. J., delivered the opinion of the court:

The facts disclosed by the pleadings, which are material for consideration on this appeal, are substantially as follows: On the 30th day of April, 1890, the plaintiff Griswold owned a two and one half story elevator building, warehouse, and corncrib attached, together with engine and boiler connections and feed mill therein, all of which were situated on the depot grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named the property described was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of

the value of \$6,000, and was at the time insured by the plaintiffs, the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmers' Fire Insurance Company, in the sum of \$1,000 each, or for the aggregate amount of \$4,000. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and claiming that, by reason of such payments, they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood by virtue of a lease to him from defendant, which contained the following provisions: "And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said described premises, the sum of one dollar, to be paid at the time and in the manner following, to wit, on the delivery of this lease: and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good, substantial elevator, coal sheds and lumber yard on the above described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which in the operation of lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal, and lumber he can control by the Illinois Central Railroad; and the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question.

The ground of the demurrer is as follows: "The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land alongside of its track, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employes. The plaintiffs, therefore, say it is against public policy, and contrary to the statutes of Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employes, and servants; and that said defense, so far as it is based upon exemptions from liability by reason of this contract or lease, is not good, as such contract of exemption is void." No special claims are made in behalf of the insurance companies; therefore their interests, and that of Griswold,

for the purposes of this appeal, will be treated as governed by the same rules.

1. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. . . ." It was said in *West v. Chicago & N. W. R. Co.*, 77 Iowa, 654, that this statute imposes an absolute liability upon railroad corporations without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes, without fault on its part, is a question not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway.

Section 1808 of the Code provides, in effect, that a common carrier, or carrier of passengers, cannot exempt itself from liability as such carrier by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of statutory regulations, that railway companies cannot restrict their liability for negligence, in transporting passengers or freight, by contracts made in advance of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in *Cooley, Torts*, 697, with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

In *Johnson v. Richmond & D. R. Co.*, 86 Va. 975, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarrymen, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to or death of any of the members of the said firm, or of any of its agents or employes, sustained from said work, should such death or injury occur, from any cause whatsoever." The court, in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to

hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done, where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally.

Railway corporations are quasi public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 609, 15 Am. Rep. 357. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which it imposed upon it by law, is void, as against public policy. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipments, including locomotives, engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which seeks to lessen the diligence and care with which it furnishes and operates its road is to that extent against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement. Elevators, coal sheds, and lumber yards are important aids to a railway engaged in carrying grain, coal, and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal, and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt the controlling considerations which induced it to execute the lease. Those improvements were not only of value to defendant, but they were important to all who bought or sold commodities which were received in them. In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the

public in its subject matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid."

It is true that a contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society. But when a contract belongs to that class it will be declared void, although in that particular instance no injury to the public may result. 5 Lawson, Rights, Rem. & Pr. § 2392. "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibitory by a statute, termed a contract against public policy (or sound policy), is likewise void." Bishop, Cont. § 473.

We do not find it necessary to go to the extent of holding, as do some of the authorities cited, that the rule which invalidates a stipulation for exemption from liability for one's own negligence is of universal application, in order to support the conclusion which we reach that the provision under consideration is void. To require us to reach that conclusion, it is only necessary for it to appear that the provision, if effectual, would cause defendant to disregard and neglect a duty which it owes to the public, and thereby violates an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, there can be no doubt.

There is nothing in *Warren v. K. & D. M. R. Co.*, 41 Iowa, 484, in conflict with the conclusion we reach. That case involved the liability of the railway company for stock killed by it at a point where it had a right to fence. The company sought to escape liability on the ground that Bell, the owner of the pasture from which the stock escaped, had agreed with it to erect the fence and keep it in repair. But it was held that as the owner of the stock was neither the owner of the pasture nor his tenant, the defense was not good. It was said by the court that, if Bell had agreed to erect and maintain the fence, he could not have recovered damages to his stock which resulted from the want of a fence; but the plaintiff in this case assumed no burden which the law imposed upon defendant. The case of *Simmonds v. New York & N. E. R. Co.* 62 Conn. 271, 53 Am. Rep. 587, is in some respects somewhat similar in principle to that last cited.

The case of *Marquette, H. & O. R. Co. v. Sparr*, 44 Mich. 170, 38 Am. Rep. 242, also cited by appellee, involves a difficult question. It appeared in that case that the owners of a warehouse, of a railway track near it, and of a quantity of hay, employed a railway company to draw cars over the track for their accommodation. The engine employed to do the work was defective, and that fact was known to the owners aforesaid, who complained of it, but with that knowledge they continued to permit its use. It finally caused a fire, which destroyed the warehouse and hay. It was held that the owners of the property destroyed

could not recover, for the reason that they had engaged the engine with knowledge of the defects which caused the loss. But in that case the plaintiffs not only owned the warehouse, but the track also, and the engine passed over that track, with their knowledge, and at their request, for their benefit. They knew in advance just what the danger to their property would be, and contributed to the result. But, putting upon the case a construction most favorable to appellee, and it is authority only for the doctrine that a railway company may exempt itself from liability to an individual on account of existing and known defect in its machinery. Whether that may be done is a question which does not arise in this case. The agreement under consideration does not seek to hold defendant harmless on account of known and specified defects in engines, or a manner of operating them, recognized to be negligent, but from "all liability for damages by fire" caused by cars or engines lawfully on the track, whatever the cause, whether then existing and known, or not then existing and not foreseen. It is our opinion for reasons stated, that the provision of the case in question is contrary to public policy, and void.

The judgment of the District Court is reversed.

A petition for rehearing was subsequently granted, after which on February 8, 1894, *Given J.*, delivered the following opinion:

A rehearing was granted in this case, and it is again submitted with further arguments. The facts disclosed by the pleadings, which are material to be considered, are sufficiently stated in the former opinion, and are as follows: "On the 80th day of April, 1890, the plaintiff Griswold owned a two and one-half story elevator building, warehouse, and corn-crib attached, together with engine and boiler connections and feed mill therein, all of which were situated on the depot grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named, the property described was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of the value of \$6,000, and was, at the time, insured by the plaintiffs the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmer's Fire Insurance Company in the sum of \$1,000 each, or for the aggregate amount of \$4,000. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and, claiming that by reason of such payments they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood by virtue of a lease to him from defendant, which contained the following provisions:

'And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said premises, the sum of one dollar, to be paid at the time and in the manner following, to wit, on the delivery of this lease; and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good substantial elevator, coal sheds, and lumber yard on the above-described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which in the operation of the lessor's railroad, or from cars and engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal, and lumber he can control by the Illinois Central Railroad. And the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid.' The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question. The ground of the demurrer is as follows: 'The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land alongside of its track, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employees. The plaintiffs therefore say it is against public policy, and contrary to the statutes of Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employees and servants; and that said defense, so far as it is based upon exemptions from liability by reason of this contract of lease, is not good, as such contract of exemption is void.' No special claims are made in behalf of the insurance companies; therefore, their interests, and that of Griswold, for the purposes of this appeal, will be treated as governed by the same rules."

1. It will be seen, from the statement of the case, that the controlling question is whether that clause in the lease whereby plaintiff Griswold agrees to protect and save harmless the defendant from all liability for damages by fire negligently communicated to the property on the leased premises in the operation of the railroad is void, as against public policy. The right to so contract as to fire accidentally communicated is not questioned, but only the right to so contract as to fire negligently communicated. Public policy is variable,—the very reverse of that which is the policy of the public at one time may become public policy another; hence, no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void, as against public policy, unless it is injurious to

the interests of the public, or contravenes some established interest of society. Public policy has been aptly described as "an unruly horse, and, when once you get astride, you never know where it will carry you." It was said by Wilmot, *Ch. J.*: "It is the duty of all courts to keep their eyes steadily upon the interests of the public, even in the determination of community justice, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance *in foro civili.*" Other courts have said: "We may take it as well settled that in the law of contracts the first purpose of the courts is to look to the welfare of the public, and, if the enforcement of the agreement would be inimical to its interest, no relief could be granted to the party injured, and even though it might result beneficially to the party who made and violated the agreement. The common law will not permit individuals to oblige themselves by a contract either to do, or not to do, anything, when the thing to be done or omitted is in any degree clearly injurious to the public." Again, it is said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract." *Euerton v. Brownlow*, 4 H. L. Cas. 1, 3 Am. & Eng. Encyclop. Law, p. 875, note 3; *Boardman v. Thompson*, 25 Iowa, 501.

Aided by these definitions and cautions, we proceed again to inquire whether the clause of the agreement in question, if carried into effect, would be injurious to any interest of the public, or, in other words, whether the public has any interest in this provision of the contract. The conclusion of the former opinion is "that the provision, if effectual, would cause the defendant to disregard and neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law." This conclusion rests, in part at least, upon holding that sections 1289 and 1808 of the Code are applicable to the question under consideration, and that the defendant owed it as a duty to the public to operate its road with care with respect to plaintiff's property. The discussion on rehearing leads us to inquire whether, under the law and facts, it is correct to say that the defendant owed any duty to the public with respect to the plaintiff's property. The former opinion holds correctly that the liability of railroad corporations, under section 1289, for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exercise care is towards the public; but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of

the property of the plaintiff. The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence the provision of section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not upon his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. They knew that the defendant corporation could only act through its officers, agents, and employes, and that these might be negligent in the performance of their duties. The plaintiff had an insurable interest, and could, as he did, protect himself, in part at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only protect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. Plaintiff Griswold contracted with his coplaintiffs, the insurance companies, for indemnity against loss by fire, whether caused by accident or negligence. The fire occurred through neglect, and the insurance companies, as they were bound to do, paid the insurance. Those contracts, like this, were for indemnity against liability by fire, whether caused by accident or negligence. Many losses by fire occur through the negligence of the insured or his family, and recovery is had unless the negligence was willful. While these policies are not before us, we may assume, we think, that under them the plaintiff Griswold would have been entitled to recover, even though the loss had occurred through his own negligence, unless it was willful. The public had no interest in these contracts of insurance between the plaintiffs; nor were they against public policy, because the companies agreed to indemnify the assured against loss caused by his own negligence. This is not a question whether, under section 1289, the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section

1289 or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact that the defendant acquired this right of way in the exercise of the right of eminent domain did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location.

2. It is contended that the defendant entered into this contract in its capacity as a common carrier, and therefore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses, or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable. *Johnson v. Richmond & D. R. Co.* 86 Va. 975, and other cases involving contracts of exemption from liability for causing injuries to, or death of, persons, are not applicable. The public has an interest in the life and safety of every human being, and every such contract is clearly injurious to public interest, but not always so as to property.

3. In the lease the plaintiff Griswold agrees "that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." While it is evident the parties contemplated a place for dealing with the public, in the maintenance and management of which the public might be interested, neither that interest nor Mr. Griswold's agreement gave the public any interest as to who should bear the hazard of the loss of the buildings by fire. The plaintiff indemnified himself against the loss, in part at least, by insurance, and the insurance companies have paid him, as they were bound to do. Surely, public policy does not demand that the defendant shall now reimburse these insurance companies for the payments they were bound to make by their own contract, and which the defendant has never promised to repay. As to the claim of the plaintiff Griswold to recover the excess of the loss over the amount of insurance, public policy answers, "You must stand by your contract." After a careful review of the

case, we reach the conclusion that the public had no interest in the clause of the contract in question, that its enforcement works no injury to any interest of the public, and that the judgment of the district court should be affirmed.

Robinson, J., dissenting:

I cannot assent to the conclusions of the foregoing opinion that the agreement in question was effectual to relieve the defendant of liability for negligently setting fire to and destroying the property of the plaintiff. Something has been said on rehearing in regard to the liability of the defendant to the insurance companies and their right to recover; but as no question in regard to such liability and right of recovery, as distinguished from the liability of defendant to Griswold for the loss he sustained, for which he has not been compensated, is presented by the pleadings, or was argued on the first submission of the case, it should not, as it seems to me, be given weight now. It is well settled that, in a civil case, a party cannot, on rehearing, make a case different from that presented on the original submission. *McDermott v. Iowa Falls & S. O. R. Co.* 85 Iowa, 180, and cases therein cited. It follows that the only questions which we should now consider are those involved in determining the character and effect of the provisions of the case in question, and the right of Griswold to recover, without regard to the interests of the insurance companies. On the rehearing we have been favored with elaborate arguments by representatives of several of the leading railway corporations doing business in the state, and in explanation it is said that the questions involved are of interest to all railway companies in the state, and that the former opinion, if adhered to, will seriously affect their management and business. It is probably fair to presume that leases with provisions similar to the one in controversy are now, or soon will be, in general use in the state, and that the questions involved are of interest to the large number of persons who are now, or shall hereafter be, concerned in buildings and property located on land owned by railway corporations by virtue of leases from the corporations. The importance of the questions to the railways and to people doing business with them is apparent. It does not seem to me that the authorities cited in the opinion of the majority justify the conclusions they reach. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. . . ." It was said in *West v. Chicago & N. W. R. Co.*, 77 Iowa, 654, that this statute imposes an absolute liability upon railway corporations without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes without fault on its part is a question

not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway. Section 1808 of the Code provides, in effect, that a common carrier or carrier of passengers cannot exempt itself from liability, as such carrier, by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of statutory regulations, that railway companies cannot restrict their liability for negligence in transporting passengers or freight by contracts made in advance of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in Cooley on Torts (page 687), with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned, because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct." In *Johnson v. Richmond & D. R. Co.*, 86 Va. 975, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarry men, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to, or death of, any of the members of the said firm, or of any of its agents or employes, sustained from said work, should such death or injury occur from any cause whatsoever." The court, in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against the public policy are void. Nothing is better settled—certainly in this court—than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally."

Railway corporations are quasi public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A 24 L. R. A.

contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 609, 15 Am. Rep. 357. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950. Among the obligations imposed upon a railway corporation is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the diligence and care with which it furnishes and operates its road is, to that extent, against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement. Elevators, coal sheds, and lumber yards are important aids to a railway engaged in carrying grain, coal, and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal, and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt important and controlling considerations which induced it to execute the lease. Those improvements were not only of value to the defendant, but they were important to all who bought or sold or stored commodities which were received in them. In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided, to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the public in its subject-matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed, at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." It is true that a contract is not void, as against the public policy, unless it is injurious to the interests of the public, or tends to have that effect, or contravenes some established interest of society. But, when a contract belongs to one of those classes, it will be declared void, although in a particular instance no injury to the public may result. 5 Lawson, Rights, Rem. & Pr. § 2392. "A contract invading any one of the other interests which the law

cherishes, though to do what is neither indictable nor prohibited by a statute, termed a 'contract against public policy' (or sound policy), is likewise void." Bishop, Cont. § 473. To justify the conclusion that the provision under consideration is void, it is only necessary to find that the provision, if effectual, would cause, or tend to cause, the defendant to disregard or neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, does not appear to me to be doubtful. It was not intended merely to require Griswold to bear the loss which should result from the hazards to which his property should be exposed by operating the railway with reasonable prudence and care, but it was intended to exempt the defendant from all liability for damages from fire which should be caused in operating its railway without regard to acts of negligence, or lack of precaution and care on its part, which should contribute to the loss. The agreement sought to exempt the defendant from liability for negligence, whatever its nature, which should be involved in the management of its railway. Such negligence might be manifested in many ways,—as, in the use of insufficient or defective machinery, in the employment of careless or incompetent trainmen, or in having an insufficient number of trainmen,—and was necessarily of a kind to affect the business of defendant as a common carrier. The tendency of the agreement was to make the defendant, in keeping its locomotive engines in good order, in adopting improvements to prevent the escape of fire, and in selecting its employes, less diligent than it would otherwise have been, and thus to expose, not only the property of Griswold, but all other property of a combustible kind located upon its grounds, to dangers which reasonable care on its part would have prevented. The tendency of the agreement is more clearly seen when the probable aggregate effect of such agreements, entered into between defendant and all the tenants on its right of way and depot grounds in the state, is considered. To keep in good order the machinery and appurtenances of a railway, and to operate it in the manner which reasonable prudence demands, involve the expenditure of large sums of money, and the constant exercise of skill and care by railroad employes. Whatever tends to lessen the degree of care used in operating a railway is to that extent inimical to public interest, and contrary to public policy. Combustible property on the depot and right of way grounds of a railway company is of necessity more exposed to danger from fire caused by operating the railway than property outside of their limits, and if it can, by agreement, protect itself against liability for negligently destroying the property on its grounds, the common experience of mankind, as applied to other matters, teaches us that the natural effect of such an agreement is to lessen the care and diligence the railway company will use to prevent such negligence and the consequent loss. It follows that each tenant is interested in the agreement of every other tenant on the same line or division of railway, and that the people who store property in the build-

ings of such tenants, or who are concerned in grain, coal, lumber, and other articles which are received in, or delivered from such buildings, are also interested in the agreements.

It does not seem to me that the law which governs ordinary contracts of insurance is applicable to this case. In such contracts the property owner is never, in terms, insured against the consequences of his own negligence. On the contrary, great care is taken to guard against and prevent negligence on his part. Insurance to the full value of the property is not given, and all inducement to negligence on his part is withheld. If loss result from his negligence, as a rule, he and the insurance company, only, are affected, his negligence not being of a character to affect the public. I am not aware that an agreement to insure a person against the consequences of his own negligence, the natural and probable effect of which would be to encourage such negligence to the danger and prejudice of others, is sustained by the courts. It is true that the public has no interest in the damages in controversy in this action, but it had an interest in the agreement in question so far as it tended to induce negligence on the part of defendant in operating its railway; and as negligence of that kind was the natural and probable effect of the agreement, and as the agreement is not separable, it would seem to follow that it should be held void. This conclusion is not only in entire harmony with the authorities cited in the opinion of the majority, but, as it seems to me, is required by them, as well as by the authorities cited in this dissent.

Whether the defendant owed to the public any duty in regard to its own buildings, whether the defendant had any insurable interest in the property of Griswold which was destroyed, and whether the insurance companies are entitled to recover the amounts they have paid to Griswold, are questions which do not appear to me to be so presented as to make it proper for us to determine them on this appeal, and in regard to them I express no opinion.

Kinne, J., concurs in the dissenting opinion.

Petition for second rehearing denied.

A'HERN, *Appt.*,

v.

IOWA STATE AGRICULTURAL SOCIETY *et al.*
(Two Cases.)

JORDAN, *Appt.*,

v.

SAME.

(.....Iowa.....)

1. A state agricultural society, which is one of the agencies of the state and not a corporation for pecuniary profit, cannot be held liable

NOTE.—For a collection of authorities to the effect that the rule holding a master liable for the torts of his servant does not apply to charitable institutions, see note to Ford v. Kendall Borough School Dist. (Pa.) 1 L. R. A. 603.

for the willful and illegal acts of its agents, as in case of willful arrests and assaults.

- 2. Arrests and detentions by agents or officers of a state agricultural society,** which are not made for any of the causes for which power of arrest is given by statute to the society, are not within the scope of their powers, so as to charge the society with liability.

(May 17, 1894.)

A PPEALS by plaintiffs from judgments of the District Court for Polk County in favor of defendant in actions brought to recover damages for alleged wrongful arrest, false imprisonment, and assault and battery. *Affirmed.*

The facts are stated in the opinion.

Mrs. Nugent & Connelly for appellants.

Mr. Henry S. Wilcox for appellee, Iowa State Agricultural Society.

Kinne, J., delivered the opinion of the court:

1. These three cases involve the same questions, and are submitted together for one opinion. The petition in each case charges, in substance, that the defendant society is a corporation organized and transacting business under the laws of this state; that on September 2, 1891, and during the annual exhibition of the society, the other defendants, as its officers and agents, and by its authority, did arrest, restrain, and commit an assault upon the plaintiffs, to their damage in the sum of \$5,000. To these petitions demurrers were filed on the ground that the alleged wrongful acts committed against plaintiffs were not shown to be within the scope of the employment of the persons committing such acts, but were in fact committed outside the scope of their duties. The lower court sustained the demurrers, and plaintiffs elected to stand on their petitions, and excepted in each case to the ruling of the court.

2. The only question for us to determine is as to the liability of the society for the acts complained of; and at the outset it is important to have in mind that the society is in no sense a corporation for pecuniary profit. It is an agency of the state. It exists for the sole purpose of promoting the public interest in the business of agriculture. Its public character more fully appears when we consider that its organization is provided for by statute; that it has no stockholders; that by law the president of each county agricultural society in the state, or other delegate therefrom, duly authorized, is made a member of the board of directors; that said board is required to make annual reports to the governor, which are to be distributed throughout the state; that the powers of the board are prescribed by statute. Code, §§ 1108-1109, 1114-1116, inclusive. The society is empowered by law to arrest persons for selling intoxicating liquors, and for gambling and horse racing within its grounds. *Id.* §§ 1114, 1116. No other authority to arrest or detain persons is given to the society, and the arrests and detentions in the cases at bar were not for any of the causes above specified. It seems to us, then, that in doing the acts complained of the defendants were not acting

within the scope of the powers which the society could confer upon them. Such acts were entirely foreign to the purposes for which the society was organized. It was not authorized to enforce the criminal statutes of the state generally. The directors of the society had no power to do the acts complained of in its behalf, and hence could not so authorize others to perform them as to bind the society. In any case, as the directors of the corporation are only its agents for the promotion of its business within the legitimate scope of the purpose for which it is created, any attempt on their part to confer authority on their agents or servants to do an act without the scope of the corporate business would not be binding upon the corporation. *Brokaw v. New Jersey R. & Transp. Co.* 82 N. J. L. 328, 9 Am. Dec. 659; *Gillette v. Missouri Valley R. Co.* 55 Mo. 315, 17 Am. Rep. 653. Again, it is a general rule that in determining the liability of the principal for an act committed by the agent we must take into consideration the character of the corporation, its organization, the scope of the authority of the agent who committed the tort, and the character of the business in which he was employed. *Morawetz, Priv. Corp.* § 730; *Miller v. Burlington & M. River R. Co.* 8 Neb. 219. The case of *Baths v. Decatur County Agr. Soc.*, 78 Iowa, 11, is in principle applicable to the case at bar. In that case it was held that the society was not liable for injuries sustained by the plaintiff on account of the negligence of a person employed to convey people to the fair grounds, as it did not appear that the officers of the society were authorized to employ hackmen to convey persons to the grounds of the society.

3. Not being a corporation for pecuniary profit, the defendant society's liability is not controlled by the rules of law applicable thereto. The society is an arm or agency of the state, organized for the promotion of the public good, and for the advancement of the agricultural interests of the state. It would be manifestly wrong to permit its funds to be used to pay damages arising out of the commission of wrongful acts by its officers and servants, and which are in no wise connected with the object and purpose of the society's creation. In *Cutwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, the action was for damages against the marshal of the city for an assault and battery, and for false imprisonment and malicious prosecution. It was charged that the marshal, under the pretense of enforcing an ordinance, committed the acts complained of. This court held that the city could not be made liable for the illegal acts of its officers. So here defendant society, not being a corporation for pecuniary profit, and being one of the agencies of the state, can no more be made liable for the willful and illegal acts of its agents than a city or school district, and especially so when, as in this case, the acts complained of were not within the scope of the purposes for which the society was created. The demurrers were properly sustained.

Affirmed.

For the general rule as to liability of master for false arrest by servant, see note to *Mulligan v. New York & B. R. Co.* (N. Y.) 14 L. R. A. 791.

24 L. R. A.

For liability of a municipal corporation for acts of policemen, see note to *Whitefield v. Paris (Tex.)* 15 L. R. A. 738.

Mary FORD, Admx., etc., of H. P. Ford,
Deceased,

v.

CHICAGO, ROCK ISLAND & PACIFIC
R. CO., Appt.

(.....Iowa.....)

1. A rule of a railroad company printed on a time table warning employees against certain risks, with a notice that they will have no claim for injuries received in consequence of taking such risks, is admissible in evidence against an employé suing for injuries and charged with violating the rule.
2. The defense of contributory negligence is not defeated, although the burden of proof is thrown on the defendant by Code, § 1226, providing that an injured party in order to recover damages from a railroad company for neglect or refusal to comply with the statute requiring safe crossings and cattle-guards, need only prove such neglect and refusal.
3. A railroad company, although required by law to erect and maintain a cattle-guard at a certain point, must make it safe as a crossing for employes, if it so locates its switch yards that they are constantly required to cross it.
4. Evidence that another employe had made complaint is inadmissible on the ques-

tion of the employé's complaints of defects and promises to him to repair them.

(May 18, 1894.)

APPEAL by defendant from a judgment of the District Court for Cedar County in favor of plaintiff in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Cook & Dodge and Wolf & Hanley, for appellant:

Even if the rule were only "advisory," it was competent evidence to go to the jury in connection with other facts as to intestate's negligence.

There is only one purpose for which a cattle-guard is or can be required, viz.: to prevent animals coming upon the track at points where a fence cannot be constructed to keep them off.

Heskett v. Wabash, St. L. & P. R. Co. 61 Iowa, 467; *Peyton v. Chicago, R. I. & P. R. Co.* 70 Iowa, 532; *Mundhenk v. Central Iowa R. Co.* 57 Iowa, 718.

The rule is different in Indiana.

Pennsylvania Co. v. Lindley, 3 Ind. App. 111, citing *Pennsylvania Co. v. Mitchell*, 124 Ind. 478; *Mt. Wayne, C. & L. R. Co. v. Herbold*, 99 Ind. 91.

NOTE.—Disobedience of master's rules as contributory negligence.

The disobedience by a servant of a rule which his master has established to promote his safety in the prosecution of the work assigned to him will preclude his holding the master responsible for a resulting injury if he has notice of the rule which is at the time applicable to him and to the duty to be performed and has not been waived or abrogated, and if the disobedience is unnecessary and contributes to the injury.

Rules binding on employes.

One engaged to work for a master who has established a set of rules for the government of employes, which are made known to him, contracts to do the work according to such rules; and if he does not follow the rules and is injured, the master is not liable to him for the injury, unless it is shown that the work could not have been done by following the rules. *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212.

Disobedience of rules is always a defense to an action by a servant against his master, unless there are facts which, in the particular instance, excuse the employé or relieve him from the duty of strict obedience. *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 579.

If a violation of a rule in whole or in part causes the accident, there can be no recovery. *San Antonio & A. P. R. Co. v. Wallace*, 76 Tex. 636.

Disobedience of rules will bar recovery, unless it is shown that such disobedience did not contribute directly or indirectly in any degree to the injury. *Prather v. Richmond & D. R. Co.* 80 Ga. 427.

The general rule is if there is nothing exceptional in the case to deny a recovery. *Lyon v. Detroit, L. & L. M. R. Co.* 31 Mich. 429; *Sutherland v. Troy & B. R. Co.* 74 Hun, 162; *Wert v. Keim*, 2 Pa. Co. Ct. Rev. 405; *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665; *Harris v. Norfolk & W. R. Co.* 88 Va. 560; *Sheeler v. Chesapeake & O. R. Co.* 81 Va. 188, 59 Am. Rep. 654; *Overby v. Chesapeake & O. R. Co.* 37 W. Va. 524.

Examples.

An attempt to couple a car having a twisted draw-bar will defeat recovery by one who had in
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his possession the printed rules of the company forbidding an attempt to make a coupling, unless the draw-heads were known to be in good condition. *St. Louis, I. M. & S. R. Co. v. Rice*, 4 L. R. A. 178, 51 Ark. 467.

The conductor of a train is not entitled to rely on signals not given in accordance with the rules of the company. *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448.

Disobedience of a rule to use a coupling stick to couple cars will prevent recovery. *Russell v. Richmond & D. R. Co.* 47 Fed. Rep. 204; *Richmond & D. R. Co. v. Free*, 97 Ala. 231.

So voluntary violation of a rule prohibiting employes to put their hands beneath a stamping press simply because by so doing work could be turned out faster will prevent a recovery for an injury thereby received. *Cullen v. National Sheet Metal Roof. Co.* 114 N. Y. 45.

An employé on a railroad must obey a general rule to be prepared at all times for special or irregular trains. *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 579.

And in *Atchison, T. & S. F. R. Co. v. Martin* (N. M.) Aug. 16, 1893, a judgment in favor of plaintiff was reversed because of his negligence to comply with a rule that "every man at work on the track must bear in mind that in operating the road under telegraphic orders a train may pass at any time."

Violation of the rule against running faster than a certain speed per hour will defeat a recovery. *Sutherland v. Troy & B. R. Co.* 74 Hun, 162; *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 22 L. R. A. 85; *Savannah, F. & W. R. Co. v. Folks*, 76 Ga. 527; *Rowland v. Cannon*, 85 Ga. 105.

So will running past switches at prohibited speed. *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637.

So will failure to put up signal when at work under a car. *Central R. & Bkg. Co. v. Kitchens*, 88 Ga. 83.

Starting from a terminal point behind the schedule time, when the rules of the road require running on schedule time, will prevent a recovery for an accident caused thereby. *Georgia R. & Bkg. Co. v. McDade*, 59 Ga. 73; *McDade v. Georgia R. Co.* 60 Ga. 119.

The statutory requirement cannot be changed by the use which may be made of the part of the track where the cattle-guard is placed.

There was in this case no neglect or refusal of the defendant to construct and maintain a good, sufficient, and safe crossing and cattle-guard, and under the established facts, the defense of contributory negligence is available. Under section 1288 of the Code, the contributory negligence of any injured party may be shown as a defense. So far as we can find, this question has never been directly decided by this court.

Payne v. Chicago, R. I. & P. R. Co. 44 Iowa, 236; *Lang v. Holiday Creek R. & Coal Min. Co.* 49 Iowa, 469; *Moriarty v. Central Iowa R. Co.* 64 Iowa, 696.

Section 1288 contains no provision in regard to the willful act of the injured party. The importance of the provision as to the willful act, as affecting the construction of the section, is shown by reference to—

Spence v. Chicago & N. W. R. Co. 25 Iowa, 189; *Aylesworth v. Chicago, R. I. & P. R. Co.* 30 Iowa, 459.

The issue was whether or not Ford had made any complaint, and had received any promise which induced him to continue to work and upon which he had the right to rely. The

complaints which others might make and the promises or refusals to them to remove the cattle-guard could in no way affect that issued.

Stoutenburgh v. Dow, 83 Iowa, 179.

The defendant was not required to adopt every or any new device until its utility had been sufficiently tested, and it appeared to be, as a whole, better than the appliance in use.

Burns v. Chicago, M. & St. P. R. Co. 69 Iowa, 450, 58 Am. Rep. 227.

Messrs. Wheeler & Moffit for appellee.

Kinne, J., delivered the opinion of the court:

1. Plaintiff's intestate, H. P. Ford, was, on and prior to December 18, 1890, employed by the defendant as a yard switchman and brakeman in its yards at West Liberty, Iowa. He had been in defendant's employ for over five years, though he had been engaged in this yard service for only three months prior to his death. He was forty-five years old, of good habits and character, had been recently married. He was earning \$45 per month. His duties required him to couple and uncouple cars, and assist in making up trains under the direction of the yardmaster. The east switch in said yards is about 90 feet west of the east line of Columbus street. Defendant's main track crosses said street at a right angle, and

So will carrying more steam in the engine than the rules allow. *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285.

And riding on locomotive. *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616.

And coupling cars in motion. *Darracott v. Chesapeake & D. R. Co.* 83 Va. 238; *East Tennessee, V. & G. R. Co. v. Smith*, 89 Tenn. 114.

So if a rule forbids trying to couple cars while in motion, a trainman cannot recover if injured by being brushed from the side of the car by another car standing too near the track, if he had gone down the side ladder for the purpose of uncoupling the cars before they stop. *Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 74.

If a conductor is on top of his train contrary to the rules of the company, he cannot recover for an injury there received. *San Antonio & A. P. R. Co. v. Wallace*, 76 Tex. 636.

So leaving the place where the rules required him to be on the train will defeat a recovery. *Louisville & N. R. Co. v. Wilson*, 88 Tenn. 816.

But disobedience of a conductor of a rule requiring him under certain circumstances to be on a certain part of his train will not bar recovery if he left for the purpose of communicating instructions to the engineer as to possible obstructions at a point on the track a short distance ahead. *Somerset & C. R. Co. v. Galbraith*, 109 Pa. 182.

Disobedience of a rule forbidding going between moving cars to couple them will defeat recovery. *Grand v. Michigan Cent. R. Co.* 11 L. R. A. 402, 83 Mich. 564.

Or going between any cars. *Johnson v. Chesapeake & O. R. Co.* 88 W. Va. 208; *Pryor v. Louisville & N. R. Co.* 90 Ala. 32; *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518; *Memphis & C. R. Co. v. Graham*, 94 Ala. 645.

Riding on the engine in violation of the rules for purposes of his own to gain information about his work will prevent a recovery for injuries received while there. *McGucken v. Western New York & P. R. Co.* 77 Hun. 69.

So of a switchman's disregard of a rule not to board a train while in motion after throwing a switch, but to follow the train until it stops before 24 L. R. A.

getting on. *Chambers v. Western N. C. R. Co.* 91 N. C. 475.

Or of a rule that one coupling car should stoop below the bottoms of them. *Northern Cent. R. Co. v. Hueson*, 101 Pa. 1, 47 Am. Rep. 690.

Or forbidding jumping on switch engines while in motion. *Francis v. Kansas City, St. J. & C. R. R. Co.* 110 Mo. 387.

Or a requirement to examine couplings before attempting to couple cars. *Karrer v. Detroit, G. H. & M. R. Co.* 76 Mich. 400.

Or against cleaning machine while in motion. *Shanny v. Androscooggin Mills*, 66 Me. 420.

So of a conductor's failure to send back signals upon the stopping of his train. *Dow v. New York, L. E. & W. R. Co.* 22 N. Y. Week. Dig. 238.

Failure of a brakeman to test the brakes before the starting of his train will prevent his recovery for an injury caused by their defective condition, if sufficient time was allowed for that purpose. *La Croy v. New York, L. E. & W. R. Co.* 132 N. Y. 570.

But a rule requiring train men to make personal inspection of the cars which come into their trains will not relieve the company from its liability to furnish safe machinery,—especially if neither time nor appliances are allowed in and by which to make the inspection. *Chicago, St. L. & P. R. Co. v. Fry*, 121 Ind. 812.

Exceptions.

The rules of the company are not binding on the employes (1) if not brought to his attention; (2) habitually disregarded with knowledge and acquiescence of superior officers; (3) when usage of master tends to mislead in violation of the rules. *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333.

If the master permits such a departure from the established rule as to create uncertainty as to its operation, and injury results, he cannot take advantage of its violation in the particular case. *Silver Cord Combination Min. Co. v. McDonald*, 14 Colo. 191.

Notice.

To bar a recovery there must have been knowledge of the rule. *Georgia Pac. R. Co. v. Davis*, 98

the east line of the street enters upon defendant's inclosed right of way; and at this point defendant had erected and maintained a cattle-guard, which was constructed of ties or timbers laid crosswise of the track, with open spaces between the same, about eight inches wide, covering an open ditch, about three feet deep. Prior to his death, Ford well knew the location and character of the cattle guard, and frequently passed over it. On December 13, 1890, deceased was engaged with the engineer and fireman of the switch engine, and with another brakeman (all servants of the defendant), in switching some cars from a point east of the cattle-guard to the switches west of said guard. At a point about 75 feet west of the cattle guard, Ford stepped between two of the moving cars to uncouple them. The pin which he tried to pull stuck, and he took another pin, and attempted to pound out the stuck pin,—the cars moving at such speed that Ford could walk between them along the track,—and, while thus engaged in trying to uncouple the cars, Ford stepped between the ties of the cattle-guard, and was instantly killed by the cars running over him. The above facts are undisputed. Other facts which we think may be treated as established will be considered hereafter. The negligence charged is in not constructing and maintaining "a

good, safe, and sufficient cattle-guard, as by statute provided." It is also averred that plaintiff's intestate did not contribute by his negligence to produce his death. The answer takes issue on the averments of the petition that the intestate was not guilty of contributory negligence; charges that intestate, with full knowledge of the condition of the cattle-guard, remained in defendant's service, and the risk incurred was incident to the service which intestate contracted to perform; that intestate gave the signal on which the train was being moved when the accident occurred, and the intestate then had full control of the train; that intestate negligently, and in violation of the rules of defendant, went between the cars while in motion to uncouple them. In a reply, plaintiff pleads notice to defendant as to the dangerous condition of the cattle-guard, and its agreement to fix the same, as an excuse for continuing in its service; denies that the danger intestate incurred was a risk incident to the service which he contracted to perform; says the rule pleaded by defendant was advisory only, and had been abrogated. The case was tried by the court below upon the theory that it was incumbent upon defendant to maintain a good, sufficient, and safe cattle-guard at the place where it was located, for the uses and purposes for which defendant habitually used

Ala. 300; Louisville & N. R. Co. v. Hawkins, 98 Ala. 241; Louisville & N. R. Co. v. Perry, 87 Ala. 392; Central R. Co. v. Ryals, 84 Ga. 420; Louisville, E. & St. L. Consol. R. Co. v. Utz, 138 Ind. 265; Peart v. Chicago, R. I. & P. R. Co. 82 Iowa, 148; Connors v. Burlington, C. R. & N. R. Co. (Iowa) Jan. 21, 1893; Atchison, T. & S. F. R. Co. v. Plunkett, 25 Kan. 188; Covey v. Hannibal & St. J. R. Co. 27 Mo. App. 170; Sprong v. Boston & A. R. Co. 58 N. Y. 56; Gulf, C. & S. F. R. Co. v. Kizslah, 4 Tex. Civ. App. 353.

An employé is not bound by a rule which has neither been communicated to him by it nor brought to his knowledge otherwise. Carroll v. East Tennessee, V. & G. R. Co. 6 L. R. A. 214, 82 Ga. 452.

There is no liability if the rule was not properly published or brought to his attention. Fay v. Minneapolis & St. L. R. Co. 80 Minn. 281.

There is some difference of opinion as to the presumptions as to the employé's knowledge of the rule. One class of cases seems to place the active duty of instruction on the master while the other requires the duty of activity upon the servant.

On the one side it is said that—

In case of a brakeman, it is the duty of the master to call his attention to written or printed rules, and either furnish him with copies or inform him where he will find them. La Croy v. New York, L. E. & W. R. Co. 57 Hun, 67.

To charge a servant with negligence for violation of a rule, it must be shown to have been brought to his notice. Mackey v. Baltimore & O. R. Co. 18 Wash. L. Rep. 797, 8 Mackey, 232.

Evidence that a person had in his possession a paper containing printed regulations for the guidance of employés is not conclusive evidence that the contents were known to him. Bradley v. Salmon Falls Mfg. Co. 30 N. H. 487.

On the other side it is said that—

It will be presumed that information of the rules was given to the employé in the absence of evidence to the contrary. Pilkinton v. Gulf, C. & S. F. R. Co. 70 Tex. 226.

If the rules have been extensively distributed and posted the presumption will be that the em-

ployés have notice of them. Alcorn v. Chicago & A. R. Co. (Mo.) May 11, 1891.

Notice of a rule cannot be presumed as matter of law from the fact that it was kept in an order book which was kept in a proper place, and was also printed and posted in conspicuous places, where the duties of employés called them. Francis v. Kansas City, St. J. & C. B. R. Co. 110 Mo. 387.

A trainman under a section foreman to whom a copy of the rules has been given will be presumed to have known of the rules, and if he has had a reasonable opportunity to become acquainted with them, it will be equivalent to actual knowledge. Shenandoah Valley R. Co. v. Lucado, 86 Va. 390.

If the injured person knew that his act was against the rules of the company, it will be no relief to him that he had never seen the particular rule on the subject and that it had not been read to him. Richmond & D. R. Co. v. Thomason (Ala.) Feb. 2, 1893.

Ignorance of rules is no excuse for the conductor of a train because it is his duty to acquaint himself with the rules under which he is to operate his train. Alexander v. Louisville & N. R. Co. 88 Ky. 690.

The question of knowledge on the part of the injured person of the rule may be somewhat qualified by the rule as to negligence of fellow servants, there being a tendency to hold that his want of knowledge is immaterial, if the accident was caused by the negligence of a fellow servant who had knowledge of the rule, as in the case of Durgin v. Munson, 9 Allen, 598, 85 Am. Dec. 770, but that question will be treated in a future note.

The rule must not have been waived.

A recovery will not be precluded by violation of a rule which was habitually violated, and which, from the inconvenience which would result from its enforcement, must be presumed not to have been intended to be enforced under the circumstances existing at the time of the accident. Atkyn v. Wabash R. Co. 41 Fed. Rep. 193.

Habitually permitting switchmen to ride in the cab on the locomotive is a waiver as to them of a

it; that, if there was a neglect of defendant in constructing and maintaining a cattle-guard, then any contributory negligence of intestate would not defeat a recovery.

2. Defendant offered in evidence a time-table of the Chicago, Rock Island & Pacific Railway Company for lines east of the Missouri river, Iowa division (which took effect October 19, 1890), with the printed rules attached thereto, and offered rule 31, printed on said time-table, which reads: "31. Employés are warned against taking risks in getting on or off trains or engines while in motion, in entering between cars to uncouple them while in motion, or in handling tools or machinery of any kind. They must protect themselves from personal injury by avoiding risks. Any employé who is careless of others, or himself, shall be liable to discharge from further service. Employés who may receive personal injuries in consequence of taking risks are hereby notified that they will have no claim on the company." This evidence was objected to—First, because the rule was merely advisory; second, that its violation by an employé is no defense in such an action, unless in its violation the employé is guilty of negligence proximately contributing to his injury; and, third, that under Code, § 1288, the defense of contributory negligence

is barred. It is conceded that the time-table and rule printed thereon and offered was in force when intestate was killed, and no objection was made as to the manner of proving the rule, and it is also agreed that intestate had knowledge of the rule since October 19, 1890. The objections were sustained, and an exception taken. We think the court erred in its ruling. This rule may in one sense be said to be advisory, yet it is more than that. It is a plain and positive direction to the employé not to take any risk in the manner stated therein. It was material as affecting the question of the intestate's negligence, and should have been admitted. If, as is claimed, it was abrogated by acts of the employés known to the proper officers, that would be a matter for the consideration of the jury under the evidence, but would not affect the question of its admissibility. While such rules cannot be made a means of legal escape from liability by the company, when they are not made with the expectation of being enforced, still a rule like that offered, made in good faith, and with the intention of being enforced, and having for its object the prevention of injuries to employés, is in the interest of humanity, and serves a useful purpose. The ground of the objection upon which the rule was excluded seems to

rule posted there that none but engineers and firemen are allowed to ride there. *Smith v. Memphis & L. R. Co.* 18 Fed. Rep. 304.

A rule requiring the use of a stick in coupling cars will not bar a recovery by one injured while coupling without it, if for years it had been abandoned and it was not required for safety. *Newport News & M. V. R. Co. v. Campbell*, 15 Ky. L. Rep. 714.

So neglect to comply with a rule requiring the use of a stick to couple cars will not bar a recovery, if the injured person was told at the time his attention was called to the rule that the exacting a promise to use it was a mere form, and the use of the appliance for carrying it was attended with more danger than the attempt to couple without it. *Louisville & N. R. Co. v. Foley*, 15 Ky. L. Rep. 17.

A rule forbidding switchmen to go between cars to couple them does not apply, where a running-board is attached to an engine for the express purpose of enabling switchmen to ride upon it. *Richmond & D. R. Co. v. Jones*, 22 Ala. 218.

A rule requiring engineers to have their engines always completely under control may be waived by fixing a schedule of time for a train which cannot be made if such a rule is obeyed. *Hall v. Chicago, B. & N. R. Co.* 46 Minn. 439.

A car repairer may rely on the promise of the master's vice-principal to protect him while he is under the car and need not set the signals required by the rules. *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588.

The custom to permit the fireman to make short moves, known to the superior officers of the company, will relieve the engineer from contributory negligence in following the custom in violation of the rule of the company. *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62.

Knowledge by the superiors of a usage to violate a rule need not be shown by direct evidence, if the practice has been so general that they must have known of it. *Ibid.*

But the employés cannot by their own disregard of a rule bring about its abrogation without the master's concurrence.

Evidence that employés violated a rule at will is not sufficient to show that it was abrogated, if the 24 L. R. A.

company was all the time trying to enforce it. *Francis v. Kansas City, St. J. & C. R. R. Co.* 110 Mo. 367.

The mere fact that the master must have known that many of its employés went between moving cars in violation of its rules will not relieve them of the charge of negligence in so doing. *Wilson v. Michigan Cent. R. Co.* 94 Mich. 20.

Violation of rules by employés without acquiescence of company is no defense. *Sloan v. Georgia Pac. R. Co.* 86 Ga. 15.

The mere usage or custom of the employés to disregard a rule is not sufficient to relieve one from the charge of negligence in case he is injured while violating it. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545.

The orders of a proper superior take precedence of the printed rules. *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173.

But a special order will supersede a standing rule only where they in terms conflict, or where it is, or ought to be, foreseen when given that the execution of the one is incompatible with the other, or becomes so afterwards by some action of the giver. Where incompatibility arises only upon unforeseen events, the special order must yield. *Illinois Cent. R. Co. v. Meer*, 31 Ill. App. 126, 26 Ill. App. 354.

Acquiescence by the division superintendent in the habitual violation of the rule may prevent the master from taking advantage of the fact of its violation, although the injured employé had signed a paper stating that the violation of rules should be at his risk. *Northern Pac. R. Co. v. Nickels*, 4 U. S. App. 399, 50 Fed. Rep. 713.

An engineer in charge of a working train has power by ordering a brakeman to go between and make by hand a coupling which cannot be made by a stick because of the bad condition of the link, to waive a rule forbidding trainmen to go between cars to make couplings. *Finley v. Richmond & D. R. Co.* 59 Fed. Rep. 419.

The command of the conductor of a freight train to a brakeman to go between the cars when he cannot couple them otherwise is a waiver of the rule of the company prohibiting a brakeman to go between cars under any circumstances. *Mason v. Richmond & D. R. Co.* 18 L. R. A. 45, 111 N. C. 432.

have been the third,—that contributory negligence was no defense. This same question is raised by instructions given by the court. The determination of this question involves a construction of section 1288 of the Code, which provides that "every corporation constructing or operating a railway shall . . . construct at all points where such railway crosses any public highway good, sufficient, and safe crossings and cattle guards. . . . And any railway company neglecting and refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal."

It is contended by appellant that the effect of the provisions at the close of the section quoted is to relieve the plaintiff from proving his own freedom from contributory negligence in order to recover, but the defendant still has thereunder the right to make any defense it may have, including the contributory negligence of plaintiff, while appellee claims that no contributory negligence of the intestate will affect plaintiff's right to recover. Assuming now that under the law it was defendant's duty to erect and maintain such a cattle-guard as would be safe for the purposes for which it

must be used, situated as it was, does the section quoted eliminate the defense of contributory negligence? Counsel refer to Code, § 1289, providing for fencing railways, and for recovery for livestock injured or killed, and for recovering for damages from fires set by railways. In this section the provision is that the railway company "shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damages caused, unless the same was occasioned by the willful act of the owner or his agent. And in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property." Under this provision it has been held that contributory negligence of an injured party was not a defense to an action for a violation of the provisions of the section. *Spence v. Chicago & N. W. R. Co.* 25 Iowa, 189; *Aylesworth v. Chicago, R. I. & P. R. Co.* 80 Iowa, 459; *Inman v. Chicago, M. & St. P. R. Co.* 60 Iowa, 459; *West v. Chicago & N. W. R. Co.* 77 Iowa, 654, 659; and *Engle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 661.

It will be observed that the language of section 1289 is not the same as in 1288. In the former section the company is made liable in terms absolutely unless the injury was the re-

If a conductor, with the knowledge of a division superintendent, orders his men to handle switches in a different manner than that prescribed by the rules of the company, one of the men cannot be held negligent in obeying the orders of the conductor rather than the rule. *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 661.

But in *Russell v. Richmond & D. R. Co.*, 47 Fed. Rep. 204, it seems to be doubted whether or not a conductor was authorized to rescind a rule made for his guidance and that of the train hands in regard to the manner of coupling cars.

A conductor of a train seems to be regarded as somewhat out of the general rule both as to liability for obeying and for refusing to obey.

If a conductor obeys an order to start his train before the arrival of another which is overdue, in violation of the rules of the company, without protest, he must be held to have assumed the risk of the negligent act. *Wescott v. New York & N. E. R. Co.* 153 Mass. 400.

But going out on the road without written instructions as required by the rules of the company will not defeat a recovery, if the train despatcher in giving verbal instructions said he could not give written ones because of the absence of a telegraph operator. *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359.

The disobedience must be unnecessary.

Disobedience of the rule is not negligence, if the work could not have been done in obedience to it. *Richmond & D. R. Co. v. Rudd*, 88 Va. 648.

If the work is carried on in such a manner as to render the violation of the rule necessary, or if the master suffers or approves of habitual disregard of the rule, its violation will not be contributory negligence. *Hayes v. Bush & Denslow Mfg. Co.* 41 Hun, 407.

To bind the employé to observe a rule requiring cars to be coupled with a stick, cars which can be so coupled must be furnished. *Hinson v. Richmond & D. R. Co.* 91 Ala. 514.

So violation of a rule requiring couplings to be made with a stick is not negligence, where the link is missing and it is necessary to supply one before

the coupling can be made. *Berrigan v. New York, L. E. & W. R. Co.* 37 N. Y. S. R. 414.

It is not negligence for an employé to go between cars to couple them, when the deed cannot be otherwise performed. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545.

A rule against running switches will not preclude a recovery for injuries received while attempting to make one, if that was the only practicable way of putting cars on the required switch. *Alexander v. Louisville & N. R. Co.* 88 Ky. 589.

Disobedience of a rule of the company forbidding engineers to place their engines in charge of other persons will not defeat the action if such action was necessary because of the sickness of the engineer and the action was not the cause but merely the condition of the accident. *East Line & R. R. Co. v. Scott*, 71 Tex. 708.

The rule must be applicable.

To charge the injured person with negligence for disobedience of rules, they must have been applicable to him. *Quick v. Indianapolis & St. L. R. Co.* 130 Ill. 334.

That a fireman obeyed the orders of the conductor without requiring a compliance with the rules which gave him a right to see the telegraphic orders under which the conductor was acting will not bar a recovery. *Hass v. Chicago, M. & St. P. R. Co.* (Iowa) Feb. 2, 1894.

A switchman working under an engineer is not guilty of contributory negligence in attempting to make a flying switch, where the rules of the company forbid conductors and engineers from making such switches but the rule is habitually disregarded by those to whom it applies. *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724.

But in *Senior v. Ward*, 1 El. & El. 385, 28 L. J. Q. B. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261, it seems to be intimated that an employé is bound to take the precautions required by the rule himself in case he knows it is habitually ignored by the one whose duty it is to observe the rule. In that case the rule had been established as to the examination of the rope that lifted the cage leading into a mine. The workmen knew that the rule was violated, and,

sult of the willful act of the owner. The provision of section 1288 is: "Shall be liable for all damages sustained by means of such neglect or refusal, and in order for the injured party to recover it shall only be necessary for him to prove such neglect and refusal. Under section 1288 a liability is fixed, and it provides what the party seeking to recover must prove in the first instance. If in such an action the plaintiff establishes the neglect and refusal of the company to comply with the statute and the fact that he has sustained an injury by reason thereof, he has made a case entitling him to recover, in the absence of evidence offered by the defendant; but it seems to us the language used does not cut off the right of the defendant to establish the fact, as a defense, that the injury was the result of the intestate's contributory negligence, or, in a proper case, of independent negligence on his part, or any other defense it may have. In *Sala v. Chicago, R. I. & P. R. Co.*, 85 Iowa, 628, this court construed sec. 1, chap. 104, Acts 20th Gen. Assem., which provides "that a bell and a steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be twice sharply sounded at least sixty rods before a highway crossing is reached, and after this sounding of the whistle the bell shall be

rung continuously until the crossing is passed. . . . and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect." It was said that there was a marked difference in the legal effect of this provision and that in section 1289 of the Code. "That statute [providing for blowing the whistle and ringing the bell] imposes a duty upon the corporation, the omission of which is negligence, but, before the person injured can recover, he must show that his negligence did not contribute to the injuries. That was the construction placed upon a statute which required railway companies to erect signs at crossings, and made them liable for damages for injuries sustained by reason of their failure to erect them. *Dodge v. Burlington, C. R. & N. R. Co.* 34 Iowa, 279; *Payne v. Chicago, R. I. & P. R. Co.* 44 Iowa, 237. See also *Reed v. Chicago, St. P. M. & O. R. Co.* 74 Iowa, 190.

This statute as to blowing the whistle and ringing the bell is substantially like the provision in section 1288, except that in 1288 these words are added: "And in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal," and this has the effect of casting the burden of proving contributory negligence on the defendant.

without making the examination themselves they were injured by reason of a defect, and the court held there could be no recovery.

The disobedience must contribute to the injury.

Disobedience of the rule will not bar a recovery, if it did not contribute to the injury. *Horan v. Chicago, St. P. M. & O. R. Co.* (Iowa) Oct. 14, 1893.

The disregard of the rule will not bar recovery, if its obedience would not have prevented the accident. *Reed v. Burlington, C. R. & N. R. Co.* 72 Iowa, 166.

Acting in direct violation of rules will not preclude recovery, unless the accident was due in whole or in part to such violation. *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 568.

Disobedience will not prevent recovery if obedience would not have removed the danger or prevented the accident. *Bonner v. Bean*, 80 Tex. 152.

Recovery cannot be prevented if an observance of the rule would not have prevented the accident. *Texas & N. O. R. Co. v. Wynne* (Tex.) March 7, 1893.

Violation of rule will not defeat recovery, if it had nothing to do with the injury. *Central R. Co. v. Mitchell*, 68 Ga. 173.

Willful injury.

So a recovery may be had if, knowing of the peril of the one injured by reason of his violation of the rule, there is a failure of ordinary care to avoid injury to him. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68; *Hissong v. Richmond & D. R. Co.* 91 Ala. 514.

Reasonableness of rule.

Some courts have stated a further exception to the rule to the effect that the rule of the master must have been reasonable. *International & G. N. R. Co. Receivers v. Moore* (Tex.) May 10, 1893.

But it has elsewhere been said that the judgment of the employee cannot be substituted for the rule. *Deeds v. Chicago, R. I. & P. R. Co.* 74 Iowa, 154.

And that if one enters employment with knowledge of the rules, he must be held to have undertaken to acquiesce in them, and he cannot afterwards insist upon the right to have the jury pass on

the question of their reasonableness. *Wolsey v. Lake Shore & M. S. R. Co.* 33 Ohio St. 227.

But the law and not the rules of the company defines negligence. *Pennsylvania Co. v. Stoelke*, 104 Ill. 201.

How the rules are construed.

The rules ought to be construed more strictly against the one who prepared and adopted them than against one who merely assented to be bound by them. *Richmond & D. R. Co. v. Mitchell* (Ga.) May 15, 1893.

So a rule requiring a train to be run very cautiously is met if there is reasonable precaution under the circumstances. *Scagel v. Chicago, M. & St. P. R. Co.* 83 Iowa, 380.

Evidence.

The rules of the company are admissible in evidence against an employé. *Memphis & C. R. Co. v. Askew*, 90 Ala. 5.

Although it is not shown that the employé had notice of them. *Alcorn v. Chicago & A. R. Co.* (Mo.) May 11, 1891.

The injured servant is left to show want of notice to overcome the effect of the rule, which makes these cases in line with those cited above to the effect that knowledge of the rule would be presumed.

Question for court or jury.

Disobedience of a rule is now regarded as very strong evidence of negligence, being sufficient to take the case from the jury.

Violation of rule not to attempt to uncouple cars while in motion is negligence as matter of law. *Sedgwick v. Illinois Cent. R. Co.* 76 Iowa, 341.

Disobedience of a rule is ground for compulsory non-suit. *Lockwood v. Chicago & N. R. Co.* 53 Wis. 50.

If violation of rules appears in plaintiff's evidence a non-suit should be granted. *Savannah, F. & W. R. Co. v. Folks*, 76 Ga. 527.

But the question becomes one for the jury when there is a conflict of evidence as to whether the injured person had knowledge of the rules. *Seese v. Northern Pac. R. Co.* 30 Fed. Rep. 487; *Brunswick & W. R. Co. v. Clem*, 80 Ga. 540. H. P. F.

In *Manwell v. Burlington, C. R. & N. R. Co.*, 60 Iowa, 664, the action was to recover for injuries to stock, caused by leaving gates open on the railroad right of way, under section 1289 of the Code, and in construing the same the court said: "The statute provides that, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; but it is manifest that, in order to recover, the owner must prove other facts. The provision quoted was designed to change the burden of proof, to some extent, and thus enable the owner to make a prima facie case by proving fewer facts than would be required in the absence of the statute." We think the provision in section 1289 providing for recovery unless the stock was killed by reason of the willful act of the owner, distinguishes that section, in legal effect, from the provisions of the one in the case at bar, in so far as the defense of contributory negligence is concerned, and that such negligence is a defense under section 1288 in this case. It is true that some language is used in other cases which tends to an opposite conclusion. Thus, in *Payne v. Chicago, R. I. & P. R. Co.*, 44 Iowa, 236, it is said, in effect, that by section 1288 the liability was absolute, regardless of the question of contributory negligence; but this can hardly be treated as binding as a precedent, as in the decision of the case it was not necessary to construe this section, as the case arose prior to its enactment. In *McKelvey v. Burlington, C. R. & N. R. Co.*, 84 Iowa, 458, the court, in speaking of contributory negligence, said: "It is not our purpose to hold that proof of such negligence would excuse the defendant company from liability, for the language of section 1288 seems to exclude such a rule." That question, however, was not passed upon in the case, the decision resting on the fact that, in any event, independent negligence of the deceased would be available as a defense to the defendant. This precise question was presented in *Moriarty v. Central Iowa R. Co.* 64 Iowa, 700, but was not decided. *Lang v. Holiday Creek R. & Coal Min. Co.* 49 Iowa, 469, was a case under section 1288, wherein the company had failed to put up a sign-board as therein provided. It was claimed that the defendant was liable, regardless of the negligence of intestate. The court held that the accident did not result from the failure to erect the sign. It seems to us clear that section 1288 of the Code imposes certain duties on railroad companies; for a failure to perform them, resulting in damages, an action lies; and recovery may be had by proving the neglect or refusal, and that the party was injured as a result thereof. When this is done, a prima facie case is made, which, in the absence of testimony by the defendant, the statute provides shall be sufficient to warrant a recovery. The defendant, however, may establish any defense it may have, including the contributory negligence of plaintiff's intestate. The statute provides what it shall be necessary for "him" (the injured party) to prove. It does not directly or by fair implication eliminate any defense which is ordinarily available to the defendant. In this view the court not only erred in rejecting the offered evidence, but also in its instructions, in so far as they are so worded as to permit a recovery regardless

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of the contributory negligence of plaintiff's intestate.

8. The court below, in substance, instructed the jury that the cattle-guard in question must be good, sufficient, and safe for all the uses and purposes for which defendant was habitually using it at and prior to the time of the accident. These instructions were excepted to, and an exception was taken to the court's refusal to give certain instructions to the jury embodying the thought that it was only incumbent on the defendant to erect and maintain such a cattle-guard as would be sufficient and safe to turn stock. We think the instructions given by the court touching this matter were correct, and those asked were rightly refused. The evidence, without conflict, shows that this cattle-guard was at a point where the defendant's employes were constantly compelled to cross and recross it in switching cars and in making up trains, and, as located with reference to the necessity of the defendant's employes passing over it in the proper discharge of their duties in switching cars, it is aptly called by one of the witnesses a "man trap." It may be conceded that primarily a cattle-guard is for the purpose of turning stock. It may also be conceded that by law defendant was required to erect and maintain a cattle-guard at the point where this one was located. But we cannot believe that the legislature intended that a railroad company might erect and maintain such a cattle-guard at a point where it was by law required so to do, and which would be sufficient to turn stock, and then so locate its switching yards adjacent thereto as to require its employes to constantly cross the cattle-guard without any protection to life or limb. If it be necessary, in the prosecution of defendant's business, to locate its yards so, as in this case, as to virtually embrace a cattle-guard, then it is clear that defendant owes the duty to its employes, whom it requires to constantly cross it in the proper discharge of their duties, to make such guard reasonably safe for all such uses and purposes. That the guard in question was not good, sufficient, or safe as a crossing for employes must be conceded. We are cited to cases where this court has held that a cattle-guard "means such an appliance as will prevent animals from going upon the land adjoining the right of way" (*Heskett v. Wabash, St. L. & P. R. Co.* 61 Iowa, 467), and that the obligation to maintain it is founded only on the relation of the company to the public. *Peyton v. Chicago, R. I. & P. R. Co.* 70 Iowa, 522. But it must be remembered that the language used in these cases had reference to the case then made before the court. The precise point in issue in this case, as to the necessity for making a cattle-guard reasonably safe for employes who are in the performance of their duty, required to pass over it, has never before been passed upon by this court. Even if it be conceded that to make such a cattle-guard as will be reasonably safe for employes, when situated and required to be used as this one was, would to some extent impair its efficiency as a guard to turn stock (a point we need not determine), still the defendant would not be relieved of its duty to its employes in this respect. In such a case the safety of the traveling public and of the employes should both be considered by the

erection and maintenance of such a guard as will best comply with the provisions of the law, having due regard to all the purposes for which it must be used. We may properly say that no switch yard should be so located, if it is practicable to avoid it, as to require employes, in the switching of cars, to cross and recross a cattle guard. Whether the guard in question was good, sufficient, and safe, in view of all the purposes for which it was required to be used, was a question properly submitted to the jury.

4. The witness Mickey was asked about complaints or protests he had made, while in the defendant's employ, touching the defective condition of the cattle-guard for the use of employes in working over it. The questions were

objected to as immaterial and irrelevant. The objections were overruled. The issue was as to whether Ford had made complaints, and received promises, upon which he had a right to rely, that the defect would be remedied, and in the faith thereof, he was induced to remain in the defendant's employ. This could not be established by proving promises made to another, who had protested against working on the cattle guard. The objections should have been sustained.

5. We have examined the record with care, and discover no other error. In view of the reversal of the case, it is not proper for us to discuss matters relating to the weight or sufficiency of the testimony.

Reversed.

CONNECTICUT SUPREME COURT OF ERRORS.

Catherine M. MULLEN

2.

Joel H. REED, Guardian, etc., *Appt.*

(.....Conn.....)

1. The words "heirs at law" in a benefit certificate made in Massachusetts by inhabitants of that state must be construed in another state as they would be in Massachusetts.
2. A widow is included among the "heirs at law," within the meaning of an insurance certificate payable to the heirs at law of the member, where, under the laws of the state, she would be entitled to a distributive share.
3. The proceeds of insurance belong to the beneficiaries and not to the estate of the deceased, when a certificate is payable to the member's "heirs at law."

(April 2, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Tolland County in favor of plaintiff in an action brought to recover a portion of the money realized from a policy of insurance upon the life of Joseph Mullen, deceased. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. J. H. Reed, guardian, in propria persona:*

The heirs of Joseph Mullen are to be ascertained by the law of this state, where he died and was domiciled at the time of his death, and not by the law of Massachusetts, where the contract was made.

Story, Conf. L. 6th ed. §§ 862, 880, 481, 481a, 484; *Holcomb v. Phelps*, 16 Conn. 183; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99.

The widow of Joseph Mullen is not included, as a co-heir with his son, by the use of the words "heirs at law" in his certificate.

Lord v. Bourne, 63 Me. 368, 18 Am. Rep. 284; *Richardson v. Martin*, 55 N. H. 45; *Wilkins v. Orduway*, 59 N. H. 378, 47 Am. Rep. 215; *Gauch v. St. Louis Mut. L. Ins. Co.* 68 Ill. 251, 30 Am. Rep. 554; *Wright v. Methodist Episcopal Church Trustees*, Hoffm. Ch. 302, 6 L. ed. 1115; *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1, and cases cited; *O'Hara, Wills*, 298, 299; *Baldwin v. Carter*, 17 Conn. 201, 43 Am. Dec. 735.

The word "heir" or "heir at law" is to be construed according to its technical or legal sense, unless otherwise indicated by the instrument itself.

Rand v. Butler, 48 Conn. 293; *Gold v. Judson*, 21 Conn. 616; *Ouahman v. Horton*, 59 N. Y. 149; *Clarke v. Cordis*, 4 Allen, 466; *Lenke v. Watson*, 60 Conn. 506.

When used in relation to personal estate the word means the same as next of kin, and next of kin does not include the widow.

Lord v. Bourne, Richardson v. Martin, Wilkins v. Orduway, Gauch v. St. Louis Mut. L. Ins. Co., Wright v. Methodist Episcopal Church Trustees, and Tillman v. Davis, supra; Keteltas v. Keteltas, 72 N. Y. 313; *Slosson v. Lynch*, 43 Barb. 148; *Murdock v. Ward*, 67 N. Y. 387; *Luce v. Dunham*, 69 N. Y. 36; *Garrick v. Camden*, 14 Ves. Jr. 372; *Drake v. Pell*, 3 Edw. Ch. 251, 3 L. ed. 646; *Watt v. Watt*, 3 Ves. Jr. 244; *O'Hara, Wills*, 293, 299, 304, 319.

The words are to receive the same construction as in a will.

Sweet v. Dutton, 109 Mass. 589, 12 Am. Rep. 744.

The words "family" and "relations" do not include a wife.

O'Hara, Wills, 317, 320.

Mr. William A. King, for appellee:

Where a husband takes out a policy on his own life, payable to his "legal heirs" after his death, the insurance money will go to his widow, children, or grandchildren.

Goeling v. Caldwell, 1 Lea, 454, 27 Am. Rep.

NOTE.—As to who are heirs, see notes to *Heath v. Hewitt* (N. Y.) 13 L. R. A. 46; *Prootor v. Clark* (Mass.) 13 L. R. A. 721, and *Johnson v. Supreme Lodge K. of H. (Ark.)* 8 L. R. A. 732, in which latter case a conclusion is reached under the Arkansas statute which is opposite to that reached in the 24 L. R. A.

above case as to a widow's being within the meaning of the words "heirs at law."

See also *Schonfeld v. Turner* (Tex.) 7 L. R. A. 186, in which a divorced wife was held not to be within the meaning of those words.

774; Hawkins, Wills, pp. 92-94, and notes; *Wingfield v. Wingfield*, L. R. 9 Ch. Div. 654, 26 Moak, Eng. Rep. 428; *Collier v. Collier*, 8 Ohio St. 869; Wigram, Wills, pt. 2, p. 808; Wms. Exs. *1107-1109; *Corbitt v. Corbitt*, 54 N. C. 117; *Freeman v. Knight*, 87 N. C. 72; *Croom v. Herring*, 10 N. C. 893; Redf. Wills, pt. 2, §§ 16-18, p. 895; Id. p. 890, note 55.

In a gift of personal property the term "heirs" should be held primarily to refer to those who would be entitled to take under the statute of distributions.

Re Stevens' Trusts, L. R. 15 Eq. 110; *McKinney v. Stewart*, 5 Kan. 884.

This contract was made in Massachusetts, where all the parties at that time resided. The Massachusetts cases are very strong in support of plaintiff's claim.

Houghton v. Kendall, 7 Allen, 77; *Sweet v. Dutton*, 109 Mass. 589, 12 Am. Rep. 744; *White v. Stanfield*, 146 Mass. 424; *Kendall v. Gleason*, 9 L. R. A. 609, 152 Mass. 457.

The following cases throw light upon the question, but deal with real and personal property, and seem to be under a Massachusetts statute:

Procter v. Clark, 12 L. R. A. 721, 154 Mass. 48; *Lavery v. Egan*, 143 Mass. 389; *Lincoln v. Perry*, 14 L. R. A. 215, 149 Mass. 368.

Addison v. New England Commercial Travelers' Assn., 144 Mass. 592, is a strong case in support of the plaintiff's claim.

The term "heirs" has no technical sense as applied to gifts of personality.

Jarman, Wills, p. 68, note; *Kiser v. Kiser*, 55 N. C. 28; *Houghton v. Kendall*, supra; *Nelson v. Blue*, 68 N. C. 659.

Is it not true that the operation of law, whenever possible, makes real estate descendible and personal estate distributable?

Re Wynell's Trusts, 17 Jur. 588; *Myers' App.* 49 Pa. 111; *Sheets' Estate*, 52 Pa. 257; *Snyder's App.* 95 Pa. 174.

The Pennsylvania cases strongly sustain the plaintiff's position.

2 Jarman, Wills, 6th Am. ed. p. 95, note, refers to *Comly's Estate*, 136 Pa. 158, and *Ashton's Estate*, 134 Pa. 890.

Joseph Mullen intended to include his widow as a beneficiary, and unless he has made use of language which the law will not, under any circumstances, permit to include a widow, his intent should prevail.

Continental L. Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 580; *Addison v. New England Commercial Travelers Assn.* supra; *Dike v. Erie R. Co.* 45 N. Y. 118; *Story*, Conf. L. § 272; *Lockwood v. Crawford*, 18 Conn. 861; *Lawton v. Cortis*, 127 N. Y. 100.

No case can be found which denies the universal and flexible rule that the word "heir" must bear the meaning which the testator intended to give it, and that meaning must prevail over its technical import and effect.

Gambrell v. Forest Grove Lodge No. 4, Independent O. of G. S. & Daughters of Samaria of Anne Arundel County, 66 Md. 17; *Weeks v. Cornwell*, 104 N. Y. 336; *Bond's App.* 81 Conn. 108.

Courts are liberal in upholding a designation of beneficiaries.

May, Ins. §§ 890-899 L, 899 O.

As between the insurance company and the

beneficiary, the policy is a contract and to be so construed.

Continental L. Ins. Co. v. Palmer, supra.

In this aspect of the case there is authority for construing the policy in accordance with the law of the place where it was issued, —and then the widow would without question be included; especially would this result follow if she had a vested interest therein, as many cases hold.

Story, Conf. L. §§ 272, 278; *Jones v. Aetna Ins. Co.* 14 Conn. 501; *Wood v. Watkinson*, 17 Conn. 510, 44 Am. Dec. 562; *Smith v. Mead*, 8 Conn. 255, 8 Am. Dec. 188; *Philadelphia Loan Co. v. Townner*, 13 Conn. 257; *Chapin v. Dobson*, 78 N. Y. 75, 84 Am. Rep. 512.

The widow is properly the plaintiff.

The beneficiaries have a vested interest the moment the policy is issued.

Continental L. Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 580; *Connecticut Mut. L. Ins. Co. v. Burroughs*, 84 Conn. 805; Statutes of Connecticut and Massachusetts; *Chapin v. Feloves*, 36 Conn. 182, 4 Am. Rep. 49; *Keller v. Gaylor*, 40 Conn. 843.

An action of debt lies by the beneficiaries named in the death certificate of a mutual insurance company.

Abe Lincoln Mut. L. & Acc. Soc. v. Miller, 28 Ill. App. 341, cited in May on Life Insurance; *Worley v. Northwestern Masonic Aid Assn.* McCrary, 63; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489; *Loos v. John Hancock Mut. L. Ins. Co.* 41 Mo. 538; *Myers v. Keystone Mut. L. Ins. Co.* 27 Pa. 268, 67 Am. Dec. 462; May, Ins. § 899 L; *Woodhouse v. Phelps*, 51 Conn. 521.

Torrance, J., delivered the opinion of the court:

In July, 1891, Joseph Mullen, domiciled in the town of Stafford, in this state, died intestate, leaving the plaintiff, as his widow, and one minor child. The plaintiff and the deceased intermarried prior to 1877, and said child is the issue of the marriage. At the time of his death, Joseph Mullen was a member of the Bay State Beneficiary Association, of Westfield, Mass., — a corporation organized under the laws of that state "for the purpose of providing benefit and protection to its members and their families." He became a member thereof in 1882, while domiciled in the state of Massachusetts, where he and his family continued to reside for some years afterwards. By the certificate of membership issued to him by said association, he was constituted a member thereof; and in said certificate the association agreed "to pay to the 'heirs at law' of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars." Within sixty days after his death, said association paid to the defendant, Reed, as the guardian of said minor child, the sum of \$5,000, in full of the amount due under said certificate, and he now holds the same as such guardian. The present action was brought by the plaintiff, the widow of Joseph Mullen, against said guardian, to recover a portion of said insurance money. The defendant, Reed, demurred to the complaint because it did not appear therein "that the plaintiff is

an heir at law of the said Joseph Mullen, or that she is entitled to any part of said insurance money." The court overruled the demurrer, and subsequently, after the administrator of Joseph Mullen had been cited in as a party, and "after a full hearing," no answer having been filed in the case, rendered judgment that the widow recover of the defendant, Reed, one third of the insurance money, together with costs of suit. From that judgment, Reed, as guardian of the child, took the present appeal; alleging, as reasons of appeal that the court erred in overruling the demurrer, and in deciding that the plaintiff was entitled to one third of the money. It does not appear that the administrator makes any claim to the insurance money, or any part thereof, or that he took any part in this suit. There is really but one question before us upon this appeal, and that is whether the widow is entitled to one third of the insurance money.

By a written agreement signed by the counsel for both parties, filed in the court below after the present appeal was taken, and printed with the record, the plaintiff attempts to bring up the question whether the widow is or is not entitled to one half, rather than one third of the insurance money, if she is entitled to any; but this agreement is no part of the record, in any proper sense, and it nowhere appears upon the record, as required by the Statute (Gen. Stat. § 1195), that this question was raised on the trial below, and decided adversely to the plaintiff. That question is therefore not properly before us, and for this reason we decline to consider it.

The question, then, is whether the widow is entitled to one third of the insurance money; and its solution depends upon the construction of the words "heirs at law," contained in the certificate of membership under which the money was paid over to the guardian of the minor child. What do these words "heirs at law," mean, in this certificate? Do they include or exclude the widow? Under these words the guardian claims the entire sum for the minor child, and the widow claims a share of it under the same words. The question, of course, is, What was intended by these words at the time they were put into this certificate? And this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning, it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that state alone, and that, both by its terms, and by the understanding of the parties, it was to be performed there. This being so the general rule is that it should be construed and interpreted according to the laws of that state. *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Koster v. Merritt*, 32 Conn. 246. "For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances." *Strigg v. Atkinson*, 144 Mass. 564. This principle is, we think, equally applicable to an instrument like this

certificate. We therefore think the words "heirs at law," in this instrument, ought to be construed by us as they would be by the courts of Massachusetts, if this certificate was before them for construction upon this point; and, as we understand the matter, the courts of that state, in cases where the words "heir at law" are used in an instrument disposing of personal property alone, having quite uniformly construed them as meaning those persons who are entitled to take under the statute of distributions, unless there is something in the context to indicate a contrary contention. *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; *White v. Stanfield*, 146 Mass. 424, 12 Am. Rep. 744; *Kendall v. Gleason*, 152 Mass. 457, 9 L. R. A. 609. And not only this, but the courts of that state have held that the words "heirs at law," when used in such an instrument, indicated an intent that such persons are to take in the same manner, and in the same proportions, as if the property had come to them as intestate estate, unless a contrary intention appears. Thus, in *Houghton v. Kendall*, *supra*, the court says: "In this commonwealth, we find no authority which would conflict with the adoption of the construction which seems to us reasonable,—that, when the word 'heirs' is used in the gift of personality, it should primarily be held to refer to those who would be entitled to take under the statute of distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the person whose heirs they are called." See also *Bassett v. Granger*, 100 Mass. 848; *Rand v. Sanger*, 115 Mass. 124. The rules of construction thus applied in that state, in the cases cited, do not probably differ materially, if at all, from those that would be applied under similar circumstances by the courts of this state. In both, the principal object is to ascertain the intention of the parties from the words used to express it; in both, the word "heirs" will be given its strict, primary, technical meaning, if such appears to have been the intention of the parties; and in both it will be given its more comprehensive and popular meaning if it appears to have been used in that sense. *Sweet v. Dutton*, *supra*; *Leake v. Watson*, 60 Conn. 498-506. Under the laws of Massachusetts at the time when this certificate was issued, if an intestate left a widow and issue, the widow was entitled to one third of the residue of the personal property; if he left a widow and no issue, the widow took the whole residue of personality, to the amount of \$5,000, and one half of the excess of the residue of such property, above \$10,000, Mass. Pub. Stat. 1882, p. 770, chap. 185, § 3. If then this certificate is to be construed as the courts of Massachusetts would probably construe it,—and we think it should be,—it follows that the words "heirs at law" must be held to include the widow, and that she is entitled to one third of the insurance money, under the certificate, because that is the share of this money she would take under the laws of that state.

The result thus reached is also, we think, in accordance with the actual intent of Joseph Mullen, so far as the same can be ascertained from the certificate, read in the light of the

circumstances under which it was made, as they appear of record, and without reference to the rule we have been considering. The certificate is in the nature of a contract of insurance. The money to become due on it, under the laws of Massachusetts (Supp. Pub. Stat. p. 811, § 15), as appears of record, could not be taken by creditors, and it is fair to presume that this was known to the deceased at the time the certificate was issued. If so, there would be the further presumption that he thus intended to create a fund for the benefit of his family, primarily, and not for the benefit of his creditors, or his estate; a fund that would go to the members of that family living at the time of his death, not as a part of his estate, but directly by force of the certificate. He designated the class who were to take as beneficiaries by the words "heirs at law;" and it is a fair presumption that he used those words for this purpose, in view of the uniform meaning which had been given to them, in instruments of a nature similar to this certificate, by the courts of Massachusetts. In short, from the certificate itself, read in the light of the circumstances under which it was made, we think it is fair to conclude that Joseph Mullen used the words "heirs at law" in their popular sense as meaning those persons who would take his intestate personal property under the statute of distributions of the state of Massachusetts, and that under them, consequently, he meant to include his widow, the money due upon the certificate at the time of his death formed no part of his estate, but belonged to the beneficiaries. It nowhere appears that the deceased had the power to substitute other beneficiaries in place of the class first designated; and, if he had, it is quite certain that he never exercised it. This certificate, then, was in effect a valid agreement, on the part of the association, to pay the money to become due under its provisions to the beneficiaries designated therein. When due, the money certainly belonged to them, and not to the estate of the deceased. *Continental Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305; *Continental L. Ins. Co. v. Palmer*, 42 Conn. 60, 19 Am. Rep. 580; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99.

There is no error apparent upon the record.
The other Judges concurred.

James CAMPBELL'S APPEAL from Probate.

(....Conn.....)

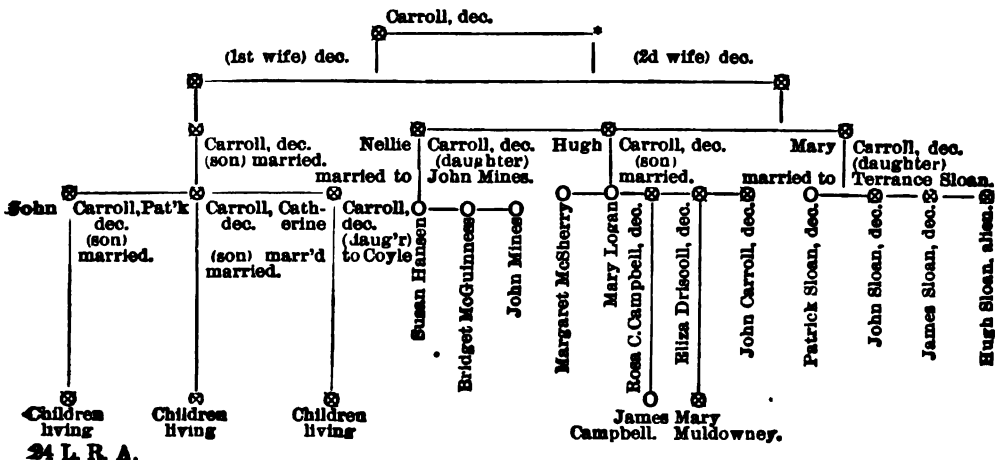
1. The common-law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in Connecticut, and therefore inheritance may be derived by collateral relatives through alien ancestors.
2. The child of a cousin cannot take the parent's share, under the Connecticut statute of distributions, where the parent dies before the intestate.
3. An allegation by an appellant that he is "aggrieved both as an heir-at-law and next of kin" is a mere averment of a legal conclusion and not sufficient to show a right to appeal, where the facts set up show that his claim is without foundation.

(May 4, 1894.)

A PPEAL by James Campbell from a judgment of the Superior Court for Fairfield County erasing from the docket his appeal from a decree of the Probate Court ordering distribution of the estate of Patrick Sloan, deceased. *Affirmed.*

On January 25, 1893, Patrick Sloan died at Bridgeport, intestate possessed of \$5,000 in personal property and \$36,000 in real estate. He was a naturalized citizen of this country. He left no lineal descendants, nor wife, sisters, father, mother, uncles, nor aunts, and but one brother, who was an alien. He left five first cousins, Margaret McSherry, Bridget McGuinness, Mary Logan, Susan Hanson, and John Mines, and a number of children of first cousins, among whom was the appellant. The first cousins above named were naturalized citizens of this country. The probate court found that the alien brother was entitled to all of the personal estate, and that the first cousins were entitled to share equally all of the real estate. The relationship of the parties is shown by the following chart:

NOTE.—As to how far the common law has been adopted in this country, see *note to McKennon v. Winn* (Okla.) 22 L. R. A. 501.



The parties particularly interested in this proceeding, together with the decedent, being represented by O, and the others by S. The claim of the appellant was that according to the principle of the common law, the blood of an alien ancestor would impede the descent of the title to land, when title was required to be traced through such alien. That this principle was a part of the laws of Connecticut; that the English Act of 11 & 12 Wm. III., which removed this disability in favor of natural born subjects of the realm also became the law in Connecticut; that the disability was never removed in favor of naturalized citizens who if compelled to trace their connection with the decedent through alien blood were disabled from taking, whereas the appellant, who was a natural born citizen, was relieved from the disability caused by the alien blood of his ancestors, and therefore, together with the other natural born children of decedent's cousins was entitled to the real estate.

Further facts appear in the opinion.

Mrs. Allan W. Paige and George P. Carroll for appellant.

Messrs. Canfield & Judson, for appellees:

This court has always required an interest on the part of an appellant of a far different quality than that set out in the appellant's motion to the probate court, as the second reason of his appeal.

Swan v. Wheeler, 4 Day, 140; *Saunders v. Dennison*, 20 Conn. 524; *Trinity Church in Portland v. Hall*, 22 Conn. 180; *Deming's App.* 34 Conn. 208; *Norton's App.* 46 Conn. 528; *Taylor v. Gillette*, 52 Conn. 217; *Dickerson's App.* 55 Conn. 229; *Buckingham's App.* 57 Conn. 454; Rev. Stat. § 644; *Dickinson's App.* 42 Conn. 502, 19 Am. Rep. 558.

For a period of two hundred and fifty years, intestate estates in Connecticut have been distributed by force of our own laws concerning the distribution of intestate estates, and the English common law on the subject of descent of land within the colony, was never recognized in any of its peculiar phases.

Long and uninterrupted usage, common understanding and general acquiescence, have made it the true construction.

Flynn v. Morgan, 55 Conn. 148; *State v. Jerome*, 33 Conn. 268.

In 1725, John Winthrop, of New London, as administrator of his father's intestate estate, refused to make any inventory of the real estate, claiming that as the only son of the intestate, he was by virtue of the laws of England pertaining thereto, entitled to all of the real estate to the exclusion of his sister Anne, wife of Thomas Lechmere, and vigorously claimed that "the laws of the colony which they are empowered to make are to be wholesome and reasonable and not contrary to the laws of England."

This attempt at interpolating conditions into the statute of distributions of the colony did not in the courts meet with success and it was adjudged that his sister was entitled to one-third part of all the real estate of which their father died possessed.

From the judgment rendered by the superior court and the proceedings of the general assembly, Winthrop appealed to the king for

relief and the case having been heard by the lord justices, the statute of distribution in force in the colony was declared to be void, as contrary to the English laws of descent.

Winthrop v. Lechmere, 7 Conn. Colonial Records, 191, 571-579.

The general assembly of the colony, when they received the news of this decision at the July session, 1728, made a vigorous protest and complained of the fact that they had not been given an opportunity to defend the validity of the laws of the colony pertaining to the distribution of intestate estates.

The resentment felt by the colony, and growing out of the decision in *Winthrop's Case*, evidently had effect, for estates were continued to be settled under our own statutes as before, and later in the case of *Olark v. Towsey*, which went before the Lords Justices in England, on appeal from a judgment rendered by the superior court sitting at New Haven, March 6, 1732, and involved precisely the same question, as to whether intestate estates within the colony of Connecticut were to be settled and distributed, having reference to the laws of England, it was decided that our statute of distributions was effective and the appeal was dismissed.

Olark v. Towsey, 9 Conn. Colonial Records, p. 550.

It will thus be seen that from the beginning of the colony we refused to permit the doctrines of the common law to govern our own rules of descent, and in much stronger language than the assertion be made, that no such obsolete principle for which the appellant contends, will ever be allowed by our courts to be interpolated into our statute of distributions.

It was the fiction of the common law that the title traversed through all the intermediate ancestors who intervened between the intestate and the claimant, and for reasons of feudal origin, the title, in its descent, was obstructed by meeting with alien blood.

Such is not the theory of descents in this state or in any other state except where the common law of England has been adopted *in toto* by statute.

Blackstone says: "The whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as to suppose the required descent."

Also see remarks of Mr. Senator Tracey in *Jackson v. Fitz Simmons*, 10 Wend. 20, 24 Am. Dec. 198.

It is said in *Swift's Digest*, vol. 1, p. 157: "Lands escheat to the state on failure of heirs according to the rules of descent."

In view of an unbroken line of decisions in this state, to the effect that estates here are not affected by the common-law canons of descent as they existed in England it seems absurd for the appellant to set up the claim which he here makes.

Brown v. Dye, 2 Root, 280; *Fitch v. Brainard*, 2 Day, 189. See also *Strong's Case*, Kirby, 345; *Cannan v. Salisbury*, 1 Root, 155; *New Haven v. Newton*, 12 Conn. 175; *Hillhouse v. Chester*, 3 Day, 218, 3 Am. Dec. 265; *Henth v. White*, 5 Conn. 233; *State v. Danforth*, 8 Conn. 118; *Baldwin v. Walker*, 23

Conn. 180; *Dickinson's App.* 42 Conn. 502, 19 Am. Rep. 533.

Even were the appellant to demonstrate that the common-law disability referred to, became a part of our laws of descent, he will have gained nothing by the demonstration; for the bar was removed in respect to native-born subjects of the realm, by the Act of 11 & 12 Wm. III.

Acts of parliament in amelioration of the common law passed prior to 1766, while having no force as statutes or positive rules of law, had their effect in determining the decision of the court if applicable to our conditions.

State v. Ward, 43 Conn. 493, 21 Am. Rep. 465; *McCreery v. Somerville*, 22 U. S. 9 Wheat. 354, 6 L. ed. 109; *Palmer v. Downer*, 2 Mass. 179, note; *Haigh v. Haigh*, 9 R. I. 30.

If effect, then, is given to the act of William III., whereby the descent would be no longer impeded in case of a native-born citizen, the same condition of amelioration of the hardship of the common law must, under the mandates of the Constitution of the United States, be fully accorded to naturalized citizens, and upon this line of reasoning, the appellees still remain the rightful heirs at law of the intestate in respect to the real estate in controversy.

Naturalization gives an alien all the rights of a natural born citizen; he thereby becomes capable of receiving property by descent and of transmitting it in the same way.

Jackson v. Green, 7 Wend. 333; *Luhre v. Bimer*, 80 N. Y. 172.

In adopting the common law it must be applicable to the habits and conditions of our society and in harmony with the genius, spirit, and objects of our institutions.

Sealey v. Peters, 10 Ill. 180; *Wagner v. Bisell*, 3 Iowa, 401.

Naturalization by act of parliament clothed a person with all the rights of a native born even in the time of the fullest rigor of the common law.

1 Bl. Com. 374; *Ainslie v. Martin*, 9 Mass. 454; 3 Am. & Eng. Encyclop. Law, p. 248, note; 2 Kent, Com. p. 71; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 825, 6 L. ed. 224; *Jackson v. Green*, *supra*.

Mr. George G. Sill for appellee Susan Hansen.

Baldwin, J., delivered the opinion of the court:

The appellant claims to be aggrieved by the probate decree of distribution, as an heir-at-law and next of kin to the intestate, and also as a citizen of the state, acting for himself and all the rest of its citizens. His contention is that either the real estate in question escheated to the state, in which case he, as one of its citizens, has an interest in defeating a distribution to private individuals, or else that an escheat, so far as he is concerned, has been prevented by force of the Statute of 11 & 12 Wm. III.; chap. 6, in favor of inheritances by natural-born citizens.

It was a rule of the common law of England that, "on failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations, being blood of the first purchaser." 2 Bl. Com. 320. The 34 L. R. A.

requirement that the heir must be of the blood—that is, descended from the first purchaser—was something peculiar to the feudal system. It rested on the principle that feuds were granted for personal service and personal merit, and that like service and like merit on the part of the successors in estate of the feudatory would be best assured by admitting to that number only those who derived their natural characteristics from him by descent. A legal fiction was next invented by which, failing direct descendants of the person last seized, his collateral heirs were deemed to be of the blood of the first purchaser; that position being arbitrarily assigned to the common ancestor, whether in fact he ever owned the land or not. In order to establish their title, however, it was necessary to trace their descent back to him, in each degree, through "inheritable blood." If, therefore, any intermediate ancestor was an alien, as he could have no heirs, so he could have no inheritable blood, and the land escheated. It is this regard paid by the common law to the original purchaser of the estate, real or fictitious, that led it to reckon degrees of consanguinity in accordance with the canon law, by simply going back to the common ancestor, without then proceeding, as by the civil law, to compute the degrees between him and the intestate. The real-estate tenures of a country are necessarily an important feature of its political system. The institutions of feudalism and primogeniture were obviously unsuited to the conditions under which New England was first settled, and her people looked more to the civil than to the common law to guide their policy as to the distribution of landed estates. 2 Washb. Real Prop. 404, 408. In October, 1689, the general court of Connecticut, upon the report of a committee which had been appointed "to ripen some orders that were left unfinished by the former court," as to the "settling of lands, testaments of the deceased," and other matters, enacted that intestate estates should be divided by the public (or particular) court between the wife, children, or kindred, "as in equity they shall see meet;" and, if no kindred be found, the court "to administer for the public good of the commonwealth." 1 Conn. Colonial Records, 88; Ludlow's Code, 553.

In the Revision of 1673 (ed. 1865, p. 36), the provision is that such estates be divided between the wife and children or kindred "according to law, and for want of law, according to rules of righteousness and equity; and if no kindred be found, the court to administer for the public good of the colony." At the close of the century, in 1689, a statute of distributions was passed, copied mainly from that adopted several years before in Massachusetts. It put all the children of an intestate on a footing of equality, except that the eldest son was to have a double portion. Statutes, Revision of 1702, ed. 1715, p. 61. In 1718 it was further provided that male heirs should have their shares set out in real estate, so far as this was practicable. *Id.* p. 192. In 1727 (Sess. Laws, p. 110), it was enacted that real estate which came to the intestate by descent should be distributed among his kindred of the blood of the purchasing ancestor, without distinction between those of the whole blood and those of

the half blood, nor should any such distinction be made as to real estate which came to the intestate by purchase, and also that "the next degree of kindred in the line transverse shall be admitted to the inheritance before the next degree of kindred in the line ascendant; and the next degree of kindred in the line ascendant shall be admitted to the inheritance before a remoter degree in the line transverse." This statute was omitted in the Revision of 1750. This course of legislation plainly set up for the colony of Connecticut rules of inheritance differing fundamentally from those of the common law of England. For that cause, our statute of distribution was pronounced null and void by the king, in council, in the well-known case of *Winthrop v. Lechemere*, in 1727-28. 7 Conn. Colonial Records, 191, 571-579. That judgment was, however, practically disregarded in the colony; and the statute was finally sustained, as a legitimate exercise of chartered rights, by the same tribunal, in 1745, in the case of *Clark v. Towsey*, 9 Conn. Colonial Records, 587-593. This had been the uniform doctrine of our own courts. "The English law of descents has never been admitted in this state." *Heath v. White*, 5 Conn. 228, 233. The common-law maxim, "*Seisina facit stipitem*," was never accepted here. *Hillhouse v. Chester*, 8 Day, 166, 211, 8 Am. Dec. 285; *Bush v. Bradley*, 4 Day, 298, 305. The computation of degrees of relationship between an intestate and his heirs has always been made according to the rule of the civil law. *Hillhouse v. Chester*, *supra*. Bastards have been allowed to inherit through their mothers without regard to the common-law doctrine as to their defect of "inheritable blood." *Brown v. Dye*, 2 Root, 280; *Heath v. White*, *supra*; *Dickinson's App.* 42 Conn. 491, 19 Am. Rep. 533.

The only indication, either in our legislative or judicial records, of the recognition in this colony of the common-law doctrine that no title to an inheritance could be traced through alien blood, which has been brought to our attention by the researches of counsel, is that contained in a private act passed by the general assembly in 1774. By this statute, entitled "An act for the naturalization of Francis Forgue, for confirming the purchase of real estate by him made and rendering his issue capable of inheriting," a grant of naturalization was made to Francis Forgue, a Frenchman, who had purchased lands in the colony, and resided in Fairfield. His title to these lands was confirmed, and it was declared that his son, Francis Forgue, Jr., was, and should be "capable of inheriting and taking by descent or purchase all and any real estate or estates whatsoever as he might, could, or would have been, had the said Francis, the elder, been completely naturalized as aforesaid before the birth of the said Francis, the younger." 14 Conn. Colonial Records, 308, 309. It is doubtless true that this express provision in favor of

the son was made in order to assure or confirm his title, should he survive his father, and become his heir, to the lands acquired by the latter while still a subject of France, as well as to any which he might subsequently purchase; and it is probable that it was inserted in view of the rule of common law that naturalization by act of parliament enables the son of the alien so naturalized to inherit from him, though born before the passage of the act. Such was not the case, if the alien had only been made a denizen by letters patent from the crown (Co. Litt. 129); and the draughtsman of our statute could hardly have felt safe in assuming that greater effect, even in our own courts, would be given to a colonial than to a royal grant, unless it was plainly required in express terms. So late as 1795, it was an unsettled question in this state whether a conveyance of land to an alien might not be an absolute nullity. 1 Swift, Syst. Laws Conn. 166; Stat. (ed. 1784), p. 83; Sess. Laws 1777, p. 476.

It is therefore our opinion that the common-law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in Connecticut, and that there was no error in the decree of distribution to the first cousins of Patrick Sloan, notwithstanding their relationship to him through alien ancestors.

Another first cousin was the mother of the appellant; but as she died before the intestate, and there is no representation among cousins under our statute of distribution, the appellant had no right to share in the inheritance, as one of the next of kin. Nor has the state (if he could make claim in its behalf) any interest in the lands, since there has been no escheat.

The extent of whatever interest the appellant could claim in the estate appeared on the face of his appeal to the superior court. He could appeal only if "aggrieved" by the decree; and as he was neither next of kin, nor heir-at-law, nor representative of any party in interest, the cause was properly erased from the docket. His allegation that he is "aggrieved both as an heir-at-law and next of kin" is a mere averment of a legal conclusion from the facts previously set up, and these show that it is wholly without foundation. The appellant claims that as, if his mother had been first purchaser of the land in controversy, he could have claimed it as ancestral estate, under Gen. Stat., § 632, the motion to erase should have been denied. But, had he such a claim to make, he was bound to set out the facts upon which it arose. In the absence of such allegations, and in the face of others showing that he is not the next of kin, the bare statement that he is the heir-at-law could not avail to defeat the motion to erase. *Norton's App.* 46 Conn. 527.

There is no error in the judgment appealed from.

The other Judges concurred.

NORTH CAROLINA SUPREME COURT.

Mattie M. TATE, *Appt.*,

v.

City of GREENSBORO *et al.*

(..... N. C.)

1. The destruction of shade trees standing on the outer edge of the sidewalk in front of a residence because the municipal authorities regard them as an obstruction of the walk and injurious to health, does not render the city or its authorized agents liable for damages to the abutting proprietor.
2. The power of a city in respect to trees in streets can be delegated to a city committee composed of members of the board of aldermen.

(Avery and MacRae, JJ., dissent.)

(May 22, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for Guilford County in favor of defendants in a proceeding to recover damages for the alleged wrongful removal of trees standing on the outer edge of the sidewalk in front of plaintiff's residence. *Affirmed.*

The facts are stated in the opinion.

Messrs. L. M. Scott, R. M. Douglas, and John A. Barringer, for appellant:

Adjacent owner by common law holds fee in soil while it is used as a highway and entitled to trees, grass, etc., growing upon it.

2 Dill. Mun. Corp. §§ 631, 633, 687, note 2, 656 a. note, 656 b. note, 668, note; *Cincinnati v. White*, 81 U. S. 6 Pet. 431, 8 L. ed. 452; *Everett v. Council Bluffs*, 46 Iowa, 66; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

The aldermen could not have taken the trees without process of law, and not then without compensation.

Yates v. Milwaukee, *supra*; *White v. Godfrey*, 97 Mass. 472.

The adjacent owner may recover in trespass for destruction of shade trees in the street in front of his lot.

Bills v. Belknap, 36 Iowa, 583; *Everett v. Council Bluffs* and *Phifer v. Cox*, *supra*.

The city council could not declare that a nuisance which was not.

Yates v. Milwaukee, and *Everett v. Council Bluffs*, *supra*.

It is a judicial act to declare a thing a nuisance and the power therefore cannot be delegated.

Evans v. Etheridge, 96 N. C. 43; *State v. Hill*, 35 N. C. 396; *State v. Knight*, 84 N. C. 793.

The city has no authority to remove trees unless such removal is demanded by the

NOTE.—As to ownership and control of trees in highways, see note to *Chase v. Oshkosh* (Wis.) 15 L. R. A. 553, which case is in harmony with the present one on the question of the right to review the action of the municipal authorities.

24 L. R. A.

wants of public travel and convenience or they are a nuisance or an obstruction.

Bills v. Belknap, and *Everett v. Council Bluffs*, *supra*.These defendants not following the law are *ab initio* trespassers.*Elliott, Roads & Streets*, page 849, cases cited.

If the corporation was not liable for the acts of King and Scott, then by ratification of this act they became responsible.

Thayer v. Boston, 19 Pick. 511, 81 Am. Dec. 157; *McGary v. Lafayette*, 13 Rob. (La.) 668; *Ross v. Madison*, 1 Ind. 281; *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299; *Donnelly v. Tripp*, 12 R. I. 97.

Messrs. Dillard & King, for appellees:

The city of Greensboro is a creature of the law with the capacities and powers named in its charter and such others by implication as are material and necessary for the object and purposes of its incorporation.

Charter, § 60.

It could acquire and have streets by condemnation proceedings as prescribed in the charter, by a twenty years' user, by dedication of the private owner, and acceptance by the city, and by acts and conduct on the part of the owner amounting to an estoppel *in pais*.Charter, § 60; *State v. McDaniel*, 53 N. C. 284; *State v. Purify*, 86 N. C. 681; *Boyd v. Achenbach*, 79 N. C. 539.

The city had power to abate a nuisance from whatever cause arising.

Charter, § 65.

Having accepted and taken possession and control of the sidewalk for public use, the city, although owning but an easement, had the right by its officers to decide and pass upon the question as to whether the trees were, or were not, an inconvenience or obstruction, and as to how much of the way should be improved, and how improved, and to such right of the city, all other rights of abutting owners must be, and are subordinated, and no judicial review can be had of the city's discretion.

Elliott, Roads & Streets, § 848; *Wood, Nuisance*, §§ 237, 252.Had the city passed a resolution by its board of aldermen directing the trees to be taken up, their removal would have been as to this plaintiff *damnum absque injuria*, and although no such previous order of the board was passed, yet, it being within the scope of its authority to remove them, in the exercise of its discretion, if the city with the co-defendants, its agents, committed the act complained of as alleged in the complaint, and the city avowed the act and ratified it and assumed to defend it and its consequences, it is the same thing, in legal effect, as if the cutting of the trees had been previously passed upon, and ordered by an order of the board in regular session, and no action can be maintained therefor.*Ratihabito mandato, acquiescent.**Elliott, Roads & Streets*, § 857; 1 Dill. Mun. Corp. §§ 463, 972; *Davis v. Jackson*, 61 Mich. 580.

If the removal of the trees was unlawful, as taking another's property, then as the city determined to remove them and did remove

them, if a remedy for payment of damages was provided by the charter, as was the fact in the city's charter, that remedy must be pursued, and the common-law remedy is excluded.

Land v. Wilmington & W. R. Co. 107 N. C. 73.

Mr. James E. Boyd also for appellees.

Burwell, J., delivered the opinion of the court:

It is contended by the plaintiff, first, that, even admitting that the act of which she complains (the destruction of shade trees standing on the outer edge of the sidewalk in front of her residence, in the city of Greensboro) was done by the duly authorized agents of that municipal corporation, she is still entitled to recover for the damage done to her property by the cutting down of these trees, because his honor has found that they did not obstruct the passage of persons on the sidewalk, that the public convenience did not require their destruction, and that the mudhole in the street, for the removing of which this act seems to have been done, could have been remedied without cutting them down. This phase of the case presents for our consideration this question: Can the courts review the exercise by the city of Greensboro of its power to repair and improve its streets, and remove what it considers obstructions therein, and find and declare that certain trees in the streets of that city, which the municipal authorities honestly believed were injurious and obstructive to the public, were in fact not so, and upon such findings, there being no allegation of negligence or of any want of good faith on the part of the city, award damages to an abutting proprietor, the comfort of whose home has been lessened by the removal of the trees?

The street in which these trees stood was dedicated to public use as a street by those under whom the plaintiff claims title. Holding control of this street by reason of its dedication only, the city nevertheless has exactly the same rights therein, and responsibilities therefor, as if it had been, by deed of the owner, conveyed to the corporation for use for street purposes, or had been condemned and taken for those purposes according to the provisions of the charter; and the rights of the plaintiff therein are no greater than if it had been so conveyed, or so condemned and taken. Now, the responsibilities that counties and townships assume, or are put under by the law, in relation to their highways, is very different from those of cities and towns in relation to their streets. It is required that roads shall be kept in repair, and certain individuals upon whom is cast, in one way or another, the burden of seeing that these repairs are made, can be indicted for failing to perform this duty; but the municipality (county or township) is not held liable for damages that may result from the road's being out of order, or obstructed. Cities and towns, however, are held to strict pecuniary accountability for the condition of their streets. They are not political divisions of the state, made by it for convenience in its government of the whole, but are corporations chartered, presumably, at the request of the inhabitants, and granted privileges, and charged with corresponding responsibilities. Among the

very gravest of the pecuniary responsibilities that the law imposes on cities and towns is liability for damages to persons and property, caused by a defective or improperly obstructed street. *Bunch v. Edenton*, 90 N. C. 431; *White v. Chowan Comrs.* Id. 437, 47 Am. Rep. 584. Hence it is that the law gives to all such corporations an almost absolute discretion in the maintenance of their streets; considering, it seems, as is most reasonable, that wide discretion as to the manner of performance should be conferred where responsibility for improper performance is so heavily laid. An illustration of this is the provision of the Code (sec. 3403) that the commissioners of towns "shall provide for keeping in proper repair the streets and bridges of the town in the manner and to the extent they may deem best." We think that under its charter, and under the general law of the state (2 Code, chap. 69), the city of Greensboro was clothed with such discretion in the control and improvement of its streets; and if damage come to the plaintiff by reason of acts done by it, neither negligently nor maliciously and wantonly, but in good faith, in the careful exercise of that discretion, it is *damnum absque injuria*. *Smith v. Washington*, 61 U. S. 20 How. 135, 15 L. ed. 353; *Brush v. Carbondale*, 78 Ill. 74; *Pontiac v. Carter*, 32 Mich. 164.

It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation, or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such a wrongdoer and trespasser. *Bliss v. Ball*, 99 Mass. 597, and *Graves v. Shattuck*, 85 N. H. 257, 69 Am. Dec. 536, are illustrations of this principle. In the former case, the court, speaking of the injury done by defendant to the trees in the street in front of plaintiff's lot, said: "If the defendant thought they were a nuisance, he might have complained to the selectmen, and it was for them to decide the question whether they should be removed. . . . The defendant had no authority to remove them, nor were the jury authorized to decide the question whether they ought to remain." And thus that authority seems abundantly to sustain the position that it is not for a court and jury to review the conduct of the proper municipal authorities in such a matter as that now under consideration. In *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, it is said: "The authorities state, and our own knowledge is to the effect, that the care and superintendence of streets, alleys, and highways, the regulation of grades, and the opening of new and the closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done."

The wisdom of this rule is well illustrated by this action. Complaints were made, it seems, by citizens, that these trees were injurious to

the public way, and in their effects, perhaps, to the public health. The proper authorities of the city, clothed with the power to repair the streets and protect the public health, listened to these complaints, and in the exercise of their best judgment, so far as appears, decided that the interest of the community required their removal. The proposition of the plaintiff is that a jury shall judge of the correctness of this conclusion, and if they find that the officials committed what they think was an error, they and the city shall be mulcted in damages. "The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality; but transfer them, not to be exercised directly and finally, but indirectly and partially, by the retroactive effect of punitive verdicts upon special complaints." Cooley, Const. Lim. 6th ed. 255. *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58, which plaintiff's counsel cited in their brief, related to a county road, and the alleged wrongful cutting of plaintiff's hedge was done by a private citizen. So it has no application, we think, to this case, and belongs to the same class of decisions as *Graves v. Shattuck*, and *Bliss v. Ball*, *supra*; *Bills v. Binknap*, 86 Iowa, 588 (also cited), relates to the cutting down of trees standing in a highway in the country, and the action was to restrain the supervisor of the road. In *Eberett v. Council Bluffs*, 46 Iowa, 66 (also relied on by plaintiff), which was a suit to enjoin the defendant from cutting down certain shade trees in front of plaintiff's lot, the petition alleged that the trees were "perfectly safe and sound, and afforded no obstruction to the free use of the street and sidewalk," and stated reasons why they should not be removed. The defendant made no answer, and, as the court said, the allegations of the petition were taken as true; and so it appeared, by the admission of the defendant, that its officers were about to do, under its orders, a wrong to the plaintiff, which, because it conceded that the public interest did not in any way require it to be done, would be wanton and unnecessary. We think that case is clearly distinguishable from the one now under consideration. The principles which govern in this matter are well stated in *Chase v. Onkosh*, 81 Wis. 318, 15 L. R. A. 553,—an action for damages for cutting down shade trees, very similar to the one we are considering,—from which we make the following quotation: "The right of the public to the use of the street for the purposes of travel extends to the portion set apart and used for sidewalks, as well as to the way for carriages, wagons, etc., and, in short, to the entire width of the street upon which the land of the lot owner abuts. As against the lot owner, the city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open, and fit for use and travel, the street over which the public easement extends, to the entire width; and whether it will so open and improve it, or whether it should be opened or improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests in and over such easements are committed. With this discretion of the authorities, courts cannot ordinarily

interfere, upon the complaint of the lot owner, so long as the easement continues to exist. . . . The public use is the dominant interest, and the public authorities are the exclusive judges when, and to what extent, the streets shall be improved. Courts can interfere only in cases of fraud and oppression, constituting manifest abuse of discretion. It necessarily follows that, for the performance of this discretionary duty by the city officers in a reasonable and prudent manner, no action can be maintained against the city."

Having shown, as we think, that the plaintiff cannot recover of the city, we come to consider her second proposition,—that she can recover damages of "the other defendants, King and Scott, not as the servants or agents of the city, but as independent tortfeasors," as it is stated in the brief of her counsel. In other words, it is proposed that the cause of action, as against the city, shall be abandoned, and the cause proceed against the other defendants, upon the theory that they had no authority from the city to do the act complained of. We think the power given to the city over the streets could be delegated to a street committee composed of members of the board of aldermen, as this one was: that this action was the action of that committee, and therefore of the city; and that just as these individuals would have been answerable in damages to the plaintiffs, if the act had been beyond the power of the municipality, so they are not liable if the act was within those powers. All went to show that the individual defendants were acting as agents and officers of the city. They so assert. The city so insists, and distinctly ratifies their act. Therefore, as the city has done no legal wrong, neither have they.

Affirmed.

Avery, J. dissenting:

It is always safe to recur to fundamental principles. It is perilous to refrain from going to the fountain head, where the controversy arises out of an attempt of a public agency to use or destroy, without compensation, what is claimed to be private property. The very question involved in the case at bar is, What are the rights, respectively, of the servient and dominant owners,—the town and the abutting proprietor in a street,—what passed to the public with the easement, and what residuary interest remained in the owner after the appropriation by the municipality for corporate purposes? The taking of private property for a public highway, like any other exercise of the right of eminent domain, can be justified only on the ground of public necessity,—that it is essential in order to subserve the convenience or promote the prosperity of the great body of people, comprehended under the general designation of the "public," to give them the use of it for certain specified purposes. Cooley, Const. Lim. 643. Where an easement is acquired, whether by grant, dedication, or condemnation, nothing more passes to the public than the power to use the land strictly in furtherance of the objects for which the legislature authorized its appropriation. Except in so far as his right of enjoyment is restricted by the inhibition against his interference with its use for the particular public purposes, all

of the rights of ownership are still retained by the holder of the servient tenement. The other estate dominates and overshadows his right only so far as is necessary to subserve the ends for which its privilege has been granted. The residuary rights of the abutting owner in a street are somewhat more restricted than those of an adjacent proprietor in a public road, because, in contemplation of law, the damages for the taking are measured by the extent of the public use, and the consequent limitation of private enjoyment by the servient owner.

I may safely lay it down as a general proposition that, when the legislature permits private property to be taken by a public or quasi public corporation, the state intends that it shall be appropriated only for corporate purposes,—such uses as may be necessary in order to enable the public agency to perform its duties to the state, and enjoy the compensatory privileges granted to it. Whatever rights of property in streets do not pass, from the very nature of a municipality, as necessary to the discharge of its public functions, or as inseparable incidents to the franchise granted, remain in the abutting proprietor, reserved by implication of law for his benefit, whether the city or town has acquired the fee or an easement, either by grant, dedication, or condemnation, and whether the line of such abutting owner extends to the margin or middle of the street. The abutting proprietors have a qualified property in a street, which entitles them to make “any beneficial use of the soil of such highway which is consistent with the prior and paramount rights of the public therein for street purposes proper.” 2 Dill. Mun. Corp. § 656b. “If they own the fee to the center line of the streets,” says Judge Dillon, “their rights therein are legal in their nature. If they own the fee to the line of the streets, their rights in the street are in the nature of equitable easements in fee, but, in extent, are substantially the same as when the fee is in them, subject to public use.” Id. §§ 661, 663, 664; *Bliss v. Ball*, 99 Mass. 597. “Where one’s land is bounded on a public highway,” says Judge Cooley in his work on Torts (page 818), “it presumptively extends, not to the outer line, but to the middle of the road; and his supreme dominion embraces the whole, qualified only by the public easement.” In this respect there is a striking analogy between abutting and riparian owners of the fee, in that a certain incidental, qualified property attaches in the highway, whether it be a public road or navigable water. *Bond v. Wool*, 107 N. C. 189; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984. The street consists of the carriage way and sidewalk, the enjoyment and use of both of which are recognized by the courts as the right of the abutting proprietor, of which he cannot be deprived by the municipality, or even by the legislature, without his consent, and without adequate compensation. *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548; *State v. Brown*, 109 N. C. 805. A municipal corporation, though authorized by statute to widen streets, can do so only where some mode of ascertaining the damage done by taking additional land, and of enforcing its payment is prescribed by law, and pursued by the corporation. On the other hand, a city or town has

no right to sell a portion of a street in front of an abutting owner, or to diminish its width in any way, without compensation, and contrary to his wishes. *Moose v. Carson*, *supra*. It being conceded that the abutting owner has a qualified property in the street on his front, the only safe criterion by which to test the justice of a claim to any specified right is the consistency or inconsistency of its exercise with the use of the highway by the municipality for corporate purposes. The original owner of the soil surrenders his absolute property in his frontage for a qualified one, in full contemplation of the authority of the corporation, whenever it may become necessary, for public purposes either to elevate or lower the level of the street, though he may suffer some inconvenience from any alteration of the grade; and consequently it is supposed that such damage was considered when the cost of the easement was estimated and paid, or that a donation was made, subject to the contingency of suffering such loss. Guided by the principle stated, this court held that, for loss caused by excavation on embankments made in changing the grade of a street, the abutting owner could not recover, unless the injury was directly due to want of skill or negligence in the excavation of the work. *Meares v. Wilmington Comrs.* 81 N. C. 78, 49 Am. Dec. 412; *Wright v. Wilmington*, 93 N. C. 156. In such cases it was considered that the alteration in the highway was not a new taking, but a use of it that was in contemplation at the time when the easement passed to the public. *Cooley, Const. Lim.* p. 671; 2 Dill. Mun. Corp. § 992, and *note*. Even this rule, however, has proven so oppressive in practice as to lead, in some of the states, to the enactment of statutes and the amendment of constitutions so as to create a liability as for an original taking, when there is a change of grade, such that damage ensues to an adjacent proprietor. *Lewis, Em. Dom.* chap. 8, especially section 221. “The public,” says Mr. Lewis, “acquire no right in the use of springs in the highway, and cannot divert them for the purpose of making a public watering place. The owner of the fee cannot change the location of the road where it crosses his land. He may deposit materials on the surface of the way, plant shade or ornamental trees therein, set hitching posts, etc. . . . The public cannot place structures on the soil which have no connection with its use as a highway.” *Lewis, Em. Dom.* p. 759; *Deaton v. Polk County*, 9 Iowa, 594. “Subject to the paramount right of the public, the rights of the owner of the fee remain the same as though the public easement did not exist. . . . As against the public, he may make any use of the land which does not interfere with the use and enjoyment of the same as a highway.” *Lewis, Em. Dom.* p. 758, § 589. The learned author claims for the owner of the fee the right to plant trees in the highway, both for shade and ornament; and it cannot be denied that he acquires a qualified property in the fruit of his labors, when they grow so as to subserve his purpose. It is conceded to be the law in North Carolina that such shade trees can be cut down by a city when the grade is changed, because they are planted in contemplation of the pri-

ciple that the power to grade is a continuing one, and that, "of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge." 2 Dill. Mun. Corp. § 686, and *note*. But though a tree be planted subject to the right of the city to destroy it, in the exercise of this continuing power to improve its streets, it is nevertheless the property of the owner of the fee; and, when no change of grade is ordered, the governing authorities of the town have the right to remove it only on the ground that it obstructs the highway, and is therefore a public nuisance, or after condemnation, and the payment of compensation ascertained in a mode pointed out by law.

Mr. Wood, in his work on Nuisance (sec. 294), not only agrees with such other able and discriminating text-writers as Judge Dillon, in declaring that the adjacent owner has a property in trees planted in his front, but maintaining that the municipal authorities are responsible if they deal with them as nuisances, when in fact they do not interfere with the ordinary use of the streets and sidewalks. He says "Shade trees set in a street or highway without authority of law, which in any measure obstruct travel, are a nuisance. But they can be removed only by the owner or the public authorities, and, if they [the public authorities] remove them when they do not obstruct travel, they are liable to the owner in damages therefor." See also *Clark v. Dasso*, 84 Mich. 86. If damage can be recovered, it must, *ex necessitate*, be assessed by a jury, since it will not be contended that it is a taking in the exercise of the right of eminent domain, for which the law provides any other mode of fixing the compensation. Thus, we find that all of the leading text-writers concur in construing the decisions which I cite to sustain my view, and to have settled the principles in this country, generally, that a shade tree is the property of the abutting owner, which cannot be destroyed, as a nuisance, unless it hinders the free use of the highway by the public, and where it is not an obstruction the owner may recover damages of the authorities of a city for its wrongful removal. In treating of the power to prevent and abate nuisances, Judge Dillon says: "This authority, and its summary exercise, may be constitutionally conferred on the incorporated place, and it authorizes its counsel to act upon that which comes within the legal notion of a nuisance; but such power, conveyed in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that, as a nuisance, which, in its nature, situation, or use, is not such. . . . It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws of the city or of the state, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself." 1 Dill. Mun. Corp. § 374; *Everett v. Council Bluffs*, 46 Iowa, 66; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 498, 19 L. ed. 984; *State v. Jersey City*, 29 N. J. L. 170; *Cooley*, Const. Lim. 242, 741, *note*; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Ward v. Little Rock*, 41 Ark. 526, 48 Am. Rep. 46; 24 L. R. A.

Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634; *Horr & Bemis*, Mun. Ord. § 252.

If the destruction of the trees, complained of, is to be imputed to the defendants, it is not contended that there was any other law authorizing the act than the general authority to prevent nuisances. Whether a city acts, in such a case as this, under the general power to abate nuisances, or under special authority to remove obstructions, the rule is the same. "Power to a city, by its charter, to regulate the use of streets and alleys, and to prevent and remove obstructions from them, contemplates the preservation of actual ways against nuisances which interfere with their accustomed use, and until they have become actually open obstructions thereon, under a claim of title apparent on the face of the prosecution, cannot be punished under an ordinance in the municipal tribunal, but the rights of the parties must be determined in the public courts." 2 Dill. Mun. Corp. p. 809, § 680, and *note*; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58. While, in the exercise of the continuing authority to raise or lower the grade of streets, the law requires of the city only good faith, care, and skill, the arbitrary destruction of property, or what is equivalent to its confiscation, cannot be justified on the ground that the act was done under the honest belief that it was a lawful abatement of a nuisance, because it obstructed the highway. If the tree was property, and was not planted in contemplation of legal authority in the city, express or implied, to cut it down at will, but only in view of the possibility of its destruction as a nuisance, then, unquestionably, the plaintiff would have the right to have any disputed facts, such as the question where the tree was standing, tried by a jury, with instruction from the court as to what constituted nuisance such as the city might summarily abate. Good faith will not protect an officer who commits a trespass without the color of authority, and thereby leave remediless one whose property is destroyed without reason or necessity. Elliott, Roads & Streets, p. 521. An obstruction is defined as "anything, which, without reasonable necessity, impedes the use of the streets for lawful purposes." *Horr & Bemis*, Mun. Ord. § 230. "When adjacent owners retain the fee in the streets, the corporation has no right to destroy the trees, unless they grow within the street, or so as to obstruct traffic." Id. § 229; *Bliss v. Ball*, 99 Mass. 597; *White v. Godfrey*, 97 Mass. 472; *Tainter v. Morristown*, 19 N. J. Eq. 46; *Cross v. Morristown*, 18 N. J. Eq. 813; *Bills v. Belknap*, 36 Iowa, 588; *Essett v. Council Bluffs*, *supra*. Whether trees in a public highway are a public nuisance "is a question of fact for the jury," in all cases. *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58. If an overseer cuts down a tree which does not obstruct or interfere with the public use of the road, he is a trespasser, and, if he does so maliciously, is liable to exemplary damages. *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678.

The case of *Chase v. Oakley*, 81 Wis. 818, 15 L. R. A. 558, may appear upon first view of it, to be in conflict with the general current of authority, and with the cases we have cited,

some of which are collated in a note appended to it; but, upon a closer examination, it will appear that the opinion rests upon the ground that the common council are, by special provisions of the charter, to "protect the streets from any encroachment or injury," and "to prevent, prohibit, and cause the removal of all obstructions in and upon all streets in said city." The charter of the city of Greensboro provides for condemnation of property for the purpose of changing or widening the streets already in existence, and laying out new ones, but we find no special warrant for assuming the judicial function of declaring any obstruction in the whole street a nuisance. If the legislature had constituted the mayor and commissioners, or the street committee selected by them, a special court, and had empowered them to remove obstructions which, in their judgment, were nuisances, we would still have been compelled to meet the question whether the legislature could in that indirect way give the officers of a municipality with the authority to destroy such private property, and deprive the sufferer of the right to "the ancient mode of trial by jury," guaranteed to him, "in all controversies respecting property," by the constitution (art. 1, § 1), unless the trees had been planted in contemplation of an express power conferred upon the town council to clear all parts of the streets of trees. This grave question does not arise in this case, and the discussion of it is therefore unnecessary. When the point shall be properly presented, it will be necessary to determine whether the legislature can dispense with the right of trial by jury in any case involving the title to property, when the litigant could have claimed it under the ancient common law.

It seems that in the recent case of *O'Connor v. Telephone Co.*, 18 Can. L. T. 836, the appellate court of Nova Scotia has held that the rights of the abutting owner of the fee on a street extended to the middle of the highway, in his front, and that he had a property in ornamental shade trees in the street, in his front, and could maintain an action against a telephone company for damages (to be assessed, of course, by a jury) for mutilating such trees. Says Lawson (Rights, Rem. & Pr. vol. 3, p. 1758): "Adjacent land owners may lawfully use the space between the carriage path and sidewalks for the growing of trees for ornament or use. Trees thus situated are in no sense nuisances, but private property." But the right of property stands upon the more substantial ground of inexorable reason. Since the city does not appropriate the space between the sidewalk and the street for corporate purposes, and the residuary right of the owner of the fee empowers him to use it. Even where the right is in the dominant owner to extend its actual dominion, if it become necessary, no such summary destruction without reason is permitted. Where the fee is condemned for a railway for a distance of 100 feet on either side of the track, while the corporation may build an additional track, if requisite for the transaction of its business, at any time during the period of its corporate existence, or may erect structures for corporate purposes upon the land appropriated, yet if the adjacent owner plant and raise corn within the limit of 100

feet, but not upon the portion of the way actually occupied by the company, the law neither imposes the duty, nor confers the power, on the latter, to cut down such corn, as a nuisance, because it may obstruct the view of the engineer, and prevent him from seeing cattle approaching the line of railway. *Ward v. Wilmington & W. R. Co.* 109 N. C. 858, 118 N. C. 566.

On the other hand, the corporation may, in that case, remove trees, because that is authorized by statute, lest they become a nuisance, by falling upon the track. But the facts are found, and in our opinion the tree was not shown to be a public nuisance, subject to summary removal by the city, but was the property of the plaintiff, for the willful destruction of which an action for damages lies against the trespassers, and those under whose authority they may have acted. There was no pretense of a condemnation for a public purpose, or of authority to take, if it was private property, other than in the mode pointed out in section 60 of the charter,—upon a valuation by three freeholders. There was no evidence that the trees were unsound, so as to endanger the safety of travelers on the highway, and there was no provision of law, in or out of the charter, authorizing the cutting down of trees located on the margin of the sidewalks, or at any point on the streets, to avert danger to the public. The authority to make improvements, given in a charter, like that to widen the streets, was coupled with the condition that commissioners should be appointed to assess any damage that might be caused by the changes made. In the case at bar the court found as a fact that the trees did not obstruct the sidewalk, and, in effect, that they were not nuisances, and, therefore, that there was no authority for destroying them. When such shade trees neither impede the passage of vehicles, nor unreasonably obstruct the sidewalks, the municipal authorities may enact general ordinances to protect them, even against wanton injury or destruction by the owner, but are not empowered, by orders or by laws, to cause them to be removed, as nuisances, when, in law and in fact, they are not nuisances. *Horst & Bemis, Mun. Ord. §§ 252, 229; McCarthy v. Boston, 135 Mass. 197; Wood, Nuisances, § 294.* An adjacent owner, notwithstanding an order or ordinance of municipal authorities authorizing it, is entitled to recover damages for any invasion of his individual rights, such as the destruction of shade trees in his front, when they do not interfere with the use of the highway for any public purpose whatever. *Horst & Bemis, Mun. Ord. § 7; Bliss v. Ball, supra; Wood, Nuisances, § 294; Elliott, Roads & Streets, p. 536.* And the destruction of shade and ornamental trees located in a public highway in front of the premises of the abutting owner has been held to be an irreparable injury to him, and for that reason has been enjoined, where their removal was not necessary to the enjoyment of the easement by the public. *Tainter v. Morristown, 19 N. J. Eq. 46; Cross v. Morristown, 18 N. J. Eq. 805; Bills v. Belknap, 86 Iowa, 583.* "As owner of the fee," says Elliott (Roads & Streets, 536), "subject only to the public easement, the abutter [who owns the fee] has all the ordinary remedies of

the owner of a freehold. He may maintain trespass against one who unlawfully cuts and carries away the grass, trees, or herbage, and even against one who stands upon the sidewalk in front of his premises, and uses abusive language towards him, refusing to depart." *State v. Davis*, 80 N. C. 351.

If the shade trees in front of the plaintiff's house were not a nuisance at common law, nor so declared by statute, no ordinance or proceeding of the municipal authorities, or their agents, could justify their destruction, in the face of the objection of the plaintiff's husband. *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242; *Tates v. Milwaukee*, *supra*; 1 Dill. Mun. Corp. §§ 874-879, *Eberett v. Council Bluffs*, 46 Iowa, 66; *Cooley*, Const. Lim., *supra*; *Northwestern Fertilizing Co. v. Hyde Park*, *supra*.

The three oak trees cut down by the street force, in obedience to the command of the defendant's street committeemen, King and Scott, after securing the approval of Mendenhall, of the same committee, stood at the outer edge of a sidewalk eight feet wide, and within the line of the curbing, and, being directly in front of the plaintiff's dwelling house, contributed to the comfort of its inmates. The space between the trees and the inner line of the sidewalk was not uniform in width. It averaged eight, but was at no point less than seven, feet in width, and was found by the court to be sufficiently wide to afford "room for persons to pass in the usual manner without inconvenience." The judge below found, also, that "the leaves on said trees obstructed the rays of the sun, and so shaded the street as to cause it to be and continue damp for a portion of the time." The finding excludes the idea that the trees were a nuisance, in obstructing the sidewalk; and the mere fact that the shade was so dense as to cause occasional dampness under it is not satisfactory evidence that they so interfered with the use of the street as to constitute them a nuisance. *Bliss v. Ball*, *supra*. It is a matter of common observation that all trees which subserve the purpose of shading the ground prevent the earth, within the line of their shadows, from becoming dry so soon as the surrounding space. And the commissioners were not authorized, because they had created a stench by filling a hole near the trees with green limbs, to declare them a nuisance, as the cause of the offensive odor, since the court finds that, after removing them, the municipal authorities, by filling the hole with stone, put the street in good condition, and that this remedy could have been effectually used without molesting the trees at all. So far from showing that the removal was demanded for the benefit or convenience of the public, the conclusion of fact submitted by the court sustains the contention of the plaintiff, that, being within the curbing (but seven feet or more from the fence), the trees neither obstructed the sidewalk, nor the twenty-three feet of carriageway; that the hole could and would have been filled with stone or earth; and that, if the dampness under the dense foliage of the trees made them a nuisance, every shade tree that subserves the purpose of planting it, if it casts a shadow upon a highway, would be liable to destruction at the arbitrary bidding of any agent of a town who might be intrusted with the duty of re-

pairing its streets. *Lawson, Rights, Rem. & Pr.* p. 1758, § 1088. The statutes which in some states protect such trees are in affirmance of the principle that the owner surrenders to the public only such dominion over the land as he could not exercise without interfering with the easement of the public for use as a highway. The admitted right of an abutting owner, under the common law, to the herbage, and to sue, or sometimes cause to be indicted and punished criminally, for a forcible trespass committed on the highway in his front, is an illustration of this well-established principle.

It is urged, however, on behalf of the city of Greensboro, that it cannot be held answerable for the trespass committed under the direction of the defendants King and Scott, because it appears that "no action was taken, or order made, by the board of aldermen, in respect to the removal of the trees, nor was any report made by the street committee to the said board with regard to their action in the premises." It was provided in section 12, chapter 1, of the City Ordinances, that a number of committees, composed of four aldermen each, should be appointed from the members of the board to take charge of certain departments of the municipal government; and among them was that composed of defendants King and Scott, and Aldermen Glenn and Mendenhall, who, by the terms of the next section, were intrusted with the "control and supervision of all matters relating to the streets, sidewalks, and pumps of the city," etc. This appointment, without any further recognition of their acts, constituted King and Scott the agents of the city for the supervision of the streets, and all that could be done for the improvement and reparation of them. 2 Dill. Mun. Corp. 979 (777). "Towns, counties, villages, and cities must respond for such torts of their officers, agents, and servants as have been suffered or committed by corporate authority." *Cooley*, Torts, p. 123. As agents, the relation of the members of the committee to the town was legally the same as that of any servant to his master; and the responsibility of the municipality, as superior, is likewise governed by the rules applicable to such relation. Where a trespass is committed in the course of the employment of an agent or a servant, and is intended and believed by the trespasser to operate for the benefit of his superior, though it may be willful, such superior is none the less answerable for damages. 1 Shearm. & Redf. Neg. § 151; *Cooley*, Torts, p. 586; 4 Am. & Eng. Encyclop. Law, pp. 252, 253, note 1; *Johnson v. Barber*, 10 Ill. 425, 50 Am. Dec. 416; *Limpus v. London General Omnibus Co.* 1 Hurlst. & C. 526. "If, in exercising its power to open or improve streets, or to make drains or sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass, or take possession of private property, without complying with the charter or statute, the corporation is liable in damages therefor. In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer, or for trees destroyed and injuries done by them." 2 Dill. Mun. Corp. § 974 (773). "Where the working and repair of streets is treated [as in North Caro-

[ina] as a municipal duty, and the officer in charge as a corporate, in distinction from an independent, public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized corporate improvement or work for them, the doctrine of *respondet superior* would apply." Id. §§ 979 (777), 980 (778), 988. If, then, the city was acting through the members of the committee, as its agents, it was in the exercise of its ministerial or corporate, as distinguished from its judicial, legislative, or discretionary, duties, and was therefore answerable, as superior, for such acts, done in the course of their employment, as were manifestly intended to inure to the benefit of the corporation. *Moffitt v. Asheville*, 108 N. C. 287; *Cooley*, Torts, pp. 619, 622. The implication from the finding of the court, if that was necessary, is that the committee "concurrent in the conclusion that the trees should be removed" in order to improve the street, and that King and Scott, as aldermen, intended to benefit the corporation when they directed the street force to do the work. They then sustained the same relation to the municipality that a conductor or other agent bears to a quasi public corporation, such as a railroad or street-car company; and it is well settled by numberless cases that though the agent or servant of such corporations may willfully commit a trespass in the course of his employment, yet if the act is done with the belief that it will benefit the principal or master, and the intention to advance its interest, the principle of *respondet superior* applies. *Moore v. Fitchburg R. Corp.* 4 Gray, 465, 64 Am. Dec. 88; *Shea v. Sixth Avenue R. Co.* 62 N. Y. 180, 20 Am. Rep. 480; *Seymour v. Greenwood*, 6 Hurlst. & N. 859; 1 Shearm. & Redf. Neg. § 150; *Cooley*, Torts, pp. 538-537; *Lampus v. London General Omnibus Co. supra*; *Pollock*, Torts, p. 15.

But not only is the corporation responsible for acts done by its agents in the execution of the duties assigned to them, but a joint action for the tort will be against the company and the servant. *Hewitt v. Swift*, 8 Allen, 420; *Johnson v. Barber, supra*; *Wright v. Wilcox*, 19 Wend. 843, 82 Am. Dec. 507. The law is founded upon the highest conceptions of natural justice. It is impracticable for a mayor and board of commissioners to move in a body along every street of a city, and sit in a judgment upon the proposed removal of a tree. A city must work through agents constituted by its governing authorities; and, when an agency is intrusted to a street committee there is no principle of law, reason, or justice that will relieve the municipality of liability for their torts, when engaged in the business intrusted to it, because the committee did not desist on an objection to the removal of the tree, stop the street force from work, and call a meeting of the council to authorize or ratify the act. The town, when engaged in the improvement of its streets, or in the performance of any act intended for the benefit of the municipality, is liable both for the negligence and willful torts of its agents, just as when an officer or servant of a quasi public corporation commits little overt acts, or negligently omits to discharge his duty, he subjects the company that he represents to liability for consequent injury.

Moffitt v. Asheville, supra; *Cooley*, Torts, p. 619. If a director of a railroad company were appointed to act as conductor, the company could not escape liability for removing a passenger on the ground that by disorderly conduct he had been guilty of nuisance, when in fact his acts did not justify the conductor in ejecting him. The committee were not the less agents of the town council because they were selected from the body itself. It is a well-known fact that the governing authorities of our towns usually, if not universally, intrust the management of improvements, not involving the condemnation of private property, to committees selected from their own bodies. To absolve the towns from liability for a trespass committed by such agents, or under their direction, for the benefit of the corporation, when, in many cases, such committeemen are irresponsible primarily, would be to countenance oppression, and, in some instances, what would be equivalent to confiscation. An ordinance provided that the street committee "shall have control and supervision of all matters relating to streets, sidewalks, and pumps, and shall determine the amount of labor and material to be used, . . . and shall report to the board from time to time, and perform the duties imposed upon them by the board of aldermen." Would the ordinary regulation that a conductor should report to the president of the company, or superintendent, the fact that he had ejected a passenger, excuse the company from responsibility for injury caused by a wrongful expulsion? When acting for its own benefit, a municipality stands upon precisely the same footing, as to liability for the acts of its agents, as does a quasi public corporation. See *Moffitt v. Asheville, supra*, and authorities cited. Suppose such a corporation should, by means of a by-law, declare the conductor, engineer, baggage master, and flagman a committee to have control of the question of ejecting drunken or disorderly passengers, or such as failed to secure tickets or pay fare. Would the corporation be allowed to evade liability for the wrongful, willful and violent expulsion of a passenger by the conductor and baggage-man after consulting the flagman, because the engineer did not approve the act till it was communicated? *Cooley*, Torts, p. 539. To apply the same principle to such agencies as govern in questions of the right of the directors of private corporations to bind their companies would be the entering wedge to the destruction of all corporate liability for the torts of agents and servants. Means would be found, by ingenious regulations, to leave the public at the mercy or caprice of irresponsible and reckless agents and servants, were the possibility of putting the corporation behind such bulwarks once suggested. The right to trial by jury is none the less a constitutional right because juries are sometimes misled by prejudice. The corrective for such an evil, if it exists, is the enactment of statutes requiring greater care in their selection, not judicial legislation restricting the operation of the original law. Says *Judge Cooley* in his work on Torts (page 122): "Towns, counties, villages, and cities must respond for such torts of their officers, agents,

and servants as have been committed or suffered by corporate authorities." "It is not merely for the wrongful act that the agent or servant is directed to do, but the wrongful act he is suffered to do, that the city is responsible." *Id.* p. 584. It was the duty of the city to see that its agents were attentive and prudent, and so conducted its business as not needlessly to injure others. *Com. v. Nichols*, 10 Met. 259, 43 Am. Dec. 432. The law presumes that the city looks after its street force; and the fact that it was engaged, two or three days after the order was given by Scott and King, in removing the trees, is evidence that the mayor and commissioners knowingly suffered the removal to be made. They knew, or ought to have known, what these paid laborers were doing. I think, therefore, that there was error in the ruling of the court below that the action could not be maintained either against the city, or the two aldermen in their individual capacity. The two aldermen were guilty of a willful trespass, for which the corporation became liable, because it was committed in the attempt to discharge their duty

to the corporation, as agents named in the ordinance, and with the intent to improve the streets. The act being willful, the agents were not relieved of responsibility because the principals were made answerable. The committee were not a corporation, but were the authorized agents of the town; and it was not essential that they should meet like stockholders, at an appointed time or place. The question is not whether they could bind a municipality by a contract, but whether, as its servants acting within the line of duty prescribed for them, they could make the city a joint tortfeasor with them. It was sufficient, I think, that a majority agreed upon a certain course of conduct, and their purpose was carried out by the laborers at the bidding of two of the number, and they were not acting in strict conformity, as stockholders, to the terms of a charter, but were agents carrying out a common purpose to cause a trespass to be committed.

MacRae, J.:

I concur in the above dissenting opinion.

MARYLAND COURT OF APPEALS.

STATE of Maryland, for Use of Isabel Collins
HARTLOVE *et al.*, *Appts.*,

M. FOX & SON.

(.....Md.....)

(June 21, 1894.)

APPEAL by plaintiffs from a judgment of the Superior Court of Baltimore City in favor of defendants in a proceeding brought to compel defendants to pay damages for the death of John W. Hartlove, which was alleged to have resulted from their wrongful act. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. W. L. Marbury and William L. Hodge, for appellants:

The right which these plaintiffs claim is the same right which the person actually injured in such a case would undoubtedly have. The plaintiffs do not pretend that the deceased had any superior rights to the rest of the public by reason of his relationship to W. H. Hartlove, but his rights are certainly no less than those of other persons.

1 Wait, Act. & Def. pp. 138 *et seq.*; *Scott v. Shepherd*, 2 W. Bl. 892; 1 Smith, Lead. Cas. 210; Benjamin, Sales, 6th ed. § 431, 2d ed. § 431, *note p.*

When this contract was made between Fox & Son and Wm. H. Hartlove, was the vendor under no obligation except his obligation to the vendee? Did he not invade the rights of the public when he set out into the community an animal which he knew was dangerous to every human being brought in communication with her—when he increased that danger by falsely misrepresenting the character of the mare's sickness?

1. The sale by false representations to an innocent purchaser of property known to the seller to be imminently dangerous to human beings and likely to cause them injury renders the seller liable for resulting injury not only to the purchaser but to such persons as may in ordinary course of events be called upon to take charge of the property for him.

2. Glanders is not a disease so frequently taken by man as to permit the court to take judicial notice that it is imminently dangerous to human beings.

3. The fraudulent sale of a horse by one who knows that it has a contagious disease such as glanders to one who is ignorant of the fact will render the seller liable for the death of one who contracts the disease while in charge of the horse for the purchaser only in case such death is a natural and probable consequence of contact with the horse.

4. A declaration in an action for causing the death of a person by contact with a diseased animal fraudulently sold by the defendant should allege that the death was the natural and probable consequence of contact with the animal.

NOTE.—The subject of negligence in respect to particularly dangerous things whether sold to or left in the way of people who do not know of the danger is essentially a modern one although it is clearly a mere special development of the general doctrine of negligence, making the duty correspond with the danger.

For negligence in respect to guns and similar

things, see *Chaddock v. Plummer* (Mich.) 14 L. R. A. 675, and *note*.

For liability of seller or manufacturer of dangerous articles to third persons, see *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and *note*; and *Heizer v. Kingland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821.

As to killing horse infected with glanders, see *Miller v. Horton* (Mass.) 10 L. R. A. 114.

There are any number of precisely analogous cases, in which this point has been decided.

Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Norton v. Sewall*, 106 Mass. 148, 2 Am. Rep. 208; *Davidson v. Nichols*, 11 Allen, 519; *McDonald v. Snelling*, 14 Allen, 290, 93 Am. Dec. 768; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Fleet v. Hollenkemp*, 13 B. Mon. 219.

The American courts hold that this class of cases are wrongs because they violate a duty owed to the public, and not owing to the violation of any duty imposed by contract.

1 Wait, Act. & Def. 186.

The English view is different.

The stranger to the contract, to recover must show that his injury was the result of a false representation, "made with the intent that it should be acted on by such third person."

Benjamin, Sales, 6th ed. p. 380.

The American rule is criticised in the leading English case.

Heaven v. Pender, L. R. 11 Q. B. Div. 514.

There is very good authority that throws doubt on Mr. Benjamin's view of the law of England, if taken without qualification.

1 Wait, Act. & Def. 188.

The only question possible to raise in this case is this: Was the death of John W. Hartlove caused by the wrong of Fox & Son? Does this declaration show that this wrong was the proximate cause of this injury, as the law views proximate cause?

If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent.

Cooley, Torts, 2d ed. p. 76.

To entitle a wrongdoer to exemption, he must show not only that the same loss might have happened, but that it must have happened if the act complained of had not been done.

Davis v. Garrett, 6 Bing. 716; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 187; *Annapolis & E. R. Co. v. Gann*, 89 Md. 148; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242, 59 Am. Dec. 72.

The first cause which the declaration sets out as leading to the death of John W. Hartlove was the fraudulent sale by Fox & Son of an animal which, as they knew, was dangerous to every human being brought in contact with it. Now, have the remaining events set out followed naturally from this first one, or has the chain been broken by some supervening cause?

Addison, Torts, 6th ed. 48 *et seq.*

The next event in the chain was that the purchaser believed the false statements of the defendants, bought the mare and carried her away. There is certainly nothing in this except the natural consequence of the first wrongful act.

Clark v. Chambers, L. R. 8 Q. B. Div. 327; Pollock, Torts, p. 83.

The last event was that the purchaser took the horse off to be attended to for him by another person, who was killed. Is this anything unusual?

24 L. R. A.

Vandenburgh v. Truax, 4 Denio, 464, 47 Am. Dec. 268.

The intention of this fraudulent vendor is absolutely immaterial in this case.

Cooley, Torts, 2d ed. p. 380; Pollock, Torts, pp. 28, 29.

Mr. T. R. Clendinen, for appellees:

In *George v. Skieington*, L. R. 5 Exch. 1, which was an action by the wife of a man to whom a druggist had sold a compound for the use of his wife, with knowledge that it was to be so used by and for her, and injury having resulted, for which she brought suit, Piggot, J., said, page 4: "The case, no doubt, would have been very different if the declaration had not alleged that the defendant knew for whom the compound had been intended." And, again, goes on to say: "Suppose, for example, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could never be contended that the chemist was liable."

Applying these principles to the present case, we insist that nothing has been alleged entitling appellants to recover.

No action growing out of the contract can be sustained (by a third person) and except by parties or proxies.

Longmeid v. Holliday, 6 Exch. 761.

A volunteer (spectator in that case) cannot recover for an injury.

Scanlon v. Wedger, 16 L. R. A. 395, 156 Mass. 462.

As illustrating the distinctions in reference to losses of this character, and as showing that appellants have no claim which can be sustained against appellees,—

See *Mullett v. Mason*, L. R. 1 C. P. 559; *Fisher v. Clark*, 41 Barb. 329; 2 Shearm. & Redf. Neg. § 638.

Assuming that defendants made false and fraudulent representations to the vendee, which, however, is not alleged, still deceased's family can have no action, because these representations were not made to deceased, nor with the direct intent that he should act upon them in the manner which occasioned his death.

Benjamin, Sales, 6th ed. § 481; *Langridge v. Levy*, 2 Mees. & W. 519; in error, 4 Mees. & W. 387; *Barry v. Croakey*, 2 Johns. & H. 1; *Peck v. Gurney*, L. R. 6 H. L. 877; *Hosegood v. Bull*, 36 L. T. N. S. 617.

Where the driver of a coach whose employers were under contract to horse it along a certain line, was injured by its breaking down, from a latent defect in its construction, it was held that he could not recover against the defendants who had supplied the coach under contract with the postmaster general.

Winterbottom v. Wright, 10 Mees. & W. 109. See also *Collis v. Selden*, L. R. 8 C. P. 495; *Rice v. Forsyth*, 41 Md. 403.

In *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, Brett, M. R., laid down this principle: "Whenever one person supplies goods or machinery or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with re-

gard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing." Even this principle would not cover the present case; yet the court refused to concur in it, considering it not supported by the decisions.

The fact that the sale may have been unlawful does not increase plaintiff's rights.

Ill v. Balls, 2 Hurlst. & N. 298.

Boyd, J., delivered the opinion of the court:

A demurrer to the declaration filed in this case was sustained by the superior court of Baltimore city. Judgment was entered on the demurrer and an appeal taken to this court. It, therefore, becomes necessary for us to ascertain what facts are alleged as the basis of the suit—they being admitted by the demurrer to be true.

The plaintiffs allege that the defendants are dealers in horses, and proprietors of a livery and sale stable, and had in their possession a mare which was "affected with a contagious and infectious disease called 'glanders,' a disease which is not only fatal to horses, but which may easily be communicated to human beings who happen to be brought into contact with horses suffering therefrom;" that the defendants, well knowing that the mare was suffering from said disease, the dangerous character of the disease, and that it was dangerous to human life, in disregard of the statutes of this state relative thereto, negligently and willfully exposed the mare for sale, and did sell her to one William H. Hartlove for the sum of \$75; that said William H. Hartlove, not knowing of the true condition of said mare, or that she had said disease, but relying upon and believing the assurance given him by the defendant that she was suffering from nothing worse than a bad cold, paid for said mare, took her away and placed her in another stable where she could be, and, has in fact (been), attended to and treated by John W. Hartlove, a brother of William H. Hartlove, the husband of one of the equitable plaintiffs, and the father of the others. They further allege that John W. Hartlove, "while attending to said mare, and using due care, and not knowing that she had said disease, contracted the same and died."

Article 67, section 1, of our Code provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action of damages, notwithstanding the death of the person injured, etc."

We are therefore to determine whether under the facts admitted by the demurrer John W. Hartlove, if he had survived, could have recovered under this declaration. It is said in Benjamin on Sales, section 481, that

"a man may make himself liable on an action founded on tort, for fraud or deceit or negligence, in respect of a contract, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence," although this statement is somewhat qualified in the later edition of that work.

The main difficulty consists in applying the principles applicable to such actions to the facts of the particular cases.

We will therefore examine into some of the authorities which have been brought to our attention to ascertain what the various courts have determined, with a view of applying what we deem to be the correct principles to the circumstances of this case. The case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is one of those mainly relied on by appellants.

It has probably gone further than most of the cases, and has been somewhat criticised by some authorities. It must be conceded that the facts of that case differ in some material respects from the one we now have under consideration.

It very clearly decides, however, that the fact that the plaintiff was not a party to the contract with the defendant, but purchased the article in question from a druggist, who had bought it from another druggist, the vendee of the defendant, did not preclude a recovery. The action was founded on the negligence of the defendants, whose agent had negligently labeled a jar of what was in fact belladonna "½ lb. dandelion," etc. By reason of this negligent labeling the intermediate vendors, as well as the plaintiff, were led to believe that it was the extract of dandelion, which was harmless, and did not know it was belladonna, which was poisonous. The court, on page 409, said: "In the present case, the sale of the poisonous article was made to a dealer in drugs, and not to a consumer; the injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as actually happened. The defendants' negligence put human life in imminent danger."

The defendants' duty arose out of the nature of his business and the danger to others incident to its mismanagement."

On page 410 it is said: "In *Longmead v. Holliday*, 6 Exch. 761, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract."

As the defendant was the cause of the injury to the plaintiff, without any intervening negligence of others, and it was "an act of negligence imminently dangerous to the lives of others," he was very properly held liable, although no fraud was proven or alleged.

In *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 548, it was held that the vendor of an

article of his own manufacture is not liable to one who uses the same, with the consent of the purchaser, for injuries resulting from a defect therein, unless such article is in its nature "imminently dangerous."

See also *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; in *Davidson v. Nichols*, 11 Allen, 514, it was held that the sale of an article in itself harmless, and which only became dangerous by being used in combination with some other article, without knowledge by the vendor that it was to be so used, did not make him liable to the purchaser from the original vendee for an injury sustained by him while using it in combination with the other article, notwithstanding it was different from that which was intended to be sold. The facts of that case did not disclose any duty or obligation which rested on the defendant toward the plaintiff in the sale of the article. The court said: "We know of no duty or principle of law by which a vendor of an article can be held liable for mistakes in the nature or quality of the article arising from his carelessness and negligence, which causes loss or injury to other persons than his immediate vendee, when there has been no fraudulent or false representation in the sale, and the article sold was in itself harmless; especially when the sale is made without any notice to the vendor that the article is bought for a third person," etc.

In *McDonald v. Snelling*, 14 Allen, 294, 92 Am. Dec. 768, the court said: "When a right or duty is created only by contract, it can only be enforced between the contracting parties. But when the defendant has violated a duty imposed on him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. . . . An action can be maintained only when there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and secondly, when it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omissions complained of."

In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, the court decided that where the defendant sold naphtha to a retail dealer to be sold by him to be used in lamps for illuminating purposes the defendant knowing it to be explosive and dangerous to life when so used and that the retail dealer's purpose was to sell the same, and the latter sold it to the plaintiff without either of them knowing its dangerous qualities, he was held liable and was bound to compensate, as a natural and probable consequence of his unlawful act, that it might explode or ignite and injure an innocent purchaser or his property and must answer in damages for such a consequence if it should come to pass. It was held in *Jeffrey v. Bigelow*, 18 Wend. 518, 28 Am. Dec. 476, that the sale of animals which had a contagious disease, known to the vendor but not to the vendee, was a fraud. This is approved of in *Cooley on Torts*, 1st ed. 481, where it is also said that the fraud would not

only be more censurable, but more clearly actionable, if that which is exposed to injury by the concealment is the health or life of human beings. See also *Wood, Nuisance*, § 146.

Hill v. Balls, 2 Hurlst. & N. 299, is in conflict with *Jeffrey v. Bigelow*, *supra*, so far as holding the concealment of the contagious disease to be a fraud, but it does not go to the extent of deciding that if in point of fact there was actual fraud or misrepresentation the vendor would not be responsible for all consequences which naturally resulted from the fraudulent sale. In the cases of *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 339, and *George v. Skivington*, L. R. 5 Exch. 1, the defendants sold the respective articles for the use of the parties injured, knowing that they were to be so used by them and hence they present some different features from the case at bar.

Such cases as *Winterbottom v. Wright*, 10 Mees. & W. 109, and *Collis v. Selden*, L. R. 3 C. P. 495, are in harmony with *Loop v. Litchfield*, and *Loose v. Clute*, above referred to.

The defendants in those cases owed no duty to the plaintiffs on account of the respective contracts, and the articles sold and the work done were not of such a character as to be necessarily dangerous to those using them or being where they were, and hence they were not bound either by contract or by any considerations of public policy or safety. *Farrant v. Barnes*, 11 C. B. N. S. 553, is to the same effect as *Thomas v. Winchester*, and *McDonald v. Snelling*, as it was decided upon the principle that a man who delivered an article which he knows to be dangerous or noxious to another person without notice of its nature and qualities is liable for any injury which may likely result, and which does in fact result therefrom to that person or any other who is not himself informed. In *Heaven v. Pender*, L. R. 11 Q. B. Div. 503 Cotton, L. J., in delivering the opinion of the majority of the court, and in declining to concur in all the principles enunciated by the master of rolls, said: "I no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to such an instrument or thing, is liable for injury caused to others by reason of his negligent act."

The appellee has cited Benjamin on Sales, ed. 1888, *Barry v. Croskey*, 2 Johns. & H. 1, and other authorities to establish the principle that a false representation made by one person to another, upon which a third person acts, and so acting, was injured, does not give such third person a right of action, unless such false representation was made with the intent that it should be acted upon by him in the manner that occasions the injury or loss. That may be a correct doctrine as far as it goes, as established by the English courts, but we do not understand it to be the law as settled by the courts of this

country, unless it be taken with the further qualification that if the act done violates a duty owed to the particular person injured or to the public the defendant will be liable to a third person. We are not prepared to announce as the law of this state that a vendor can, by means of false representations as to the character and condition of the thing sold, induce his vendee to purchase it from him, thereby causing him innocently to subject a third person to the injury which naturally comes from coming in contact with the thing purchased, and still in all cases excuse liability to such third person, unless the latter can establish that such false representations were made with direct intent of their being acted on by him in the manner that occasions the injury.

We have referred to a number of cases which present various phases of such questions as may reflect upon the one before us. Without deeming it necessary to pass upon all of them, or to go to the full extent that *Thomas v. Winchester* has gone, we are of the opinion that the authorities and a proper regard for the protection of innocent persons fully justify us in the conclusion that if a vendor sells any property, which he knows to be imminently dangerous to human beings and likely to cause them injury, to an innocent vendee who is not aware of the danger and to whom false representations have been made as an inducement to the sale, he may under proper allegation and proof be held responsible not only to the vendee but to such person or persons as the vendee may in the ordinary course of events call upon to take charge of the property for him.

It only remains for us to determine whether the allegations made in the declaration bring this case within the above rule.

It is true that it alleges that the defendants knew that the disease of glanders was dangerous to human life, and that it may be easily communicated to human beings who happen to be brought into contact with horses suffering therefrom. It does not, however, allege that there is any imminent or serious danger of human beings contracting the disease. The allegation that "it may easily be communicated to human beings is not sufficient, being too indefinite and general to bring the case within what we deem to be the correct principle applicable to such cases. The declaration should allege not only that the disease was imminently dangerous, or something to that effect, but the natural or probable consequence of human beings coming into contact was that they would contract it. Glanders is not a disease so frequently taken by man, as to permit the court to take judicial notice of its character. Instances are probably very rare where they have contracted the disease. It may be true that if the disease is taken by a man his life will be in great danger, but is there great or imminent danger of him getting it by simply coming in contact with it? Is that the natural and probable result to be expected? The declaration must not leave to

conjecture or implication anything that is material.

In such cases as *Thomas v. Winchester*, *supra*, the defendants were held liable for the negligent sale of poison because the probable result and natural consequences of the use of poison is the death of or injury to the person taking it, but in cases of this character it may not follow as a necessary or probable consequence that human beings will be injured as they may come in contact with glandered animals without contracting the disease. The declaration should have presented such a case as showed that the defendant owed a duty to the deceased not to fraudulently expose him to a disease which would probably result in his injury by coming in contact with it. But it is also defective in not stating that John W. Hartlove contracted the disease as the probable and natural consequence of his attending to the mare. If his case is a rare exception and a very unusual result from there coming in contact with the disease, it would not do to hold the defendants responsible for his death.

In such a case they could not have been held to have reasonably contemplated such a result from their conduct. It would be carrying the principle too far and beyond what we believe to be authorized by the authorities. The declaration simply alleges that John W. Hartlove, while attending to said mare, and using due care, and not knowing that she had said disease, contracted the same and did die. It should have alleged that he contracted the disease as the probable and natural consequence of his being brought in contact with it or something to that effect, and it would have been proper to set out more fully John W. Hartlove's connection with the case so as to show that he was in the employ of or had been called in by the purchaser to attend to or treat the animal. For although we think it can be gathered from the declaration that John W. Hartlove was acting for his brother, and was not a mere volunteer or intermeddler, it is not very explicit in that respect. What we have said above concerning the right of one not a party to a contract, to sue, has been on the assumption that the declaration does show that John W. Hartlove was attending to the mare at the instance of his brother, and for that reason we think the plaintiff could sue the defendants, provided the circumstances were such as to justify it and proper allegations were made, as we do not mean to decide that any third person, without his being in some way connected with the purchaser, could sue.

Being of the opinion that the declaration has not made out such a case as calls upon the defendants to plead, we think the demurrer was properly sustained, and will therefore affirm the judgment, but we will remand the case so that the plaintiffs can amend the declaration if they see proper to do so.

Judgment affirmed with costs and cause remanded.

VERMONT SUPREME COURT.

Jerome F. MANNING

v.
Benjamin F. LEIGHTON.

(85 Vt. 84.)

1. The settlement of an estate in a foreign jurisdiction will not be held to bar a claim against the administrator arising after the death of the deceased upon a showing only that a claim against an estate must be filed within a certain time after the issue of letters and that notice was given the claimant but no claim was filed, since ordinarily those referred to as creditors of an estate are persons holding claims against the deceased in his lifetime and the requirements as to the presentation of claims do not ordinarily refer to liabilities incurred by the administrator.
2. The provisions of the Act of Congress of June 5, 1838, re-establishing the court of Alabama claims and authorizing the rendition of judgments in the mode and subject to the conditions, limitations, and provisions of the Act of 1874, originally establishing such court, revives the provision that the court shall on motion allow the compensation of attorneys and enter it as part of its judgment and that all other liens upon the judgment shall be of no effect.
3. The right of an attorney to assert a lien upon a recovery on a claim against the United States under an agreement for a conditional fee is inconsistent with

U. S. Rev. Stat., § 3477, providing that all transfers and assignments of any claim upon the United States or of any interest therein shall be absolutely null and void unless made with certain formalities, and after the allowance of the claim and the issuing of a warrant therefor.

4. Claims under the Act of Congress of June 5, 1832, for damage on the high seas by confederate cruisers and for premiums charged for war risks after the sailing of any confederate cruiser although to be satisfied out of a particular fund without further responsibility on the part of the United States, are since the money had been covered into the treasury and the right to it was to be established by legal proceedings, within the provisions of U. S. Rev. Stat., § 3477, making void all transfers and assignments of any claim upon the United States before the allowance of the claim and the issuing of the warrant so as to prevent a lien in favor of an attorney under an agreement for a conditional fee for their prosecution.
5. An attorney who has rendered services in the recovery of a claim from the United States which has finally been recovered by the administrator of the beneficiary through another attorney cannot impose a lien upon the fund where such administrator had no further notice of the lien than the mere knowledge that such attorney had rendered services in connection with the claims, nor can he hold him personally liable although he has paid over the fund to the persons entitled.
6. An attorney's lien is either a retain-

NOTE.—What assets will give jurisdiction to appoint administrator.

There are few cases in which the appointment of an administrator has been set aside because of lack of assets to sustain the jurisdiction. More cases can be found in which the assets have been held sufficient to support the jurisdiction, but the body of the law upon this subject seems to be continued in dicta, more or less authoritative, uttered during the discussion of kindred subjects.

The subject is to a large extent governed by statutory provisions. The old English law upon the subject is only to a limited extent applicable in this country, but it has nevertheless become the foundation, for most of the decisions which were not controlled by statute.

The Tennessee court in considering the effect of the English law upon the right to grant administration upon a judgment says: "We understand that law to be merely a local rule or principle of probate jurisdiction for the purpose of regulating or determining the right of granting letters testamentary or of administration as between the different diocesan or prerogative courts within that country." *Swanoy v. Scott*, 9 *Humph.* 327.

While we have here no system of superior probate jurisdiction such as was in vogue in England by which in case of assets within the jurisdiction of more than one inferior official, an official whose jurisdiction extends over both localities can grant the administration and thus save conflicts, and while the jurisdiction first assumed is either exclusive as when the assets all lie within the same state, or is practically ignored as when they are in different states, yet many of the rules formulated there and much of the nomenclature have been adopted here.

What value necessary.

In England there seems to have been no reason
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why administration could not have been granted by the ordinary in any case, no matter how small the amount, but in case of assets in more than one diocese, so as to make a conflict of jurisdiction and bring the case within the power of the archbishop, the value of the estate must have been, as finally fixed, five pounds. *Viner's Abr. Executors*, l.

In this country the rule fixing the jurisdiction of the ordinary rather than that of the archbishop seems to have been generally adopted.

In a Massachusetts case it was said that no particular amount of goods is necessary. *Pinney v. McGregory*, 102 *Mass.* 186.

So some articles of furniture and personalty, though of small value, were held to be sufficient in *Harrington v. Brown*, 5 *Pick.* 521.

A Japanese folding chair will give jurisdiction. *White v. Nelson*, 2 *Dem.* 265.

In *Nan Glessen v. Bridgford*, 83 *N. Y.* 355, jurisdiction was attempted to be founded on the existence of an old family Bible and a pair of ear-rings, but it was refused partly because of lapse of time, the time since the death of decedent being about 200 years, and partly because of failure to identify the articles as those of decedent.

So slaves are assets. *Henderson v. Clarke*, 4 *Litt. (Ky.)* 277.

And a mansion house and goods and chattels are sufficient to sustain the appointment of an administrator. *Emerson v. Ross*, 17 *Fla.* 122.

But the interest of decedent must, it seems, at least appear to have some value.

Thus proof that decedent was defendant in an action pending at the time of his death, in which his personal property was attached, and that it was afterwards surrendered and removed from the state upon the execution by a third person of an accountable receipt therefor to the officer, and that deceased was mortgagee of real estate in a mort-

ing or a charging lien. The former is based upon the possession of money or papers, and expires when the possession ends; the latter is the right to make the claim for compensation a charge upon the judgment and is not perfected until notice is given the defendant.

7. An administrator of the beneficiary of a claim against the United States appointed to meet a requirement of the court and taking charge of the case with its approval, does not by making use of proofs procured by a former attorney accept the benefit of the latter's services so as to render himself liable to pay for them where such proofs were in the files of the court and beyond the control of such attorney and he has no knowledge that the attorney whom he employs has made an arrangement with the former attorney who is relying on him to act in his interest.

8. The appointment of an administrator cannot be collaterally attacked because the petition for administration fails to allege the death of the intestate since the jurisdiction of the court did not depend upon the formality of the petition or adherence to any technical rule of the procedure.

9. He who questions the validity of an administration has the burden of establishing its invalidity where the facts of the death of the person upon whose estate letters are granted and of the existence of assets within the jurisdiction appear upon the record as judicially ascertained.

10. A general finding by a referee that a party was duly appointed administrator of the estate of a person referred to as deceased throughout the report is sufficient to

sustain the administration were nothing further appears in the record to enable the appellate court to judge of its legality.

11. A claim against the United States under the Act of Congress of 1882, providing for the distribution of the award for the Alabama depredation is property in the jurisdiction of the courts of the District of Columbia, authorizing the appointment there of an administrator of the deceased claimant.

12. The appointment of an administrator cannot be collaterally attacked on the ground that the petition falsely represented the petitioner to be a creditor of the intestate where neither the residence of a creditor within the jurisdiction nor the application of one is essential to the jurisdiction.

13. One entitled to administration who stands by with knowledge of the application of another for appointment and the fact that he is administering upon the estate, is estopped to assert his prior right and claim the appointment made to be invalid.

14. A judgment of the court of Alabama claims making an award to an ancillary administrator appointed in the District of Columbia cannot be collaterally attacked on the ground that foreign administrators were entitled to recognition.

15. An ancillary administrator is not liable to pay for services contracted for by the foreign administrators, since there is no privity between them.

(December 13, 1892.)

EXCEPTIONS by defendant to a *pro forma* judgment in favor of plaintiff entered up-

age not discharged of record, though the debt was paid, does not show sufficient assets to support administration. *Crosby v. Leavitt*, 4 Allen, 410.

So partnership real estate standing in the name of the deceased partner is not assets which will authorize the appointment of an administrator for him, if the entire assets of the firm are not enough to pay their debts and the surviving partner has made an assignment for creditors. *Shaw*, Appellant, 51 Me. 207.

But in Maine to authorize administration there must be personal estate to the value of \$20 or real estate and debts amounting to that sum. *Bean v. Bumpus*, 22 Me. 549; *Gross v. Howard*, 52 Me. 193.

Where assets are regarded as located.

For the purpose of determining the question whether or not there were assets in the dioceses of more than one ordinary so as to bring the case within the jurisdiction of the archbishop certain rules were established which are applicable upon the question, What are assets? As a general rule it may be said that everything belonging to a decedent which had any value so as to be utilized in paying debts may be regarded as assets for the purpose of granting administration. The question of the existence of such asset is seldom difficult, but the question where it may be regarded as located may often become so. In settling this question the common-law rules are generally followed.

In *Atty-Gen. v. Bouwens*, 4 Mees. & W. 191, the court in considering the liability to probate duty, said "as to the locality of many descriptions of effects, household and movable goods for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property it was established as law that judgment debts were assets where the judgment is recorded; 24 L. R. A.

leases where the land lies; specialty debts where the instrument happens to be; and simple contract debts where the debtor resides at the time of the testator's death; and it was also decided that, as bills of exchange and promissory notes do not alter the nature of simple contract debts but are merely evidence of the debts due, those instruments are assets where the debtor lives and not where the instruments are found.

The presence of assets is not necessary to the appointment of an administrator at the place of decedent's domicile at the time of his decease. *Toledo, St. L. & K. C. R. Co. v. Reeves*, (Ind.) Nov. 8, 1893.

In *Putnam v. Pitney*, 11 L. R. A. 41, 45 Minn. 242, it appeared that there was a Minnesota debtor to the New Jersey deceased debtor of a Maine creditor. The Maine creditor applied to the Minnesota courts for administration to assist him in collecting his demand, but the court said that it was better for the whole estate to be settled by the one administrator who had been appointed in New Jersey, and that so far as foreign creditors were concerned, Minnesota courts would not, by reason of the debt, appoint administration adverse to that of the New Jersey administrator.

Simple contract debts.

A debt owing to decedent is estate authorizing the appointment of administration. *Emery v. Hilbreth*, 2 Gray, 228.

A statute permitting administration, if any goods are found within the state, will include choses in action and evidence of debt. *Epping v. Robinson*, 21 Fla. 58.

In *Picquet*, Appellant, 5 Pick. 65, administration was granted to collect a debt.

The claim against an administrator who, knowing of a paper purporting to be a will of the alleged intestate, distributes the property to the

on the report of a referee in a proceeding brought to compel payment for services rendered in the prosecution of Alabama claims. *Judgment reversed.*

The facts are stated in the opinion.

Mears, Stewart & Wilds, for defendant:

The plaintiff's lien was barred by section 18 of the Act of 1874.

The Act of 1882 provided "that the court of commissioners of Alabama claims created by chapter 459 of the Laws of the 43d Congress is hereby re-established, in the manner and with the obligations, duties and powers imposed and conferred by said chapter, except as changed or modified by this Act."

In no adjudicated case has the efficacy of the statute to defeat liens been assailed.

See *Backman v. Lawson*, 109 U. S. 659, 27 L. ed. 1067; *Brooks v. Ahrens*, 68 Md. 212.

The plaintiff's lien was barred by section 3477 of U. S. Rev. Stat.

Burke v. Child, 88 U. S. 31 Wall. 441, 22 L. ed. 623; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 820; *Becker v. Sretzer*, 15 Minn. 427; *United States v. Gillis*, 95 U. S. 407, 24 L. ed. 503.

Although it has been held in several cases, notably *Brooks v. Ahrens*, *supra*, and *Taft v. Mansely*, 120 N. Y. 474, and by a divided court in *Heard v. Sturgis*, 146 Mass. 545, that the money paid under this Act of 1882 constituted a gift and did not pass to the assignee under a previous assignment in bankruptcy, yet there can be no doubt that after the Act of 1882 went into effect, the claim by force of the Act then became such a claim against

the government, as is contemplated in § 3477.

An attorney of record in the court of claims has no lien on the judgment.

Brookes' Case, 12 Ops. Atty-Gen. 216.

The defendant was not affected with notice of the alleged lien and cannot be held to respond out of his own funds to the plaintiff.

The great indulgence shown by courts to the attorney's charging lien upon judgments has never gone to the extent of charging the judgment debtor who, without notice of the lien, and without collusion, pays the judgment to the judgment creditor.

1 Jones, Liens, § 209; *Welsh v. Hole*, 1 Dougl. 238; *Read v. Dupper*, 6 T. R. 361; *Mitchell v. Oldfield*, 4 T. R. 123; *Marshall v. Meach*, 51 N. Y. 140, 10 Am. Rep. 572; *Pinder v. Morris*, 3 Cal. 165; *Heartt v. Chipman*, 2 Aik. 162; *Hooper v. Welch*, 43 Vt. 169, 5 Am. Rep. 267; *Young v. Dearborn*, 27 N. H. 324; *Courtney v. McGavock*, 23 Wis. 619.

The obvious import of the plaintiff's undertaking was to prosecute these several claims to judgment. If then, judgment was obtained by him, to have one half of the amount recovered.

If he had renounced his employer's service, without cause, before the judgment was obtained, could he have maintained a lien? Most certainly not, for he would have violated the contract upon the performance of which his lien depended.

How, then, does he stand in any better light, having by his own fault placed himself where he could no longer act as his client's attorney in that court?

next of kin, is sufficient to justify granting of letters of administration with the will annexed. *Re Nesmith*, 1 N. Y. Supp. 342.

Viners Abridgment, Executor H. says it seems it is not law that a debt without specialty shall be counted *bona* where the debtor dwells and not where the testator dwelt.

But that statement cannot now be regarded as true.

In England to found the jurisdiction of the prerogative court there must be *bona notabilia*, and for this purpose simple contract debts were *bona notabilia* at the place where the debtor resides. *France v. Aubrey*, 2 Lea, Ecol. Rep. 594.

There is a dictum in *Wyman v. United States*, 109 U. S. 654, 27 L. ed. 1068, that all simple contract debts are assets at the domicile of the debtor, to which several authorities are cited.

In considering the question of the power of the administrator to release it, the court in *Chapman v. Fish*, 6 Hill, 554, said "a simple contract debt would be *bona notabilia* in the state where the debtor lived."

In a case where the question was as to what law should govern in the distribution of some notes and bonds which had been deposited with an agent for safe keeping, the court said at common law for the purpose of administration a simple contract debt is assets where the debtor resides. *Cooper v. Beers*, 143 Ill. 26.

And a similar rule was recognized in the following cases: *Sayre v. Helme*, 61 Pa. 299; *Kohler v. Knapp*, 1 Bradf. 241; *Arnold v. Arnold*, 62 Ga. 627; *Vaughn v. Barret*, 5 Vt. 333, 26 Am. Dec. 308.

Where a debt must be demanded and paid or prosecuted, is where administration must be taken out. *Com. v. Hudgin*, 2 Leigh, 248.

The Tennessee Code, section 3043, provides that letters of administration may be granted where a 24 L. R. A.

debtor of deceased resides; where a debtor of another debtor of the deceased resides; where a suit is to be brought, prosecuted, or defended in which such estate is interested.

Interest in pending suit.

An interest in an action at law is assets. *Murphy v. Creighton*, 45 Iowa, 179.

A bond in suit at the death of the intestate will support administration. *Barclift v. Treece*, 77 Ala. 523.

A claim for which a removed executor was prosecuting an action will authorize the appointment of an administrator with the will annexed. *Hayward v. Place*, 4 Dem. 487.

A pending suit to enjoin an action at law and for an account is within a statute permitting the appointment of an administrator for goods, and the fact that the suit is finally decided against the administrator will not destroy the original jurisdiction to appoint the administrator so as to make the proceeding void and relieve the sureties from liability. *Robinson v. Epping*, 24 Fla. 237.

Action for wrongful death.

A right of action for negligent injuries causing death is assets. *Missouri Pac. R. Co. v. Lewis*, 3 L. R. A. 67, 24 Neb. 848.

Administration for the purpose of enforcing the statutory liability for killing the intestate is a matter of right. *Hartford, & N. H. R. Co. v. Andrews*, 36 Conn. 214.

But a statutory right of action for death in one state will not give jurisdiction to grant administration in another. *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177.

And in Indiana it was held that "where a cause of action for negligent killing is prosecuted for the benefit of the widow and children, the right of ac-

Hektograph Co. v. Fourt, 11 Fed. Rep. 844. *Messrs. A. P. Tupper and J. F. Manning*, for plaintiff:

Defendant had sufficient notice to put him upon inquiry as to all the facts.

Blaisdell v. Stevens, 16 Vt. 179; *Stafford v. Bailou*, 17 Vt. 329; *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 374; *Stevens v. Goodenough*, 26 Vt. 684; *Lovell v. Field*, 5 Vt. 218.

The court of Alabama claims was bound to recognize the foreign administrators and pay them the money.

Williams v. Saunders, 5 Coldw. 60; *Tompkins v. Tompkins*, 1 Story, O. C. 547; *Croudson v. Leonard*, 8 U. S. 4 Cranch, 434, 2 L. ed. 670; *The "Mary"*, 18 U. S. 9 Cranch, 126, 3 L. ed. 678; *Gelston v. Hoyt*, 16 U. S. 8 Wheat. 246, 4 L. ed. 881; *Armstrong v. Lear*, 25 U. S. 12 Wheat. 169, 6 L. ed. 589; *Elliot v. Peirson*, 26 U. S. 1 Pet. 338, 7 L. ed. 169; *Thompson v. Tolmie*, 27 U. S. 2 Pet. 157, 7 L. ed. 881.

The probate court had no jurisdiction to appoint the defendant administrator. The petitions do not allege the death of the intestate, and there were no assets in the District of Columbia.

Bachman v. Lawson, 109 U. S. 659, 27 L. ed. 1087; *Smith, Lead. Cas.* p. 669; *Freem. Judgm.* § 608; *Schouler, Exrs. & Admsrs.* §§ 80, 91, *et seq.*; *Allen v. Dundas*, 3 T. R. 125.

There was an implied promise from the defendant to pay the plaintiff's claim.

Paddock v. Kittredge, 31 Vt. 378; *Boothe v. Fitzpatrick*, 36 Vt. 661; *Cobb v. Cowdery*, 40 Vt. 25, 95 Am. Dec. 370; *Barlow v. Smith*, 4 Vt. 139; *Glass v. Beach*, 5 Vt. 172; *State v. St.*

tion is not assets which will authorize the appointment of an administrator. *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477, and this case was followed in *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420.

Specialties.

Debts by specialty are assets where they are found. *Byron v. Byron*, Cro. Eliz. 472; *France v. Aubrey*, 2 Lee, Ecol. Rep. 534; *Vaughn v. Barret*, 5 Vt. 333, 25 Am. Dec. 306.

A bond is assets where it is found and not where the debtor resides. *Beers v. Shannon*, 73 N. Y. 302.

Judgments.

Judgments are *bona notabilia* where the record is. *Vaughn v. Barret*, *supra*; *Gold v. Strode*, Carth. 148.

But in *Swaney v. Scott*, 9 Humph. 327, the court held that in cases a judgment was recovered in a foreign state and then the creditor died and the debtor removed to the state of the application, administration could be granted to recover the claim.

Corporate stock.

Shares of stock in a domestic corporation which are found within the state will give jurisdiction to grant letters of administration. *Winter v. London (Ala.)* Feb. 6, 1893.

Shares of the capital stock of a corporation are assets where the stock books are kept, transfers made, and dividends paid. *Arnold v. Arnold*, 62 Ga. 627.

Insurance policy.

The indorsee of a policy of insurance resident in the state where the insurer resides may have administration for the purpose of enforcing the policy. *Merrill v. New England Mut. L. Ins. Co.* 108 Mass. 247, 4 Am. Rep. 543.
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Johnsbury, 59 Vt. 337; *Corey v. Gale*, 13 Vt. 644; *Bennett's Vermont Justice*, p. 55.

The plaintiff had an attorney's lien upon the funds.

Harris v. Osbourn, 2 Car. & M. 228; *Nicholls v. Wilson*, 11 Mees. & W. 105; *Whitehead v. Lord*, 7 Exch. 691; *Mygatt v. Wilcox*, 45 N. Y. 806, 6 Am. Rep. 90; *Nixon v. Phelps*, 29 Vt. 198; *Williams v. Ingersoll*, 89 N. Y. 508; *Story*, Eq. Jur. 1040.

These war premiums were not claims against the United States.

Bailey v. United States, 109 U. S. 432, 27 L. ed. 988; *Spafford v. Kirk*, 97 U. S. 484, 24 L. ed. 1032; 2 Abb. Nat. Dig. 609; *Burnand v. Rodocanachs*, L. R. 5 C. P. Div. 424.

Munson, J., delivered the opinion of the court:

The tribunal of arbitration which met at Geneva, in Switzerland, under the provisions of the treaty of Washington, for the adjustment of the claims of the United States against Great Britain, known as the "Alabama Claims," awarded to the United States a certain sum, in gross, in satisfaction of its demands. In 1874 the court of commissioners of Alabama claims was established, by act of congress, to effect a distribution of the sum so awarded; but, after the satisfaction of all claims which the court was authorized to allow, a portion of the award remained undistributed, and was covered into the treasury of the United States. In 1892 this court was re-established for the allowance of claims directly resulting from damage done on the high

Two New York cases appear to conflict on this question. One holds that a claim against an insurance company is assets where the insurer is located, although the policy is in another state. *Re Miller*, 5 Dem. 381.

The other holds that the interest of decedent in a policy of insurance issued for his benefit on the life of another is assets where the policy is found. *Johnston v. Smith*, 25 Hun, 171.

Claims against government.

Under the Act of Congress of 1821, giving executors from other states the right to sue in the District of Columbia, no administration could be appointed there to receive a claim due decedent from the government so long as there was an executor having authority from the state where the decedent was domiciled at the time of his death. *Kane v. Paul*, 39 U. S. 14 Pet. 83, 10 L. ed. 341.

The mere fact that the United States has given drafts payable at the treasury in Washington and has deposited the money there to pay them does not compel administration there to collect them, but the proper officers may in their discretion pay the administrator of the domicile, and mandamus will not lie to control such discretion. *Wyman v. United States*, 109 U. S. 654, 27 L. ed. 1068.

A claim against the United States is not a local asset in the District of Columbia which will give jurisdiction for administration of an estate of a person domiciled elsewhere. *King v. United States*, 27 Ct. Cl. 629; *Rutherford v. United States*, Id. 539.

Where the sole asset was an indebtedness of the state, any ordinary within the state could grant administration. *Ex parte Dauthereau*, 2 Brev. 459.

But the Irish court refused to grant administration upon the estate of an Irish officer who died in India leaving property there and a sum of money

seas by confederate cruisers, and claims for the payment of premiums charged for war risks after the sailing of any confederate cruiser; and provision was made for the payment of the claims so allowed, by the secretary of the treasury, out of the balance of the Geneva award not appropriated to claims allowed under the previous act. This suit is to recover for services rendered in the prosecution of claims of the second class above named before the court of commissioners, as thus re-established.

Soon after the passage of the Act of 1882 the plaintiff undertook to prosecute the demands of certain complainants under contracts by which he was to have one half of the amount recovered and collected, and was to make no charge unless recovery was had. These demands were based upon payments made by the complainants as agents of certain beneficiaries, who had afterwards reimbursed such complainants for the sums advanced. While these claims were pending the court promulgated a construction of the statute under which they were presented, to the effect that when payment of premiums had been made by one party in his own name for the benefit of others, and the amount of such payment had been refunded to him by the persons for whose benefit the payment was made, the petition should be made out and sworn to in the name of the party who paid the premiums, on behalf of the persons for whose benefit such payment was made, and should state the names and residences of the parties beneficially interested, and the amount of their respective

interests, and that separate judgments should be entered in favor of such beneficiaries. After this was promulgated the petitions in the cases in which the plaintiff rendered the services sued for were amended accordingly. The plaintiff subsequently continued the prosecution of the claims under such circumstances regarding employment by the beneficiaries as will be hereafter stated. Previous to the 15th day of July, 1885, the proofs were completed, and the claims ready for judgment as the petitions then stood. On that day the court announced a further decision, to the effect that, where the claimant's administrator received his appointment without the United States, ancillary administration must be taken out in the District of Columbia, and that the ancillary administrator, only, could maintain the claim of the decedent, and take judgment thereon. It was also held that a judgment could not be rendered in favor of a guardian. On the 29th day of July, 1885, and before any further action had been taken by the plaintiff upon the claims in question in view of these decisions, the plaintiff was prohibited from appearing in the court of commissioners, and from exercising in any way the functions of an attorney and counselor of that court; and the clerk was authorized to substitute for the plaintiff's name the name of any other attorney, upon the receipt of a written request to that effect from the claimant or his legal representative. The plaintiff did not appear in court after this, and rendered no further services in connection with the claims; but he entered into an arrangement with one Edward E.

in the hands of the secretary of state for war. *Re Butson*, L. R. 9 Ir. 21.

Assets brought within jurisdiction after death of intestate.

Administration may be granted on property brought into the state after the intestate's death. *Robinson v. Robinson*, 11 Ala. 947; *Miller v. Jones*, 25 Ala. 247; *Kohler v. Knapp*, 1 Bradf. 241.

A debt due by one who comes into the state after the creditor's death will authorize administration on the estate of the creditor. *Pinney v. McGregory*, 102 Mass. 186.

If the debtor of an estate removes within a state where there are claims against the decedent, an administrator may be appointed to collect the debts and pay the claims. *Stearns v. Wright*, 51 N. H. 800.

Proof of will may be taken, if, since testator's death, a promissory note secured by a mortgage on land in another state has come within the jurisdiction. *Re Hopper*, 5 Dem. 242.

But property temporarily brought into the jurisdiction for a special purpose does not confer jurisdiction. *Christy v. Vest*, 36 Iowa, 287.

So an article temporarily brought into the jurisdiction after the death of the intestate on a bailment, but removed before application for administration, is not assets. *Kohler v. Knapp*, *supra*.

And in Kentucky it is held that property brought into the country after the decease will not give jurisdiction. *Embry v. Millar*, 1 A. K. Marsh. 300, 10 Am. Dec. 732.

In *Burnett v. Meadows*, 7 B. Mon. 277, 46 Am. Dec. 517, it was held that property owned by one who died *in transitu* between the state of his former residence and that to which he was intending to remove might be considered assets in the latter state 24 L. R. A.

if the family continued the journey and finally settled in the land of adoption.

Lands.

Real estate may be assets. *Bishop v. Lalouette*, 67 Ala. 197; *Sprayberry v. Culbertson*, 32 Ga. 299; *Littie v. Sinnett*, 7 Iowa, 324; *Lees v. Wetmore*, 58 Iowa, 170; *Prescott v. Durfee*, 131 Mass. 477; *Hart v. Coltrain*, 19 Wend. 378.

In the latter case, however, it is said that under the statute the jurisdiction did not turn upon the question of assets.

And to make lands assets, it is probable that they must be necessary to pay debts. *Ives v. Jacksonville Nat. Bank*, 23 Ill. App. 563.

In *Floyd v. Pilgrim*, 32 Wis. 378, it is suggested that if there is no personalty and no debts, no administration could be granted for real estate.

And a similar suggestion was made in *Filbey v. Carrier*, 45 Wis. 469.

In *Fay v. Haven*, 3 Met. 109, administration was granted where the only assets were lands.

Lands are assets if the owner died an alien and an administrator is needed to protect the estate and care for its proper disposition. *Niorosi v. Giuly*, 85 Ala. 365.

In *Temples v. Cain*, 60 Miss. 473, real estate which was left by a resident was held to be assets, but this is, perhaps, not so when left by a nonresident. *Partee v. Kortrecht*, 54 Miss. 68.

In Kentucky, however, lands are not assets. *Thumb v. Gresham*, 2 Metc. (Ky.) 306; *Rutherford v. Clark*, 4 Bush, 27.

And under New York Rev. Stat. lands are not assets which will warrant the granting of administration. *Hollister v. Hollister*, 10 How. Pr. 532.

An allegation of fraudulent transfer by decedent of his real estate will authorize administration. *Bowdoin v. Holland*, 10 Cush. 17.

Holman, who was then a clerk in his office, by which it was agreed that Holman should procure an appointment in the orphans' court of the District, as ancillary administrator of the several beneficiaries, and appear in the several cases in the interest of the plaintiff, and take judgment upon the several claims, and receive from the plaintiff for these services a certain share of the amounts collected. Before anything had been done under this agreement, Holman abandoned his employment as the plaintiff's clerk, and commenced practice for himself; and he thereupon procured the defendant to take out the administration made necessary by the above decision. After duly qualifying under his appointments as administrator, the defendant employed Holman to appear in the several cases and obtain judgment. Holman was regularly substituted in place of the plaintiff as attorney, and prosecuted the claims in behalf of the defendant. But no further proofs were furnished, except the depositions of the defendant, in which he referred to the proofs already on file, and expressed his willingness to accept as correct the amounts therein named. Judgments were obtained in due course, of which the defendant received part satisfaction.

The beneficiaries whose claims were thus preferred for allowance by the plaintiff, and of whose estates the defendant was thus appointed administrator, with the exception of Henry W. Slicer, died in foreign countries, and left estates which were there administered. In some of the cases the entire service of the plaintiff is shown to have been rendered after the death of the beneficiary; and this is apparently true of all the cases, except that in the Case of Raynsford the initiatory proceedings were before his death. In some of the cases the plaintiff was directly employed, or clearly recognized, by the personal representative of the beneficiary in the country of principal administration, as attorney for the further pro-

secution of the claim; but no adoption of the contract made with the complainant is shown in any case. Slicer died in Baltimore, Md., leaving minor children, of whom Laura G. Cooper was the duly appointed guardian. The amendment and subsequent prosecution of the petition by the plaintiff was done as her attorney. Raynsford died at Rio Janeiro, in Brazil, leaving a widow, who was there duly appointed his administratrix. She furnished such further proofs as the plaintiff called for. Grossman died in the kingdom of Prussia, leaving a widow, who was appointed his executrix, and who continued the plaintiff as her attorney. Miguel Bou died in Barcelona, in Spain; and the petition in his case was further prosecuted in the name of his son, as executor, who recognized the plaintiff as attorney for the complainant, and appointed an agent to protect the beneficiary's interest. Zangroniz was a member of the firm of Y. M. Zangroniz & Co.; the other partners being Baron Kessel and Sebastian de Lassa, residents of Cuba. One Kerlegand, of Havana, was appointed executor, etc., of the estate of Zangroniz, and recognized the plaintiff as his attorney in the prosecution of the decedent's claim. But no judgment was rendered in favor of the Zangroniz estate, the judgment upon this claim being awarded to Kessel and De Lassa, as surviving partners, but without any such judgment being asked by them, or by any representative or attorney in their behalf. Cosme de la Torricute died in Cuba, and one Rionda was duly appointed administrator of his estate, and as such agreed that the plaintiff should receive for his services 60 per cent of any judgment obtained, and should have a lien upon any draft which might be issued in payment of such judgment, and be the lawful custodian of such draft until the amount due him should be paid. The defendant has settled his several administration accounts, and with the exception of the amounts received on

The reversion after the death of the widow will authorize the appointment of an administrator *de bonis non*. *Banoroff v. Andrews*, 6 Cush. 494.

Rents of real estate accruing and collected subsequently to the decedent's death are not assets. *Kohler v. Knapp*, 1 Bradf. 241.

Deposits.

United States bonds deposited upon a special certificate of deposit for their safe keeping are not assets at the place of deposit so as to prevent their being taken possession of by the foreign executor and require the appointment of a local administrator. *Shakespeare v. Fidelity Ins. Trust S. D. Co.* 97 Pa. 173.

Doubtful claims.

The mere fact that a claim may be doubtful is, it seems, immaterial. The question of the validity of the claim is not for the probate court to decide.

A claim against one with whom the decedent had deposited money is assets, and it is immaterial that the claim may prove to be invalid or incapable of enforcement. *Sullivan v. Fosdick*, 10 Hun, 173.

A note may constitute assets, although it is secured by a mortgage on land which is claimed by a third person by adverse possession, since the probate court cannot determine the validity of such claim, but must leave its decision to the courts of law. *Parsons v. Spaulding*, 120 Mass. 33.

Claim against personal representatives.

An attempt to assert a right against the personal representative will not give jurisdiction to appoint an administrator. *Fatillo v. Barkdale*, 22 Ga. 354.

After claims have been collected by an executor in a foreign country and remitted for distribution, they cease to be assets so as to permit administration in the state of their destination. *Sedgwick v. Ashburner*, 1 Bradf. 105.

Money sent by foreign administrators to their agent in this country to be paid over to the legatees is not assets in his hands which will authorize the appointment of an administrator at the instance of creditors of the decedent residing here. *Wheelock v. Pierce*, 6 Cush. 233.

In *Warner v. Bevil*, 17 Ala. 233, it is said that an orphan's court has no jurisdiction of personality which, after the death of the testator, the executor removed from the place of the testator's residence into the territorial jurisdiction of such court.

Bills and notes.

In Tennessee the court adopted a rule on this question at variance with the rule at common law as stated above, and held that bills and notes are assets where they are found and not where the debtor resides. *St. John v. Hodges*, 9 Bart. 334.

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the Zangroniz claim, and in the Slicer estate, has paid over the sums received, less the expenses allowed, to the personal representatives of the several decedents in the foreign countries named.

The plaintiff sought to establish before the referee an express promise by the defendant to pay for these services. The referee having failed to find that any promise was made, the plaintiff now claims that the circumstances were such that the law will imply one. This claim must rest upon one of two grounds,—either that the defendant has received and disposed of a fund upon which the plaintiff had a lien, and out of which it was the duty of the defendant to see that the plaintiff was paid, or that the defendant has received the benefit of the plaintiff's services under such circumstances that the law casts upon him the burden of compensation. But the defendant suggests that the plaintiff's only remedy, upon a claim of this nature, was in the court where the defendant accounted for the estates. The case shows that, to establish a claim against a deceased person's estate in the District of Columbia, the claim must be filed with the register of wills within 18 months after the issue of letters of administration; that the notice required by law to be given to creditors in such cases was duly given by the defendant; but that the plaintiff did not, within the period named, file any claims against these estates. Ordinarily the persons referred to as creditors of an estate are those who had claims against the deceased in his lifetime; and the requirements concerning the presentation of claims ordinarily refers to demands of this character, and not to such liabilities as may have been incurred by the administrator in the settlement of the estate. Without more definite findings as to the probate procedure in the District of Columbia, we should hesitate to reject any claim which the plaintiff may have obtained against the administrator, as barred by the settlement of the estate. It will therefore be necessary to consider the grounds of the plaintiff's claim.

The plaintiff claims to have had an attorney's lien upon the money recovered by the defendant; and the defendant insists that any right of this kind, which the plaintiff might otherwise have had, was barred, both by the provisions of the act constituting the court, and by the Revised Statutes of the United States. By the Act of 1874 it was provided that the court should, upon motion, allow the compensation of attorneys, and enter the same as a part of its judgment, and that all other liens upon the judgment should be of no effect. The Act of 1882 re-established the court, with its former obligations, duties, and powers; directed that the practice and proceedings established by the former act should be followed; and authorized the rendition of judgments in the mode, and subject to the conditions, limitations, and provisions, of that act. This seems clearly to revive the provisions of the Act of 1874, above recited. It has been so held in Maryland. *Brooks v. Ahrens*, 68 Md. 212. And those provisions being in force, an attorney's lien could not be acquired. *Bachman v. Lawson*, 109 U. S. 659, 27 L. ed. 1067.

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The plaintiff's right to assert a lien seems, also, to be inconsistent within section 3477 of the Revised Statutes of the United States, as construed by the United States Supreme Court. It is provided by that section that all transfers and assignments of any claim upon the United States, or of any interest therein, shall be absolutely null and void, unless made with certain formalities, and after the allowance of the claim, and the issuing of a warrant therefor. In several cases involving the claims of agents and attorneys for compensation for services rendered in establishing claims, this provision has been treated as inconsistent with the existence of any lien upon the sum recovered. *Trist v. Child*, 88 U. S. 21 Wall. 441, 23 L. ed. 633; *Wright v. Tebbitts*, 91 U. S. 352, 23 L. ed. 320. In *Hopford v. Kirk*, 97 U. S. 484, 24 L. ed. 1032, the court held that an assignment of an interest in a pending claim was a nullity, as between assignor and assignee, and said of this section, "it strikes at every derivative interest, in whatever form acquired." The limitations since placed upon the language quoted do not touch the decision itself, as an authority against the enforcement of liens. *Bailey v. United States*, 109 U. S. 432, 27 L. ed. 988. In *United States v. Gillis*, 95 U. S. 407, 24 L. ed. 508, where it was sought to restrict the application of this section, it was said to cover "all claims against the United States, in any tribunal in which they may be asserted."

But the plaintiff insists that these claims are not "claims against the United States," within the meaning of the statute or the decisions, but are merely demands which the claimants are permitted to prosecute against a special fund. It is true that the judgments recovered are to be satisfied out of a particular fund, and that the United States assumes no responsibility beyond this. But the money had been covered into the treasury of the United States, and the right to it was to be established by legal proceedings. Whatever the relation of these parties to the United States may have been before the Act of 1882 was passed, it is certain that by that act they were placed upon the footing of persons having a right to establish claims against the United States. In *Hobbs v. McLean*, 117 U. S. 575, 29 L. ed. 948, a claim against the United States is defined to be "a right to demand money from the United States." We think the claims in question were claims against the United States, within the meaning of the law, and so within the scope of the section referred to.

But, if the plaintiff was entitled to assert a lien, it does not follow that defendant is liable for having paid over these judgments without satisfying it. The report contains nothing to charge the defendant with a knowledge of the plaintiff's claim upon the funds transmitted. The defendant knew that the plaintiff had rendered these services, but had no knowledge of the terms upon which they were rendered, and supposed that the plaintiff's claim for compensation was against the person who had employed him. He knew that the plaintiff had been precluded from practicing in the court of commissioners, but had no knowledge that Holman had agreed to prosecute the claims

in his interest, and supposed that the cases could be taken up by any attorney who might be employed to do so. We do not see how the defendant could be held liable by reason of the existence of a lien, unless he knew, or should have known, that one was claimed. An attorney's lien is either a retaining lien or a charging lien. A retaining lien is based upon the possession of money or papers, and expires when the possession ends. A charging lien is the right to make the claim for compensation a charge upon the judgment, and this is not perfected until notice is given to the defendant. *Huilebert v. Brigham*, 56 Vt. 868; *Weed Sewing-Mach. Co. v. Boutelle*, Id. 570. The usual assertion of a charging lien would have occurred if this plaintiff had given notice of a lien to the United States, in order to prevent the payment of a judgment to this defendant, and make the United States liable if the judgment should be paid in disregard of the notice. If the money is suffered to reach the one who recovers it, the question, as regards him, is ordinarily reduced to one of personal liability. Here, the money has come into the hands of the defendant, the plaintiff in the suits in which the judgments were recovered, who in ordinary course would have been the plaintiff's client; and, the money so received having been disbursed in due course of administration, the plaintiff now seeks to charge the defendant with the payment of his claim, on the ground that he had a lien on the funds thus recovered and disbursed. The effort is to impose a lien upon the funds in the hands of the recovering party, and through the lien a personal responsibility, where otherwise none would have existed. If other conditions permitted, this certainly could not be accomplished without notice; and the mere knowledge that a former attorney had rendered services in connection with the claims did not constitute notice. Upon the findings of the referee, we cannot say that the circumstances were such as to put the defendant on inquiry, and charge him with knowledge of a lien; and, there being no notice of a lien, the defendant could safely assume that the plaintiff had had his pay, or that he relied upon the personal responsibility of his employers.

It is true that the funds realized from the Slicer and Zangroniz claims are still in the hands of the defendant. But the views before stated, as to the right of the plaintiff to assert a lien, leave no ground upon which this fact can entitle the plaintiff to a judgment for any part of the compensation claimed. If it should seem that the defendant's possession of this money ought to avail the plaintiff in some way, it must be remembered that this is not a proceeding to reach and control the fund in satisfaction of a lien, but a suit to establish a personal liability for the payment of the claim. If the defendant could have been held liable, on account of the other cases, in a suit of this character, brought while the money was still in hand, special difficulties might be found in the way of recovery on account of these two. The plaintiff's services in the Slicer Case were rendered upon the employment of the guardian of the heirs, and judgment was obtained by the defendant as administrator of Slicer's estate. The Zangroniz claim was prosecuted

by the plaintiff for the foreign executor of Zangroniz, while the fund is held by the defendant as administrator of the estates of Kesael and De Lassa.

It remains to consider whether the defendant has taken the benefit of services rendered by the plaintiff under such circumstances that he should be, and can be, compelled to pay for them. Did the use of the proofs filed by the plaintiff, in the circumstances stated, fasten upon the defendant a legal obligation to compensate the plaintiff? It is true that the law will sometimes imply from circumstances a request to render services when no actual request was made, and a promise to pay for them where no such promise was expressed; and this without there having been any intention between the parties to enter into a contract. *Jess v. Huile*, 12 Vt. 814, 827; *Paddock v. Kittredge*, 31 Vt. 878, 884. But it is difficult to see how the plaintiff in this case can recover on the ground of an implied undertaking on the part of the defendant to pay for his services. At the time the plaintiff rendered the services, the defendant was an absolute stranger to the proceedings, and to every interest involved in them. When the defendant became connected with the proceedings, the proofs were in the files of the court, and entirely beyond the control of the plaintiff. The defendant had no communication with the plaintiff in regard to these proceedings, and received from him nothing pertaining to them. He entered upon the trust to meet a requirement of the court, and took charge of the cases with its full approval. He did not know that the plaintiff had made an arrangement with Holman, and was relying upon him to act in his interest. We find nothing in the case upon which the law can raise an implied promise. The procurement of judgments upon proofs provided at the expense of the plaintiff, and receiving what appears to have been sufficient compensation for the entire business, while ignoring the plaintiff's claim, certainly presents an inequitable feature, which appeals to the careful consideration of the court. But the apparent inequity of this proceeding is somewhat modified by other features of the case. True, the plaintiff's right to pursue employers in foreign countries, if he is in a position to assert that right, can hardly be considered a substantial remedy, in view of the nature and size of the demands. But the law under which the claims were presented seems to have provided a method by which the plaintiff could have had any proper claim for compensation allowed by the court, and made the basis of a judgment in his favor. He might have taken measures to charge the fund, or have proceeded against the estate, or against the defendant personally, during the year or more that elapsed between the recovery of the judgments and the making of the disbursements. The plaintiff's assertion that during this time he notified the defendant of his claim, and was promised payment, is not sustained by the referee.

But the plaintiff claims, further, that the orphans' court of the District of Columbia had no jurisdiction of the estates of these beneficiaries; that the entire proceedings in probate are void, and afford the defendant no protec-

tion; that he should be treated as an intermeddler, and held, to the extent of his receipts, for the payment of any just claim against the defendant's estate. If the proceedings of the court of the District of Columbia are entitled to the same credit that is required to be given to judicial proceedings in one of the states, they are nevertheless open to examination upon the question of jurisdiction. Story, Conf. L. § 689. Only two things are essential to the jurisdiction of a probate court,—the death of the person upon whose estate letters are granted, and domicile or assets within the District. 8 Redf. Wills, 121, *note*. It is not necessary to consider the difference in the nature of these requirements, as affecting the validity of an administration based upon the erroneous finding, nor the conflict of authority in regard to matters of presumption and record. By all the cases, if these two facts exist, and appear of record as judicially ascertained, the grant of administration is valid, however irregular the proceedings may have been. And, if these two matters properly appear of record, the administration is at least *prima facie* valid, and he who questions it must establish its invalidity. *Fisher v. Bassett*, 38 Am. Dec. 289, *note*. The plaintiff seeks to impeach the defendant's appointments on both of these grounds. It is said that the petitions for administration did not allege the death of the persons upon whose estates administration was asked, and that without an allegation the fact could not be proved. If the alleged defect sufficiently appeared, it could not be given the effect claimed. The jurisdiction of the court did not depend upon the formality of the petition, nor upon an adherence to any technical rule of procedure. The records of appointment, and the letters issued, would doubtless show that the appointments were upon the estates of persons ascertained to be deceased; but neither of these have been placed before us. The referee reports that the defendant was duly appointed administrator of certain beneficiaries, who throughout the report are referred to the persons deceased. It is evident that no question was made before the referee touching the jurisdictional requirement, under consideration, and that for this reason nothing more than the general finding above stated was asked for, or deemed necessary. A general finding of this character will sustain an administration, when nothing further is submitted to enable the court to judge of its legality.

The plaintiff further objects that this claim was not an asset upon which administration could be granted, and that consequently there was no estate within the jurisdiction. Passing the question whether the action of the orphans' court is conclusive upon this point, we think the obligation assumed by the United States was an asset in the jurisdiction where provision was made for its satisfaction. A debt due the deceased is property in the jurisdiction of the debtor. The right to prove a claim upon this fund, even if granted as a pure gratuity, must be treated as a demand against a debtor for the purpose of administration. The money could be obtained only by an administrator whom the tribunal charged with the distribution of the fund would recognize as having authority to sue in that jurisdiction.

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Moreover, it has been held that a claim of this character will pass under the designation of "property," to an assignee in insolvency in proceedings subsequent to the Act of 1892. *Goreley v. Butler*, 147 Mass. 8. Doubtless these claims of the second class must be treated as having had no existence prior to the passage of that act. *Taft v. Marzly*, 120 N. Y. 474; *Heard v. Sturges*, 146 Mass. 54. But it is not necessary that the assets upon which administration is granted should have been within the jurisdiction at the time of the decease. The rule, as usually stated by text-writers, would seem to require this; but it is evident that an adherence to the rule as thus stated would sometimes exclude assets from administration. Certainly, a debtor would not be permitted to defeat the collection of his debt by moving from one jurisdiction to another after the death of the creditor. The subsequent creation of an obligation to be collected by the representative of the deceased presents the same necessity. The jurisdiction must exist in favor of the estate wherever legal proceedings are necessary to establish its right to property, and none but a local administrator can secure the recognition of the courts. *Pinney v. McGregory*, 103 Mass. 188.

It is further objected that, in the petitions upon which the defendant's letters were granted, the petitioner represented himself to be a creditor, and that it appears from the accounts submitted that he was not. If this were sufficient to determine that the representation was untrue, and that the administration was granted on the ground of that representation, and not of other representations which the petitions may have contained, the objection could not avail the plaintiff. The matter does not touch the question of jurisdiction. Neither the residence of a creditor within the District, nor the application of one, if creditors there were, was essential to the validity of the proceedings. It was within the power of the court, in certain circumstances, to make an appointment not based upon kinship or interest. *Schouler, Exrs. & Adms.* § 115. If administration is granted in disregard of the preferences recognized by law, it may be revoked upon application of those whose rights have been ignored. *Id.* §§ 153, 153. True, the general rule is that foreign judgments may be impeached for fraud, as well as want of jurisdiction. It is said, however, that a grant of administration cannot be impeached for fraud in its procurement. 1 Woerner, *Law of Administration*, § 266. But the plaintiff insists that it may be, as against the administrator, if he be implicated in the fraud. It is to be noticed that the question, as presented here, touches only the priority of right to a necessary administration. In such a case we think it must at least be held that one who is entitled to interfere cannot stand by until the administration is completed, and then charge the administrator as if there had been no grant. The plaintiff knew that the defendant was administering upon these estates, and, if he claimed an interest that entitled him to the administration in place of the defendant, he should have asserted his right.

But the plaintiff insists that the foreign administrators were entitled to recognition, and

that the court of commissioners could not lawfully render judgments in favor of an administrator appointed in the District. The foreign administrators certainly had no better standing than an administrator appointed in one of the states would have had. In *Wyman v. United States*, 109 U. S. 654, 27 L. ed. 1068, it is said that the United States may, in their discretion, exercised through their appropriate officers, pay a debt due the estate of a deceased person, either to the administrator appointed in the state of his domicile or to an ancillary administrator appointed in the District of Columbia. In *Mackey v. Coxe*, 9 U. S. 18 How. 100, 15 L. ed. 299, an administration in the District had been required by the treasury department as a prerequisite to the payment of a claim. The court said that the claim might have been paid, and indeed should have been paid, to the attorney in fact of the principal administrators, but did not speak of the ancillary administration otherwise than as one required through abundant caution. The court established to allow these claims having held that judgments could be obtained only by administrators appointed in the District, it

is not important to consider whether some other course might properly have been taken.

It is true that an award of the court of commissioners is only a determination of the amount and validity of the claim, as against the United States, and precludes no one who claims to have been entitled to the allowance from asserting his right to the funds against the recovering party in other tribunals. *Heard v. Sturgis*, 146 Mass. 545. But if it could be held that the court of commissioners awarded these funds to one not entitled to receive them, the plaintiff could gain nothing by it, for he has no title to assert.

The defendant cannot be held liable to pay for the plaintiff's services on the ground that they were contracted for by the foreign administrators. The defendant's administration was ancillary, and independent of the administration in the country of domicile. There is no privity between principal and ancillary administrators. *Story*, Conf. L. § 522; *Low v. Bartlett*, 8 Allen, 259.

Judgment reversed, and judgment for defendant.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Francis J. BYRNE, Admr., etc., of George Nason, Deceased, *Ptff. in Err.*,
v.

KANSAS CITY, FT. SCOTT & MEMPHIS R. CO. *et al.*

(61 Fed. Rep. 605.)

1. A railway company is not responsible for the acts of an engineer and fireman in running an engine which it has rented to a bridge company, used as a switch engine on a bridge used by several other railway companies, at a rental of \$10 a day, besides payment of the expenses of running the engine and the wages of the engineer and fireman, who were carried on the pay-roll of the railway company.
2. A horse railway is not a railroad within the meaning of Code, section 1804, which requires the stopping of every engine or train before crossing an intersecting railroad.
3. The requirement of a lookout on every locomotive and the giving of an alarm and stopping of the train when any obstruction appears on the track, by Milliken & Vertrees' Code, section 1298, does not apply to a case where a person gets upon the railroad track so short a time before he is struck that it would be impossible to sound the alarm whistle and down brakes, or use any other means to stop the train.
4. The rule of law in Tennessee, which prevents the defense of contributory

NOTE.—The above case is interesting in its discussion of the exceptional rule as to the effect of contributory negligence.

As to when the federal courts will follow state decisions, see *note to Forepaugh v. Delaware, L. & W. R. Co.* (Pa.) 5 L. R. A. 508.

As to how far the giving of statutory signals is the measure of a trainman's duty at a highway crossing, see *note to New York, L. E. & W. R. Co. v. Leamon* (N. J.) 15 L. R. A. 428.

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negligence from being a complete bar to an action for injury to a person on a railroad track under the statute but makes it cause for reduction of damages, being one which grows out of the language of the statute itself, the construction thereof by the supreme court must be followed in federal courts, in an action arising in that state.

(April 8, 1894.)

ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment in favor of defendants in a proceeding brought to recover damages for the alleged wrongful killing of the plaintiff's intestate. *Affirmed in part; reversed in part.*

Statement by Taft, Circuit Judge:

This was a writ of error from the circuit court of the United States for the western district of Tennessee, sued out by the plaintiff below, Francis J. Byrne, administrator of George Nason, deceased. The action was brought for the wrongful death of the plaintiff's intestate against the Kansas City, Ft. Scott & Memphis Railroad Company and the Kansas City & Memphis Railway & Bridge Company.

The amended declaration averred that plaintiff's intestate was run over and killed by a train of the defendant the Kansas City, Ft. Scott & Memphis Railroad Company, running on the track of the Kansas City & Memphis Railway & Bridge Company, at a place where it crosses Pennsylvania avenue, a street of the city of Memphis. That the death was caused by the negligence of the defendants in not keeping the crossing at Pennsylvania avenue in good repair, as the bridge company had agreed with the city of Memphis to do; in not

keeping the bell of the engine constantly ringing while said engine was passing through the city; in not keeping a lookout ahead; in not sounding the alarm whistle; and in not putting down the brakes to stop the engine before Nason was struck,—all in violation of the laws of Tennessee. Further wrongful conduct was averred in that the engine did not come to a full stop before crossing the street railroad which was being operated on Pennsylvania avenue, in violation, as charged, of the statutes of the state.

The facts developed by the evidence were as follows: Pennsylvania avenue runs north and south. The bridge company owns a track of about two and one-half miles, connecting the bridge with the railways which run into Memphis. The track runs east and west, and crosses Pennsylvania avenue at right angles. From the east side of Pennsylvania avenue it curves rather abruptly to the south, the curve being about 10 feet in 100 from a straight line. The bridge company owns no engines of its own, but it rented the one in question from the Kansas City, Ft. Scott & Memphis Railroad Company. The accident occurred upon Sunday, June 26, 1892, about 6 o'clock in the evening, in broad daylight. The engine was running west, on business of the bridge company, with its tender in front. It was a switch engine, and, as is generally the case in such engines, the tender slopes downward towards the back. Coal had been piled up on the tender so as to somewhat obstruct the view of the engineer. There was a flagman at the Pennsylvania crossing at the time of the accident. Nason, the deceased, was a colored man, eighty-six years of age. A few minutes before the accident he had crossed the track, and entered into conversation with the flagman and a boy about twelve years of age, who was sitting there with the flagman. In the course of the conversation he expressed a desire to die; said that he was not happy, and that if he did die he could not be in a worse place than he was then. The flagman's house was at the southeast corner of the crossing. Nason, who lived in a house at the northwest corner of the crossing, about 80 feet from the track, started towards his home. There was a double railway track on the crossing. The engine was backing down on the north track. The flagman saw the engine, and put out his red signal, and then discovered Nason walking towards the track, and called out to him. So also did the young boy who was with the flagman. As the locomotive ran onto Pennsylvania avenue, Nason was on the south track. Without halting he walked onto the north track immediately in front of the engine. Before stepping on the track, he turned his head to look either at the engine or at those who were shouting at him. He was run down, and thrown some 20 or 30 feet beyond the west line of Pennsylvania avenue. Two witnesses of the plaintiff swear that they were sitting within 30 or 40 feet of the crossing, and that the engine bell did not ring. The engineer and the fireman upon the engine, and the flagman and the boy who was at the crossing, all swear that the bell did ring. The engineer testified that the whistle had been

blown about a block away from the Pennsylvania crossing. The engine did not stop before it crossed the street car track. The engineer did not see the man until he was about to step upon the track, 10 feet away from the tender. He then reversed his engine, and did everything he could to stop, but was unable to prevent the accident. The trial judge first directed a verdict for the railway company on the ground that it was not responsible for the negligence of the engineer and fireman, because at the time of the accident they were rented with the engine to the bridge company. After full argument he also directed a verdict for the bridge company on the ground that, while the bridge company was negligent in certain respects, the accident was also due to the gross negligence of the deceased, which barred recovery.

Argued before Taft and Lurton, Circuit Judges, and Barr, District Judge.

Mr. Francis J. Byrne, plaintiff in error, *in propria persona*.

Mr. Wallace Pratt, with **Messrs. E. F. Adams** and **C. H. Trimble**, for defendants in error.

Sections 1298, 1299, 1300, of Milliken & Vertrees' Code of Tennessee have no application to this case because there was not time after the deceased appeared on the road in front of the engine to comply with the statute or save his life.

East Tennessee, V. & G. R. Co. v. Scales, 2 Lea, 688; *East Tennessee & V. R. Co. v. Swaney*, 5 Lea, 119; *Louisville, N. & G. S. R. Co. v. Reidmond*, 11 Lea, 205; *_____ Railroad Co. v. Hicks*, 89 Tenn. 301; *Nashville, C. & St. L. R. Co. v. Seaborn*, 85 Tenn. 391; *Chesapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 880.

Nashville, & O. R. Co. v. Anthony, 1 Lea, 516, relied upon by plaintiff, has been overruled as to what constitutes the "road" within the meaning of the statute.

Louisville, N. & G. S. R. Co. v. Reidmond, *supra*.

This court is not bound by the decisions of the supreme court of Tennessee as to the effect of the negligence of a plaintiff where both parties are in fault.

The rule is not based upon any statute of the state.

Whirley v. Whiteman, 1 Head, 610; *Nashville & O. R. Co. v. Carroll*, 6 Heisk. 848; *Louisville & N. R. Co. v. Robertson*, 9 Heisk. 276.

It is therefore a question of general law as to which the courts of the United States exercise an independent judgment, not being bound by the decisions of the supreme court of Tennessee.

Swift v. Tyson, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 859; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772.

Judges in the United States courts are not required in modern times to submit a case to a jury where there is a mere scintilla of evidence.

Schuykill & D. R. Imp. Co. v. Munson, 81 U. S. 14 Wall. 442, 20 L. ed. 867; *Pleasant v. Fant*, 89 U. S. 22 Wall. 116, 22 L. ed. 780.

The facts of this case warranted the court in directing a verdict for the defendants because deceased was guilty of such contributory negligence as to bar a recovery as matter of law.

Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 543; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Horn v. Baltimore & O. R. Co.* 64 Fed. Rep. 301; *Mobile & O. R. Co. v. Stroud*, 64 Miss. 784; *Haas v. Grand Rapids & I. R. Co.* 47 Mich. 401.

The positive evidence of four witnesses that the bell was rung must prevail over the testimony of an equal number of witnesses that they did not hear it.

Haas v. Grand Rapids & I. R. Co. supra; *Stitt v. Hudekopers*, 84 U. S. 17 Wall. 384, 31 L. ed. 644.

Running more than six miles an hour through the corporate limits of a city in violation of a statute of Mississippi did not excuse negligence on the part of deceased.

Mobile & O. R. Co. v. Stroud, supra. See also *Sullivan v. Missouri Pac. R. Co.* 117 Mo. 214.

A statute of Ohio requiring every locomotive approaching a grade crossing to sound the whistle or ring the bell does not impose any liability on the company for a failure to comply, if the deceased was guilty of contributory negligence.

Horn v. Baltimore & O. R. Co. supra.

The violation of the statute of Michigan requiring a caution-board to be erected at the crossing of a railroad makes the company liable to one who knew the crossing was there and was guilty of negligence in going over.

Haas v. Grand Rapids & I. R. Co. supra.

The failure to ring the bell, if any, the failure to blow the whistle, if any, the existence of the ditch, if improper, unlawful speed, if any, cannot excuse the neglect of deceased, since he acted with full knowledge of all the facts.

Pukulinsky v. New York Cent. & H. R. Co. 82 N. Y. 424.

The rule that where the defendant is guilty of negligence and the plaintiff also contributed to the misfortune by his negligence, yet the plaintiff can recover if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence, is not applicable to this case, because there was no time after the plaintiff put himself in a perilous position, or after his peril was or could have been discovered by defendant, for the defendant to have done anything which would have averted the calamity.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 558, 85 L. ed. 272; *Louisville & N. R. Co. v. Wallace*, 90 Tenn. 53; *Patton v. East Tennessee, V. & G. R. Co.* 12 L. R. A. 184, 89 Tenn. 370; *Pierce, Railroads*, 325, 326; *Sullivan v. Missouri Pac. R. Co. supra*; *State v. Lauer*, 20 L. R. A. 61, 65 N. J. L. 205.

The Tennessee rule is that where a defendant is negligent and the negligence of a plaintiff has also contributed to the production of a calamity, the plaintiff can recover if the negligence of defendant was the proximate cause thereof, but he cannot recover if his negligence was the proximate cause.

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Neither can he recover if both parties were equally in fault.

Whirley v. Whiteman, 1 Head, 610; *Nashville & O. R. Co. v. Carroll*, 6 Heisk. 347; *East Tennessee, V. & G. R. Co. v. Hull*, 88 Tenn. 38.

The negligence of a plaintiff where he is permitted to recover goes in mitigation of damages.

East Tennessee, V. & G. R. Co. v. Fain, 12 Lea, 35.

The supreme court of Tennessee has in numerous instances authorized trial judges to charge the jury that on a statement of facts enumerated the negligence of a plaintiff was the proximate cause of an injury and there could be no recovery.

Knorrville Iron Co. v. Smith, 86 Tenn. 45; *Louisville & N. R. Co. v. Wilson*, 88 Tenn. 816; *Patton v. East Tennessee, V. & G. R. Co.* and *Louisville & N. R. Co. v. Wallace, supra*.

The Supreme Court of the United States has also stated cases illustrating what is proximate cause as matter of law.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506; *Inland Seaboard & Coasting Co. v. Tolson*, 139 U. S. 551, 85 L. ed. 270; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

The court did not err in holding that the engineer and fireman were servants of the bridge company alone, and on that ground directing a verdict in favor of the Kansas City, Fort Scott, & Memphis Railroad Company.

Powell v. Virginia Constr. Co. 88 Tenn. 693, and authorities cited.

Petition for rehearing.

That the failure of the defendant railroad company to comply with sub-section 8 of section 1298 of Milliken & Vertess' Code of Tennessee, providing that "on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals until it has left corporate limits," would make the defendant liable, regardless of whether any relation of cause or effect existed between a failure to ring the bell and the collision.

This construction would be correct under the earlier statutes given by the supreme court of Tennessee.

In 1879, however, the case of *East Tennessee, V. & G. R. Co. v. Soales*, 2 Lea, 688, came before the court.

The trial judge had charged the jury: "Under these provisions, above stated, the court instructs you that railroad companies must comply with them; that sub-section 4 above quoted is imperative upon the company; that it must be complied with and that when any person, animal, or other obstruction appears upon the defendant railroad and said requirements of the statute are not observed by the agents and servants of the company, said company would be responsible for all damages to the person or property occasioned by or resulting from any accident or collision that may occur, and that the company would not be exonerated by showing, in such cases, that a part of the requirements only of the statute was observed and complied with. The burden of proof is upon the defendants to show that all the requirements were observed and complied with. If they were not, and

plaintiff's mare appeared upon the road and was killed or injured, defendants would be responsible."

The court said: "The charge is authorized by and pursues the language in the case of *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 262, and *Memphis & C. R. Co. v. Smith*, 9 Heisk. 860."

The court further said: "We must so understand the legislature or hold that they must be responsible for all damages to private property resulting from an accident for which no blame can be attached to them, and which no human foresight, activity, or attention could have avoided."

The court then laid down the principle that the proper construction of the statute only required the engineer to do such acts as he had time to do tending to prevent the accident between the time of the appearance of the animal upon the track and the time when it was struck, overruling former cases which held that the only way the company could escape liability where an animal was struck was by showing that all the acts enumerated in the statute had been done even though the animal might have been run over and killed long before these could have been performed.

In *East Tennessee & V. R. Co. v. Swaney*, 5 Lea, 119, the question again came before the court in a suit for the death of a human being. It was attempted in that case to draw a distinction between liabilities growing out of the killing of stock and those growing out of injuries to persons, but the court ruled that "the rule of impossibility clearly applies to all cases of injury whether to persons or property," and held further that all the subsections of the statute must be construed as *in pari materia*.

The impossibility meant by the Tennessee court is the impossibility of preventing the accident by doing the acts specified. And whenever it is manifest that a compliance with the statute would not prevent the accident the Tennessee decisions hold that the defendant is not bound to comply.

Chesapeake, O. & S. W. R. Co. v. Foster, 88 Tenn. 671; *Louisville & N. E. Co. v. Howard*, 90 Tenn. 144.

Taft, Circuit Judge, delivered the opinion of the court:

The first question for our consideration is whether the contract by which the Kansas City Company rented its engine to the bridge company relieves it of responsibility for negligence in the operation of the engine while in the service of the bridge company. It appears from the statement of Nettleton, who was both the superintendent of the bridge company and of the terminals of the Kansas City Railroad Company at Memphis, that the bridge company rented the engine from the railway company at \$10 a day, and also paid the railway company the expense of the fuel and supplies used in the running of the engine, and the wages of the engineer and fireman, who were carried on the pay rolls of the railway company. The bridge is used by several different railway companies. The switch engine pushes all trains over it, and thus gives assistance to the regular engines of the railway com-

panies on the heavy grades of the approaches. The engineer and fireman were subject to the orders of Nettleton as superintendent of the bridge company. As he expressed it, the bridge company rented the crew, along with the engine, from the railway company.

On this state of facts we are clearly of the opinion that the court was right in holding that the railway company was not responsible for the acts of the engineer and fireman in running the engine which killed Nason. They were, it is true, general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officers, and in what they did or failed to do were acting for the bridge company. The question is one of agency. The result is determined by the answer to the further questions, Whose work was the servant doing? and, Under whose control was he doing it? The railway company had simply lent its general servants to become special or particular servants of the bridge company, had for the time parted with control over them, and was not responsible for their acts while in the service and under the control of their temporary master.

The latest authority in support of this conclusion is *Donovan v. Laing, Wharton & Donovan Constr. Syndicate, Limited*, a decision by the court of appeals of England, reported in [1893] 1 Q. B. 629. In that case the defendants contracted to lend to a firm, who were engaged in loading a ship at their wharf, a crane, with a man in charge of it. He received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers, was struck by the crane, and injured, by reason of the negligence of the man in charge of it, and sued the defendants on the ground that the negligence was the act of their servant. It was held that, though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him in the work in which he was engaged, they were not liable for his negligence while so employed. Judgments were delivered in this case by Lord Esher, Master of the Rolls, and Lindley and Bowen, Lord Justices.

Lord Esher said: "In this case the crane and the man to work it were lent by the defendants to Jones & Co. for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and, in consequence, any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders, and under the entire and absolute control, of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to

a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co.; and if they saw the man misconducting himself in working the crane, or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority, but there is authority for it, without going back to an earlier date, in the case of *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. Div. 205."

Lindley, *Lord Justice*, said: "The key to the whole case is that Jones & Co. were loading the ship, and not the defendants. The crane was being used for Jones & Co's purposes, and not for those of the defendants, and the former must, for that particular job, be considered as Wand's [the man in charge of the crane] masters."

Lord Justice Bowen said: "The law on the matter now before us seems to me to be perfectly clear. The question is not who procured the doing of the unlawful act, but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done in this sense; that by the employer is meant the persons who had a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago in *Sadler v. Henlock*, 4 El. & Bl. 570, in the form of the question, 'Did the defendants retain the power of controlling the work?' Here the defendants certainly parted with some control over the man and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and the end being prescribed, the means of arriving at it may be left to him; or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another,—that is, he may lend them,—and in that case he does not retain control over the work. . . . In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time."

In *Rourke v. White Moss Colliery Co.*, *supra*, the defendants, the owners of the colliery, had begun to sink a pit or shaft, and had erected and employed men to drive a steam engine near its mouth. After doing some work on the shaft, they entered into an agreement with one Whittle to carry on the work for them; Whittle to find all the labor necessary, and the defendants to provide and place at his disposal and under his control the necessary engine power, ropes, etc., with the engineer, who was paid by the defendants. The plaintiff, who was one of the men employed and paid by Whittle, while working at the bottom of the shaft, was injured by the negligence of the engineer. It was held by the court of appeals, consisting of *Chief Justice Cockburn*, *Lord Justice Mellish*, and *Baggallay* and *Bramwell*, *Justices of Appeal*, that, though the engineer was the general servant of the defendants, 24 L. R. A.

yet, because he was under the orders and control of Whittle at the time of the accident, he was at that time the servant of Whittle, and not of the defendants, who were, therefore, not liable for his negligence.

The same view was taken by the supreme court of Tennessee in the case of *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, in which *Judge Lurton* delivered an elaborate opinion for the court. In that case the construction company undertook to build a railroad from Memphis to Jackson, and sublet to a subcontractor the laying of part of the track. The construction company agreed to furnish push cars, locomotive, flats, and engineer and fireman and one brakeman, to be used and controlled by the subcontractor in doing this work. The inference from the contract was that the engineer, fireman, and brakeman were to be paid by the construction company. The plaintiff was injured by reason of the negligence of the fireman furnished by the construction company in running the engine. It was held that in so doing the fireman, though paid by the construction company, was the servant of the subcontractor, and that the construction company could not be held liable for his negligence. *Judge Lurton* quotes with approval from *Chief Justice Cockburn's* judgment in *Rourke v. White Moss Colliery Co.*, this language: "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

In *Miller v. Minnesota & N. W. R. Co.*, 76 Iowa, 655, a contractor agreed to lay defendant's track at the rate of a certain number of miles per month, defendant "to furnish the motive power and cars, and operate the construction trains." One of the contractor's employes was killed by the too rapid running of the construction train. It was held that the defendant railway company was not liable, because, from the nature and terms of the contract, it did not have control of the construction trains, though the trainmen were retained on its pay roll, and received their wages from it.

In *New Orleans, B. R. V. & M. R. Co. v. Norwood*, 63 Miss. 565, 52 Am. Rep. 191, a different view of the law was taken. There a railroad company employed M., a contractor, to do certain work upon its road, and paid him therefor a stipulated price, and furnished him a construction train, and engineer to run the same. Subject to certain regulations as to speed, the control, management, and direction of the construction train was given wholly to the contractor. The engineer was selected by the company, and it alone had the right to discharge him, though bound to do so upon the complaint of M., and to supply his place. The company paid the engineer's wages, and charged the same to M., and deducted the amount thereof from the sum due him for his work. The railroad company was held liable to the owner of a mule killed by the negligent running of the construction train. The conclusion of the court was made to rest on what are known as the *Carriage Cases*,—*Laughter v. Pointer*, 5 Barn. & C. 547, and *Quarman v. Burnett*, 6 Mees. & W. 499. The supreme

court of Texas in *Burton v. Galveston, H. & S. A. R. Co.*, 61 Tex. 526, reached the same conclusion on the same authorities. These *Carriage Cases* were clearly distinguished from the case at bar and like cases by *Lord Justice Bowen* in *Dorosan v. Laing, Wharton & Down Constr. Syndicate, supra*, in the following language: "The principal part of the argument for the plaintiff was founded on what may be called the *Carriage Cases*,—*Laugher v. Pointer*, and *Quarman v. Burnett*,—but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving, and, if the coachman acts wrongfully, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and an injury occurs to any one, the hirer may be liable, not as the master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane and their responsibility for his acts ceased for the time."

This explanation of the *Carriage Cases* is also clearly stated by *Mr. Justice Field* in *Little v. Hackett*, 116 U. S. 866, 372, 880, 29 L. ed. 652, 654, 657. It is manifest, therefore, that they have no application whenever it appears that the master has parted to another for a time with control over his servant, to be used in the work of that other.

We think that the weight of reason and authority is in favor of the ruling of the learned judge below, and the judgment for the *Kansas City, Ft. Scott & Memphis Railroad Company* is affirmed.

The second question is whether the bridge company was obliged to stop its engine before crossing the street-railway track upon Pennsylvania avenue, under section 1804 of the Code of Tennessee. That section provides that every engine or train shall be brought to a full stop before crossing a railroad which intersects the road upon which it runs. If a stop was required by the statute in this case, it might be argued that the deceased had the right to rely on its doing so; and therefore that he was not negligent in crossing the track without looking for a train or locomotive, or, at least, that the question was one for the jury. The court below was of the opinion that section 1804 did require the engine to stop before crossing a street railway. We are unable to concur in this view. The evidence is that this was a street railway, from which we infer, in the absence of evidence to the contrary, that it was a horse railway. It has been decided by the supreme court of Tennessee in *Katsenberger v. Lawo*, 90 Tenn. 385, 18 L. R. A. 185, that: "A dummy line, over which trains are drawn by a small steam engine for transportation of passengers only, whether operated within or without the limits of a municipality, is a railroad, within the meaning of the statutes prescribing certain precautions for prevention of accidents on railroads."

And it was held that it did not affect the ap-
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plication of those statutes that the dummy was running longitudinally upon the streets of the city, for the very cogent reason that under such circumstances the danger of accidents is obviously increased. The decision just cited was based upon that in the case of *East End Street R. Co. v. Doyle*, 88 Tenn. 747, 9 L. R. A. 100, in which it was held that a dummy railroad, constructed by authority upon a public road or street, and operated for the transportation of passengers only, by means of a steam engine and coaches, constituted an additional burden upon the ultimate fee in the road or street, for which the owner of that fee was entitled to compensation as to the taking of his property for a public use. In the latter case the supreme court of the state expressly distinguish between a dummy railroad operated by steam and an ordinary street railroad, the motive power of which is horses, and classify the dummy railroad with commercial railways, and differentiate it from an ordinary horse car line. It follows therefore that the statute of Tennessee, which requires that the trains on one railway shall come to a full stop before crossing the line of another railway, has no application to the crossing by a steam commercial railway of an ordinary horse-car line.

The third question in the case is whether there was such contributory negligence on the part of the deceased as to bar his recovery in this action. We fully concur with the learned trial judge in the view that there was conclusive evidence of the grossest negligence on Nason's part, by reason of which he stepped to his death. Indeed, there are some circumstances tending to show that his death was voluntary, but they are not of that conclusive character which would justify a court in predicating a peremptory charge thereon. Were this a suit for common-law negligence alone, there is no doubt that the action of the court in taking this case from the jury and directing a verdict for the bridge company would have to be affirmed. But the difficulty in the case arises from certain statutory requirements affecting the operation of railways in Tennessee, the construction of which, by the supreme court of that state, gives them a peculiar effect in actions for damages for personal injury. Those statutes are contained in sections 1298 *et seq.* of *Miliken & Vertrees' Code*.

Section 1298: "In order to prevent accidents upon railroads, the following precautions shall be observed:

"1st. The overseers of every public road, crossed by a railroad, shall place at each crossing a sign marked: 'Look out for the cars when you hear the whistle or bell,' and the county court shall appropriate money to defray the expenses of said signs; and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing unless it is so designated.

"2d. On approaching every crossing so distinguished the whistle or bell of the locomotive shall be sounded at the distance of one fourth of a mile from the crossing, and at short intervals, till the train has passed the crossing.

"3rd. On approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals till it reaches its depot or station; and

on leaving a town or city, the bell or whistle shall be sounded when the train starts and at intervals till it has left the corporate limits.

"4th. Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident."

Section 1299: "Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property, occasioned by or resulting from any accident or collision that may occur."

Section 1800: "No railroad company that observes or causes to be observed these precautions, shall be responsible for any damages done to persons or property on its road. The proof that it has observed said precautions shall be upon the company."

The learned judge held that the fourth subsection of section 1298, above quoted, did not apply to this case, because Nason appeared upon the road so short a time before he was struck that it was impossible to sound the alarm whistle, put down the brakes, and use any other means than were used to stop the train. We concur in this view. It is quite true that there was evidence to show that the engineer and the fireman were prevented from having a full lookout ahead by reason of the coal upon the tender, but it also appears that the engineer saw Nason before he stepped upon the track, or within striking distance of it. Until Nason did so, subsection 4 did not apply. When he did so, it was impossible for the engineer to do anything other than to reverse his engine and attempt to stop it. If the engineer had been on the lookout ahead as he came on to the crossing, without any obstruction by any of the coal in the tender, he would have seen nothing except Nason walking toward the track. In *Louisville & N. R. Co. v. Howard*, 90 Tenn. 144-149, it was held that the engineer of a railroad was not guilty of violating the statute if he failed to take steps to stop his train whenever a wagon was seen approaching its track. It was held that it was only when the obstruction appeared on the track, or within striking distance of it, that the statute imposed the requirement of putting on the brakes, reversing the engine, etc. In the case of *Louisville, N. & G. S. R. Co. v. Redmond*, 11 Lea, 205, it was held that to constitute an obstruction within the meaning of this statute, prescribing the duties of the railroad company when a person, animal, or other obstruction appears upon the road, the animal must be in a position to be struck or directly injured by the engine while moving on the rails, and that the statute does not apply when the animal or person appears on some other part of the company's right of way, but that the duty and liability of the company in such a case are regulated by the principles of the common law.

Under the third subsection, the bearing of which upon this case does not seem to have engaged the attention of the learned trial judge, there is much more difficulty in supporting the peremptory charge for the defendant. This 24 L. R. A.

engine was leaving the city of Memphis. Subsection 3 requires that when a train is leaving a city the bell or whistle shall be sounded when the train starts, and at intervals until it has left the corporate limits. By reference to the first paragraph of the subsection, "at intervals" has been construed by the supreme court of the state to mean "short intervals." *Louisville & N. R. Co. v. Gardner*, 1 Lea, 688-690. Now, there was positive evidence from three witnesses, who were near enough to hear the bell if it did ring, that it did not ring as the crossing was approached. The preponderance of the evidence was that the bell did ring all the time. But there was a conflict of evidence. There was evidence, therefore, tending to show that the precautions enjoined upon railroad companies in subsection 3 of the statute were not observed, and the question which remains to be considered is whether a right of action founded on such failure to observe precautions is barred by the contributory negligence of the injured person. If the decisions of the supreme court of Tennessee are controlling in this forum upon this point, then there can be no doubt that contributory negligence is not a bar to the action under section 1299 for failure to comply with any of the subsections of section 1298, and that the court below erred in taking the case from the jury. The last expression of the supreme court of Tennessee is to be found in the case of *Knoxville, C. G. & L. R. Co. v. Acuff* (decided in 1893) 92 Tenn. 26. That was a suit against the railroad company for the failure to observe the fourth subsection of 1298. The deceased, for whose killing the plaintiff brought the action, was a deaf and dumb man, who was run down by a construction train. The court below was requested to charge the jury as follows: "If the jury shall find that the deceased was deaf and dumb, and shall further find that on the morning of the killing he was warned of an unusual danger from walking the track, by reason of the irregular running of a construction train, or for any other cause, and advised to take the dirt road, and still deceased, regardless of the warning, chose to walk on the railroad track, knowing that he could hear no signal, this would be such negligence as would bar recovery, and you should so find."

The court refused to give this instruction because counsel asked that it be applied to both counts of the declaration. Said Judge Caldwell, speaking for the supreme court: "The reason given sustains the action of the court. The declaration contained two counts,—one for negligence at common law, and the other for failure to observe statutory precautions for prevention of accidents when obstructions appear upon the track. Contributory negligence might have defeated the common-law action, but not that based upon the statute. As to the latter, it could be considered only in mitigation of damages."

The same rule has been laid down in a great number of cases, where the actions were founded on a failure to observe the statutory precautions in cases described in subsections 2, 3, and 4 of section 1298. *Little Rock & M. R. Co. v. Wilson*, 90 Tenn. 271, 13 L. R. A. 864; *Louisville & N. R. Co. v. Howard*, 90 Tenn. 144; *Patton v. East Tennessee, V. &*

G. R. Co. 89 Tenn. 370, 12 L. R. A. 184; *Cheapeake, O. & S. W. R. Co. v. Foster*, 88 Tenn. 672; *Nashville & O. R. Co. v. Smith*, 9 Lea, 474; *East Tennessee, V. & G. R. Co. v. Seales*, 3 Lea, 688; *Louisville & N. R. Co. v. Gardner*, 1 Lea, 691; *Nashville & O. R. Co. v. Nowlin*, Id. 523; *Railroad v. Walker*, 11 Heisk. 388; *Hill v. Louisville & N. R. Co.* 9 Heisk. 823; *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *Louisville & N. R. Co. v. Conner*, 2 Baxt. 882; *Louisville & N. R. Co. v. Burke*, 6 Coldw. 45.

The last-named case was decided in 1869, and by an unbroken line of authorities the rule as above stated has been enforced from that time down to the latest utterance of the court in 1898. The case of *Louisville & N. R. Co. v. Howard*, *supra*, was quite like the one at bar. There the deceased was driving a wagon across the track at a road crossing within the corporate limits of the town of Paris. The proof showed that all the statutory precautions were observed, and every possible means employed, by the company to prevent the accident, with a single exception, to wit, that it did not appear that the bell or whistle was sounded at short intervals continuously throughout the last mile before reaching the depot. The deceased was said to have been guilty of gross contributory negligence in failing to look and listen for approaching trains before driving upon the track; but the railway company was nevertheless held liable in damages for killing the deceased, the jury being required to consider deceased's contributory negligence in mitigation of damages.

The question whether we are bound by the decision of the supreme court of Tennessee as to the effect of contributory negligence in statutory actions depends on the basis given by that court for its conclusion. If the statute is held to be merely declaratory of the common law both in its requirements and in the liability imposed for failure to observe it, and the plea of contributory negligence is allowed only in mitigation of damages, because, in the view of the supreme court of Tennessee, that is the only effect it could have in an action for common-law negligence, we conceive that the effect of contributory negligence in such a case would be a question of general common law, with respect to which we might exercise an independent judgment. But if the rule of the state supreme court grows out of the peculiar liability imposed by the statute as distinguished from that imposed for negligence at common law, then it is the legitimate effect of a construction of a state statute by the highest tribunal of the state, and we are, of course, bound by it. That the rule as to contributory negligence in statutory actions is not the result of an assimilation of common-law principles to statutory negligence is most clearly brought out in *Knorrville, O. G. & L. R. Co. v. Acuff*, 92 Tenn. 26, above cited. There it will be seen that the court held that a certain state of facts might constitute gross negligence, and a complete bar to the action for common-law negligence, but that it was not such a bar to the statutory action. Now, it is true that it has several times been decided by the supreme court of Tennessee that the precautions enjoined by statute upon railway companies are only such pre-

cautions as the rules of common-law negligence would require them to observe. *Horne v. Memphis & O. R. Co.* 1 Coldw. 72-76; *East Tennessee, V. & G. R. Co. v. Pratt*, 85 Tenn. 9-14.

But it is apparent that, while the precautions to be taken are those which the common law would enjoin, the liabilities incurred for not taking them are quite different. Thus it has been held by the supreme court of the state that, if an accident occurs, a liability to the injured person is imposed upon the railway company for failure to comply with the statutory precautions, even if such failure did not cause the accident. *Railroad v. Walker*, 11 Heisk. 388; *Louisville & N. R. Co. v. Burke*, 6 Coldw. 45.

In the last case the sections of the statute we have been considering received a full construction by the supreme court of the state, which construction has never since been departed from. The court said: "The railroad company is responsible for the damages occasioned by or resulting from the accident or collision, unless it shows that the precautions prescribed by these sections were performed, and although it may appear that the accident or collision would have occurred had the precaution been performed. Cases of hardship and absurdity may occur upon such construction of the clauses of the code, but the language is explicit and certain, and the construction is inevitable. These sections are not invalid for want of constitutional or sovereign power in the legislature to enact the law expressed by them. The statute is founded on a policy of double aspect,—one to guard and protect the safety of the general public, and the other to compensate the injured person,—which has sanction in what is called the police power of the government. Corporate bodies are subject, as natural persons, to general laws enacted to protect and promote the quiet, comfort, health, and safety of the people, unless exempt by reason of plain implication from the nature of the privileges or franchises granted by their charter. In the absence of such exemptions, railroad corporations are subject, as would be natural persons in like occupation, to laws prescribing extraordinary vigilance, skill, exertions, and other precautions to be observed by their servants or agents in the running of trains, for the purpose of preventing accidents or collisions, and subjecting their companies to damages occasioned by or resulting from any accident or collision, unless they show that the prescribed precautions were performed. . . . Generally the negligence of a person injured by collision upon the track is not a bar to an action by him for damages, unless the railroad company show by proof that all the precautions prescribed by the Code were performed to prevent the accident. A person injured by a collision or accident caused by his own wilful act cannot, by virtue of the sections 1166, 1167 [now 1293, 1299], etc., maintain an action for damages done him, occasioned by or resulting from the collision or accident. . . . Negligence of the person injured, which caused or contributed to cause the accident or collision, or without which the accident or collision would not have occurred, may be taken into consideration by the jury

in determining the amount of damages proper to be given for the injury. Such construction the clause of the code will bear, and must be given."

In *Louisville & N. R. Co. v. Gardner*, 1 Lea, 688, referring to the subsections of 1288 and to 1299 above quoted, Judge Freeman says: "It was intended to enforce the strict performance of these duties by fixing arbitrarily upon the company a liability in case of their neglect."

It is sufficiently apparent from the statute and its construction by the court, whose construction of it is authoritative, that the statute is penal in character, and that the ordinary rules which obtain in common law negligence cases have no application to the defenses which may be set up to actions brought in accordance with its provisions. The cardinal principle in negligence cases at common law is that no recovery can be had unless the negligence complained of causes the injury. As we have seen, to justify a recovery under the statute there need be no causal relation whatever between the failure of the company to take the precautions required and the injury. All that is required is that the injury be caused by a collision or accident happening at the time when the precautions should have been, but were not, observed. In this construction of the statute it may be a little difficult to understand how the supreme court of Tennessee could, by reason of the contributory negligence of the sufferer, logically mitigate the damages to be recovered by him when the statute in terms gives to the person injured all the damages suffered by him. But the supreme court of Tennessee have thus mitigated the severity of the statute by construction, and it is not for us to question the power or propriety of doing so. The construction has prevailed for twenty-five years without disturbance by the legislature, and is a part of the law of the state as much as if expressly incorporated in the statutes.

That federal courts will always follow the construction given by the state supreme courts to the statutes of their respective states is too well settled to need discussion. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 859; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795. The last case is a much stronger one than the one at bar. There the question was whether a passenger upon a railroad could be prevented from recovering damages for an injury occasioned by the negligence of the company by reason of the fact that when injured he was traveling in violation of the Lord's day act of Massachusetts. Under a similar statute passed by the state of Maryland, the Supreme Court of the United States, in *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Tow Boat Co.*, 64 U. S. 28 How. 209, 16 L. ed. 483, had decided that it was no defense, in a suit brought by the owners of a vessel against a railway company for an injury caused by collision with piles negligently left by the railway company concealed in navigable waters, that the injury occurred when the vessel was violating the Sunday law of the state of Maryland. Nevertheless, in view of the fact that by repeated decisions, and for a number of years, the supreme judicial court of Massachusetts

had held that one receiving an injury while engaged in violation of the Lord's day act could maintain no action for damages therefor, the Supreme Court of the United States held that in administering the common law of Massachusetts with reference to the effect of the Lord's day act it would follow those decisions, and reach a result contrary to its own opinion as expressed in the previous Maryland case. It is to be observed that the main question at issue in the *Bucher Case* was not that of the construction of the Lord's day act of Massachusetts, for that needed no construction. It merely imposed a penalty for traveling on Sunday. The question was one of the common law, namely, what effect should it have upon the right of one injured by the tort of another that the injured person at the time of the injury was committing a misdemeanor? If, on such a question, decisions of the state courts become rules of decision for the federal courts, then clearly twenty-five years of repeated decisions by the supreme court of Tennessee as to the effect of the defense of contributory negligence to statutory actions, based on the language of the statute giving the right of action, must furnish the sole guide to federal courts in hearing and deciding such cases. See *Western & A. R. Co. v. Roberson* (decided by this court at this same session) 61 Fed. Rep. 592.

It is quite true that the use of contributory negligence to mitigate the damages recoverable under these statutes was probably adopted by analogy to the somewhat peculiar rule of the Tennessee courts in cases of common-law negligence. In *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128, Judge Cooper explains the position of the Tennessee courts on contributory negligence as follows: "The intrinsic difficulty of the subject on contributory negligence has led to three distinct lines of decisions. In England and a majority of the states of the Union the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action. In the states of Illinois and Georgia the doctrine of comparative negligence has been adopted; that is, if, on comparing the negligence of the plaintiff with that of the defendant, the former is found to be slight and the latter gross, the plaintiff may recover. In this state we hold that, although the injured party may contribute to the injury by his own carelessness or wrongful conduct, yet, if the act or negligence of the party inflicting the injury was the proximate cause of the injury, the latter will be liable in damages, the negligence or wrongful conduct of the party injured being taken into consideration, by way of mitigation, in estimating the damages. In other words, if defendant was guilty of a wrong by which plaintiff is injured, and plaintiff was also in some degree negligent, or contributed to the injury, it should go in mitigation of damages, but cannot justify or excuse the wrong. *East Tennessee, V. & G. R. Co. v. Fain*, 13 Lea, 85. At the same time we hold that if a party, by his own gross negligence, bring an injury upon himself, or proximately contribute to such injury, he cannot recover; neither can he recover in cases of mutual negligence."

But certainly this principle with reference to

contributory negligence which prevails in the courts of Tennessee has not been applied to the statutes which we are discussing as it would be applied to cases of common-law negligence, because, if so, then, under the distinction referred to by Judge Cooper in *Fleming's Case*, the gross contributory negligence of the plaintiff, if the proximate cause of the injury, would entirely defeat the action under the statute. This it has been held not to do, because of the imperative language of the statute. We are thus brought back to the proposition that the rule of law in Tennessee which prevents the defense of contributory negligence from being a complete bar to the action under the statute grows out of the language of the statute itself and the construction of that language by the supreme court of Tennessee. Therefore it follows that the duty of the trial judge in the court below was to follow the decisions of the state court with reference to the defenses under this statute, and that the gross negligence of Nason was not a complete bar to the action, but should have been considered by the jury in mitigation of damages.

The supreme court of Tennessee have been very stringent in requiring that trial judges should instruct the jury, in cases under this statute, that they must reduce damages for contributory negligence. *Nashville & O. R. Co. v. Noulis*, 1 Lea, 528. In this case, should the same facts appear, the court should tell the jury that on the undisputed facts the deceased

was guilty of gross contributory negligence, and that, if they should find the company had sustained the burden of showing that the bell was ringing as the engine approached and made the crossing, plaintiff could not recover, however negligent, in other respects, the bridge company might have been. The court should also say to the jury that they must, if they find that the bell was not rung, reduce the damages to be awarded the plaintiff by reason of his intestate's gross negligence, and that, if the jury should see fit, they may carry the reduction to the extent of making the damages merely nominal. In several cases, the supreme court of Tennessee have sustained verdicts in suits under this statute, where contributory negligence was shown, in sums which were little more than nominal. Of course, if Nason's death was the result of his own willful act, which some of the evidence tended to show, no recovery could be had, under the case of *Louisville & N. R. Co. v. Burke*, 6 Coldw. 45, already cited, and that question should also be left to the jury.

For the reasons given, the judgment of the court below is reversed as to the bridge company, and a new trial ordered against that defendant.

As already stated, the judgment in favor of the Kansas City, Ft. Scott & Memphis Railroad Company is affirmed.

Rehearing denied.

NEBRASKA SUPREME COURT.

Charles G. LOW, *Plff. in Err.*,

REES PRINTING CO.

(.....Neb.....)

- *1. Sections 1 and 3 of chapter 54 of the Session Laws of 1891, having provided, in effect, that for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, a day's work should not exceed eight hours, and that, for working any employe over the prescribed time, the employer should pay extra compensation, in increasing, geometrical progression, for the excess over eight hours (the rate of payment for the eighth hour being taken as the basis upon which to reckon such progression).—*Held*, that these provisions are unconstitutional—First, because the discrimination against farm and domestic laborers is special legislation; second, because, by the act in question, the constitutional right of parties to contract with reference to compensation for services is denied.

- *2. It being apparent, from an inspection of the entire act in question, that

*Headnotes by RYAN, C.

NOTE.—For a full discussion of the constitutionality of statutes regulating contracts between master and servant, see *State v. Loomis* (Mo.) 21 L. R. A. 792, and *note*, and *Com. v. Perry* (Mass.) 14 L. R. A. 325, and *note*.

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sections 1 and 3 thereof formed an inducement to its passage, no part of said act can be sustained as constitutional.

(June 6, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover the amount allowed by statute for work done by plaintiff for defendant after the hours which constituted the statutory day. *Affirmed*.

The facts are stated in the commissioner's opinion.

Messrs. Mahoney, Minahan & Smyth, for plaintiff:

A special law is such as at common law the courts would not notice unless it were pleaded and proved like any other fact. This law therefore is not a special one.

Hingle v. State, 24 Ind. 84; *Heridia v. Ayers*, 12 Pick. 844.

If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations or circumstances provided for, it is not objectionable as wanting uniformity of operation.

State v. Berka, 20 Neb. 879; *McAulich v. Mississippi & M. River R. Co.* 20 Iowa, 388; *State v. Graham*, 16 Neb. 76; *Cooley*, Const. Lim. § 890.

A class is a collection of persons distinguished by some common characteristic or circumstance. In the class provided for by this

law the characteristic or circumstance which distinguishes it is the working as a mechanic, servant, or laborer in any kind of work, excepting any farm or domestic work, not as a farmer or domestic, but in farm or domestic work. It is the character of work in which the individual is engaged that determines whether or not he belongs to the class upon which this law operates.

We have a striking illustration of this kind of classification in the mechanics' lien law, which is constitutional.

Davis v. State, 3 Lea, 876.

There is a natural and positive distinction between the body of laborers who follow the avocation of farming and the body of laborers who follow the industrial avocations.

The act in question operates upon a particular condition, and attaches to it certain consequences, and whenever that condition exists the consequences follow. The condition here is the working as a mechanic, etc.

Haskel v. Burlington, 30 Iowa, 237; *State v. Schlemmer*, 10 L. R. A. 135, 42 La. Ann. 1166 (applies to bakers only); *Barbier v. Connolly*, 118 U. S. 27, 23 L. ed. 923 (applies to laundries); *Minnesota & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 33 L. ed. 585; *Hancock v. Yaden*, 6 L. R. A. 576, 121 Ind. 866 (act applies to miners only); *Vermont Loan & T. Co. v. Whitehead*, 2 N. Dak. 83; *McAulich v. Mississippi & M. River R. Co. supra*.

The law is uniform.

People v. Judge of Twelfth Dist., 17 Cal. 555.

The constitution does not prohibit, under all circumstances, the enacting of special laws; it prohibits it only where a general law can be made applicable. Could a general law have been made applicable? If this be a special law, the legislature by passing it has answered the question in the negative. Is that answer reviewable by this court, or is it final? The authorities say it is final.

Wichita v. Burleigh, 36 Kan. 34; *Gentile v. State*, 29 Ind. 412; *State v. Hitchcock*, 1 Kan. 184, 81 Am. Dec. 503; *Beach v. Leahy*, 11 Kan. 27; *Marks v. Purdue University Trustees*, 87 Ind. 155; *State v. Tucker*, 46 Ind. 355; *State v. Boone County Ct.*, 50 Mo. 817, 11 Am. Rep. 415; *Richman v. Muscatine County Suprs.*, 4 L. R. A. 45, 77 Iowa, 513.

The act is not violative of that provision of the constitution which declares that no person shall be deprived of his liberty or property without due process of law.

"Due process of law," says Mr. Cooley in his work on Constitutional Limitation, p. 430, "means the same as the law of the land."

Courts do not declare laws unconstitutional because they are unjust, unrepugnant, or impolitic. That being so, what rule of conduct, which courts can enforce, does this act violate? None. Then it restrains defendant's liberty by the lawful exercise of a lawful power.

Murray v. Hoboken Land & Imp. Co., 59 U. S. 18 How. 277, 15 L. ed. 374.

The words "law of the land," as used originally in the Magna Charta in reference to this subject, are understood to mean "due process of law," that is by indictment or presentment of good and lawful men, "and this" says Lord Coke, "is the true sense and explanation of 24 L. R. A.

those words." The better and shorter definition of "due process of law" is that it means law in its regular course of administration through courts of justice.

Re Brosnahan, Jr., 18 Fed. Rep. 66; *Rowan v. State*, 30 Wis. 146, 11 Am. Rep. 559; *Es parte Ah Fook*, 49 Cal. 406; *Weimer v. Bunbury*, 30 Mich. 210; *Brown v. Board of Levee Comrs.*, 50 Miss. 479; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *McMillen v. Anderson*, 95 U. S. 87, 24 L. ed. 385; *Davidson v. New Orleans*, 96 U. S. 105, 24 L. ed. 620; *Dent v. West Virginia*, 129 U. S. 114, 33 L. ed. 623.

Due process of law has reference only to the manner of proceeding in taking the property or restraining the liberty.

This is a "law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610.

Does the fact that the power to contract is limited make the act unconstitutional? Surely not.

The books are full of such laws, and they are not considered insulting to those who deem it well to avail themselves of their protection.

The law declares that payment in part of an ascertained debt shall not extinguish it, although the parties agree that it shall do so.

Ogborn v. Hoffman, 52 Ind. 439; *Smith v. Tuler*, 51 Ind. 513; *Markel v. Spittler*, 23 Ind. 438.

A party will not be allowed to contract to waive the benefit of the homestead or exemption laws.

Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 49; *Kneettle v. Newcomb*, 23 N. Y. 249, 78 Am. Dec. 186; *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Moxley v. Ragan*, 10 Bush, 156, 19 Am. Rep. 61.

A debtor cannot waive a stay of execution by contract.

McLane v. Elmer, 4 Ind. 239; *Devlin v. Wood*, 3 Ind. 102.

By the English law a seaman cannot by contract waive his right to wages.

Kay, Shipmaster & Seamen, 636.

Parties cannot by contract bind themselves in advance not to resort to the courts for the redress of wrongs.

Bauer v. Sampson Lodge K. of P., 103 Ind. 262; *Dugan v. Thomas*, 79 Me. 221; *German-American Ins. Co. v. Etherton*, 25 Neb. 503.

A contract providing that a party shall not remove a cause to a federal court is void.

Homa Ins. Co. of New York v. Morse, 87 U. S. 20 Wall. 455, 23 L. ed. 869; *Doyle v. Continental Ins. Co. of New York*, 94 U. S. 535, 24 L. ed. 143.

A party will not be allowed to contract without limitation that he will not engage in a particular business.

Taylor v. Saurman, 110 Pa. 8.

A statute may require parties to insert in a promissory note the words "given for a patent."

Herdic v. Reusser, 109 N. Y. 127; *New v. Walker*, 106 Ind. 365, 58 Am. Rep. 40.

Priority in the allowance and payment of claims may be regulated by legislation

United States v. Fisher, 6 U. S. 2 Cranch, 358, 2 L. ed. 804.

A lien for miner's wages may be made superior to the royalty due to the owners of the mine from the lessees or operators.

Warren v. Sohn, 112 Ind. 218.

A statute prohibiting parties from contracting to pay attorney's fees is constitutional.

Churchman v. Martin, 54 Ind. 890.

Without law as one of its factors there is really no such thing as a contract. The law is a silent but ruling factor in every contract.

Long v. Straus, 107 Ind. 94, 57 Am. Rep. 87; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 75 U. S. 8 Wall. 276, 19 L. ed. 849.

This act is within the police power of the state.

Kansas Pac. R. Co. v. Mower, 16 Kan. 576; *Cooley*, Const. Lim. 573.

Its purpose is to give employment to the idle and food to the hungry by reducing the hours which the laborer may work in the day to eight, and thus increase the demand for laborers.

Its aim is to prevent one class of citizens from depriving the other of the opportunity to earn a living; to so regulate the conduct of the employer that the laborer may have a fair share of the wealth which he produces; and to give to the laborer an opportunity to attend to the education of his children; to cultivate his own moral and intellectual faculties, and thus serve the public good.

The artisan who is demanding at this time an eight hour's day in the building trades is simply striving to recover what his ancestry worked for four or five centuries ago.

Six Centuries of Work & Wages, Rogers, M. P. pp. 542, 548; William Roscher, Leipzig, Principles of Political Economy, pp. 78-76.

The vast majority of all wage laborers have little or no accumulations.

They are, therefore, unable to stand out against the employers and make terms for their services, or to seek a better market for their labor in another town or city, but must accept the first offer for employment however meager the compensation.

Francis A. Walker, Yale College, Wage Question, pp. 296, 297; Tiedeman, Pol. Powers, § 178; Smith, Wealth of Nations, pp. 50, 51; Ward, Workman & Wages, p. 224.

Shorter hours enable the workman to put more energy into his work.

Schoenhof, Industrial Situation, pp. 127, 128.

The subjects and objects of this act come clearly within Judge Brewer's definition of the police power, and the principle decided in the so-called oleomargarine cases is applicable to the case at the bar.

Powell v. Com. 114 Pa. 265, 60 Am. Rep. 850; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 258.

The legislature, then, has the power to restrain the doing of this or that act if, in its opinion, the public weal demands it.

State v. Moore, 104 N. C. 714; *Alexander v. Archer*, 21 Nev. 22; *Mohle v. Tschiroh*, 68 Cal. 882; *Mugler v. Kansas*, 128 U. S. 623, 81 L. ed. 205; *State v. Schlemmer*, 10 L. R. A. 135, 42 La. Ann. 1166; *Singer v. State*, 8 L. R. A. 551, 73 Md. 464; *Territory v. Ah Lim*, 9 L. R. A. 895, 1 Wash. 156; *State v. Addington*, 24 L. R. A.

77 Mo. 110; *State v. Marshall*, 1 L. R. A. 51, 64 N. H. 549; *Re Bromahan, Jr.*, 18 Fed. Rep. 66; *Butler v. Chambers*, 36 Minn. 69.

There is no distinction between the law which fixes the price which a man shall charge for the use of his money, and the law which puts a price on his labor.

Messenger v. State, 25 Neb. 676; *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375.

This law may be put on the doctrine laid down in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and this brings it within the police power.

Nash v. Page, 80 Ky. 589, 44 Am. Rep. 490; *Munn v. People*, 69 Ill. 80; *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201; *Davis v. State*, 68 Ala. 58; *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1.

Mearns, Ambrose & Duffie, for defendant in error:

When a law operates differently upon each of two citizens engaged in the same business and occupying the same position, that law is open to the objection of being special and class legislation, and falls under the constitutional inhibition found in section 15 of article 3 of our Constitution.

Depps v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; *Roxworthy v. Hastings*, 28 Neb. 772.

Every one has the right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which applies in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government.

Cooley, Const. Lim. p. 891; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Durham v. Lewiston*, 4 Me. 140; *Lewis v. Webb*, 3 Me. 326; *Holden v. James*, 11 Mass. 896, 6 Am. Dec. 174; *Picquet, Appellant*, 5 Pick. 65; *Budd v. State*, 8 Humph. 488, 39 Am. Dec. 189.

In 1886 the Pennsylvania legislature passed an act in relation to laborers, and making eight hours of labor between the rising and setting of the sun a legal day's work, where there is no contract or agreement to the contrary.

The validity of this act was denied in the case of *Godcharles v. Wigeman*, 118 Pa. 431.

We do not believe a statute of the kind under consideration can be sustained even in a state whose constitution does not prohibit class or special legislation.

Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500; *Caldar v. Bull*, 8 U. S. 3 Dall. 387, 1 L. ed. 648; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 143, 3 L. ed. 180.

The clause "law of the land" is held to mean a general public law, equally binding on every member of the community.

Wally v. Kennedy, *supra*; *Bank of the State v. Cooper*, 2 Yerg. 599.

The rights of every individual must stand or fall by the same general law that governs every other member of the body politic in the land, under similar circumstances, and therefore a partial law which proposes to affect or destroy the rights of particular persons, or a particular class of persons, is not the law of the land.

Achison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356.

Statutes of this character, if not similar to the one in question, at least involving the same constitutional questions and principles have been held unconstitutional.

People v. Gillson, 109 N. Y. 889; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 747, 28 L. ed. 585; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *State v. Goodwill* (W. Va.) 6 L. R. A. 621, and cases cited in the notes.

Ryan, C., filed the following opinion:

In the district court of Douglas county, plaintiff in error filed his petition, wherein were stated three causes of action. Of these, the third cannot be reviewed, for the reason that there was no motion for a new trial filed or passed upon, in respect to it. The stipulation waiving the motion for a new trial, and consenting that the action in this court should be treated as if such motion had actually been filed and ruled upon in the district court, ignores the consideration that is due to the trial court, where the motion in question should have been duly passed upon, that whatever errors were presented thereby might be corrected. The consideration of this case, for the reason just indicated, will therefore be confined to the first and second causes of action stated in the petition. After alleging that the defendant was a corporation doing business in the city of Omaha, the averments of plaintiff in his petition were as follows:

"Further complaining, plaintiff states for his first cause of action that on the 10th day of August, 1891, he contracted with the defendant to work for it, as a printer, for thirty cents per hour; that, pursuant to said contract, he entered the employment of said defendant: and that, on said 10th day of August, said defendant worked this plaintiff eleven hours. Said defendant thereby became indebted to this plaintiff in the sum of \$6.60; that is to say, \$2.40 for the first eight hours worked, sixty cents for the ninth hour worked, one dollar and twenty cents for the tenth hour worked, and two dollars and forty cents for the eleventh hour worked. Of said sum thus due, defendant has paid plaintiff three dollars, and no more.

"For a second cause of action, plaintiff states: That on the 8th day of August, 1891, he, at the request of the defendant, entered into a contract with the said defendant, which contract was in the words and figures following, viz.: 'To all employes of Rees Printing Co.: From and including August 1st, 1891, all employes of this company will be employed and paid by the hour for the number of hours they work, at the same rate of wages now paid, and not by the day. Any employe who is willing to work the same number of hours as heretofore at the rate of wages heretofore paid him will report in writing at once to the undersigned. July 30th, 1891. Rees Printing Co.

"Receipt of the above rule and regulation is hereby acknowledged. I am willing to continue in the service of the company subject to the same.

August 8, 1891.

Charles G. Low."

"That the rate of compensation or wages agreed upon between the plaintiff and defend-

ant, and paid to the plaintiff by said defendant, prior to entering into said contract, was \$3 per day for each day worked by plaintiff, which day consisted of ten hours. That on said 8th day of August, 1891, the defendant worked this plaintiff ten hours, and thereby became indebted to him in the sum of \$4.20; that is to say, \$2.40 for the first eight hours, sixty cents for the ninth hour, and one dollar and twenty cents for the tenth hour worked. Of said sums thus due to the plaintiff, defendant has paid \$3.00, and no more."

A demurrer was filed to the above causes of action on the grounds following: "(1) The said petition does not state facts constituting a cause of action against the defendant, nor does any of the counts thereof state facts constituting a cause of action in plaintiff's favor against the defendant. (2) Chapter 54 of the Acts of the 22d Session of the Legislature of Nebraska, under the provisions of which this action was brought, and by virtue of which plaintiff must recover if at all, is unconstitutional and void, and in contravention of the constitution of Nebraska and of the United States. (a) It seeks to take away and limit the right of the citizen to enter into contracts relating to legal and lawful business; (b) it seeks to abridge the rights of the people in disposing of their lawful property, and the purchase of the same; (c) it is special and class legislation, and an attempt on the part of the legislature to grant special immunities and privileges to certain employes and employers; (d) the statute, while intended to be general in its operation, excepts certain of our citizens from its provisions; (e) it seeks to abridge the privileges of certain of our citizens, and deprive them of their property without due process of law, and denies to certain of our citizens equal protection of the law, and is therefore in conflict with sections 1 and 8 of article 1 of the Constitution of Nebraska, and section 1 of the Fourteenth Amendment of the Constitution of the United States. (3) Said act is broader than the title, in so far as it provides for a penalty for violation thereof, and seeks to fix the compensation of the employe; and to that extent the provisions of the act are in conflict with section 11, article 8, of the Constitution of this state. (4) Said act is in conflict with section 5, article 8, of the Constitution of Nebraska, in that it seeks to give to the employe a part of the penalty provided for its violation."

This demurrer was argued in the aforesaid district court, *Judges* Wakely, Doane, and Davis presiding, by whom, upon due consideration, it was sustained, as to said first and second causes of action. Thereupon, the plaintiff electing to stand on said two causes of action, and refusing to further plead, judgment was thereupon rendered in favor of the defendant. By petition in error, plaintiff has duly presented for review by this court the same questions passed on in the district court.

Chapter 54, specially described in, and against which the demurrer was directed, is in the following language:

"Be it enacted by the legislature of the state of Nebraska:

"Section 1. That eight hours shall constitute a legal day's work for all classes of mechanics, servants and laborers, throughout the state of

Nebraska, excepting those engaged in farm and domestic labor.

"Sec. 2. Any officer or officers, agent or agents in the state of Nebraska, or any municipality therein who shall openly violate or otherwise evade the provisions of this act, shall be deemed guilty of malfeasance in office and be supplanted or removed by the governor or head of the department to which said officer is attached.

"Sec. 3. Any employer or corporation working their employes over the time specified in this act shall pay as extra compensation, double the amount per hour as paid for previous hour.

"Sec. 4. Any party or parties contracting with the state of Nebraska, or any such corporation or private employer who shall fail to comply with or secretly evade the provisions hereof by exacting or requiring more hours of labor for the compensation agreed to be paid per day than is herein fixed or provided for, shall on conviction thereof be deemed guilty of a misdemeanor and be punished by a fine of not less than one hundred (\$100) dollars nor more than one thousand (\$1000) dollars."

The constitutional provisions with which it is claimed the above act is in conflict are: First, the closing sentence of section 15, art. 8, that "in all cases where a general law can be made applicable no special law shall be enacted;" second, the third section of the bill of rights, that "no person shall be deprived of life, liberty, or property without due process of law." It is also urged against the act that it is void as an attempt by the legislature to prevent persons legally competent to enter into contracts to make their own contracts. In the present controversy there is necessarily involved the validity of the entire act; for, although only the first and third sections are directly attacked, yet it is apparent, from an inspection of the act as a whole, that these two sections formed an inducement to its passage. The act must therefore stand or fall as an entirety. *Trumble v. Trumble*, 87 Neb. 340.

There seems to have been an oversight as to the first cause of action, for the averments therein were, in substance, that there was a contract of employment at the rate of 30 cents per hour; that the plaintiff was, by the defendant, worked eleven hours, and had received payment to the amount of but \$3,—that is, for ten hours work at the rate stipulated. On the face of the petition there was therefore unpaid 30 cents upon the first cause of action. This has not been insisted upon in argument, however, and will therefore receive no further attention.

The second cause of action avers that there was a written agreement between the parties that after August 1, 1891, employment should be by the hour, at the rate of \$3 for ten hours' work; that is to say, plaintiff was to receive 30 cents per hour, but he agreed to work each day ten hours. It is alleged that on August 8, 1891, plaintiff had worked ten hours and had been paid therefor \$3. According to the terms of the agreement between the parties, the plaintiff, by the payment of \$3 had received all that was his due. By virtue of the provisions of section 3 of the Act under consideration, it is insisted however, that, for the ninth hour plaintiff is still entitled to receive 30 cents, and

for the tenth hour he is yet entitled to 30 cents. This clearly presents the question whether a contract fairly entered into, and in compliance with which both parties have acted to the full discharge of their obligations thereunder, must be deemed modified by the existing provisions of the statute, irrespective of the intention of the parties, as expressed in their contract. Until a comparatively recent period, it would have been quite difficult to find adjudications pertinent to the legal propositions involved. For some reason, not necessary to consider, there has, in modern times, arisen a sentiment favorable to paternalism in matters of legislation. The outgrowth of this sentiment has been legislation for the regulation of the media of payment, the manner in which products shall be measured or weighed when compensation depends upon measure or weight; the hours of labor; and other kindred subjects. In each instance the statutory provision is necessarily a restriction of the right to regulate relations and duties by contract. To the fact that these attempts have recently been so frequently made, we are indebted for a number of well-considered adjudications bearing upon the questions now presented for our determination. While there has not been an entire unanimity, the decided weight as well as the number of authorities are coincident with those from which quotations will hereafter be made. That these quotations are freely made requires no other apology than that the cases quoted from are so ably and carefully considered that to them we should be hopeless to make any additions or improvement by the most careful research of which we are capable. The three several objections to the act under consideration will be taken up in the order of their statement; and considered rather in the light of authority, than in that of original reasoning or research.

1. The first section of the statute under consideration provided what number of hours shall constitute a legal day's work for all classes of laborers, except those engaged in farm or domestic labor. The argument made in favor of the necessity that, each day, the excess over eight hours should be devoted to rest, recreation, and mental improvement, loses much of its force when these very desirable benefits are, by the statute itself, restricted to certain defined classes of laborers, no one of which, independently of the statute, devotes so many hours to labor as do the classes denied the protection of the statute. Legislation of this kind is always fraught with danger. Hence arose the prohibition of special legislation, when avoidable, which is found in our constitution. In *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, we find an opinion of the supreme court of Missouri (one judge alone dissenting), of which the syllabus is as follows: "Rev. Stat. 1889, §§ 7053, 7060, making it unlawful for any corporation, person, or firm engaged in manufacturing or mining to issue, for the payment of wages, any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiated and redeemable at its face value, in cash or in goods, at the option of the holder, at the store or other place of business of the corporation, person, or firm without

placing similar restrictions on others employing labor, are unconstitutional, as class legislation." In the majority opinion which was filed March 25, 1893, class legislation is ably discussed in the following language: "There is no doubt but that many of our legislative enactments operate on classes of individuals only, and they are not invalid because they so operate, so long as the classification is reasonable, and not arbitrary. Thus, it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property, and the safety, health, and morals of the citizen. But classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons may be deemed competent to contract for themselves; but no one will claim that competency to contract can be made to depend upon stature, or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land. When speaking upon this subject *Judge Cooley* says: 'The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting the rights and privileges and legal capacity in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to build such houses as others were allowed to erect, or in any other way to make use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid an individual or class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim the right to do so should be able to show specific authority to do so, instead of calling upon others to show how and where the authority is negated.' *Cooley, Const. Lim. 6th ed. 484*. There can be no doubt that the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employes, but that is not the scope of the second section of the statute now in question. They single out those persons who are engaged in carrying on the pursuits

of mining and manufacturing, and say to such persons: 'You cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder and the numerous contractors, employing thousands of men, may make such contracts, but you cannot.' They say to the mining and manufacturing employes: 'Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone, as others may.' It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary and every day contracts,—a right accorded to all other persons. This denial of the right to contract is based upon a classification which is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract." After the above expression of its views, the supreme court of Missouri reviewed the authorities bearing upon the question discussed. This review we shall quote, because therein is contained a condensed statement of the purport of numerous decisions which tend to enlighten the subject under discussion. The language in which this review was made is as follows: "The supreme judicial court of Massachusetts had under consideration in *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 825, a statute which provides that 'no employer shall impose a fine upon, or withhold the wages, or any part of the wages, of an employe engaged at weaving, for imperfections which may arise during the process of weaving.' Stat. 1891, chap. 125, § 1. It was held that, if the act went no further than to forbid the imposition of a fine for imperfect work, it might be sustained, but that the attempt to make inferior work answer a contract for good work presented a different question; that the right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the courts. Says the court: 'If it [the statute] be held to forbid the making of such contracts, and to permit hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one when it declares that he has a natural, inalienable right of acquiring, possessing, and protecting property. *Godcharles v. Wigeman*, 113 Pa. 431, was an action brought by Wigeman to recover wages as a puddler. Plea of payment, etc. During the time of his employment, the plaintiff asked for and received orders from defendants, on different parties, for coal and other articles, which orders were honored by the parties on whom drawn, and the defendants paid them. It seems an act of the legislature made all orders given by employers engaged in the business of manufacturing, to their workmen, payable in goods, or anything but money, void. Speaking of these sections of

the act, the court said: "They are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employé. He may sell his labor for what he thinks best,—whether money or goods,—just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." In *State v. Goodwill*, 88 W. Va. 179, 6 L. R. A. 621, a statute of that state prohibited persons engaged in mining and manufacturing from issuing orders in payment for labor, except as such should be made payable in money. It made a violation of its provisions a misdemeanor. The constitution of that state declares that all men have certain inherent rights; that is to say, 'the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.' The statute was held unconstitutional after a full consideration. Says the court: "The right to use, buy, and sell property, and contract in respect thereof, including contracts for labor, which is, as we have seen, property, is protected by the constitution." The scope of the opinion is well summarized in the headnote, in these words: "It is not competent for the legislature, under the constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed upon the owners of other property, or employers of labor, and prohibit them from making contracts which it is competent for owners of property or employers of labor to make." And this ruling was followed and approved in *State v. Fire Creek Coal & Coke Co.*, 38 W. Va. 188, 6 L. R. A. 859. The statute brought in question in *Millet v. People*, 117 Ill. 204, 57 Am. Rep. 869, required all coal produced in the state to be weighed on scales to be furnished by the mine owners, and subjected the mine owners to fine or imprisonment for a failure to comply with its provisions. By another section [Act June 20, 1885, § 2], it was provided that 'all contracts for the mining of coal in which the weighing of coal as provided in this act shall be dispensed with, shall be null and void.' It was held that the mine owners could not be compelled to make a contract for mining coal, so as to be regulated by weight, and that they could not be compelled to keep and use scales for such purposes, save when they saw fit to make contracts for mining on the basis of weight. The law was considered repugnant to the constitutional provision that 'no person shall be deprived of life, liberty, or property without due process of law' [Const. art. 2, § 2]; that to single out mine owners, and prohibit them from making contracts which it was competent for other employers of labor to make, was not due process of law. And for like reasons the same court held an act void which denied all persons and corporations engaged in mining or manufacturing the right to keep, or be interested in, a truck store for furnishing supplies, etc. *Fraser v.* 24 L. R. A.

People, 141 Ill. 171, 16 L. R. A. 492." The opinion above quoted from reversed the judgment of the second division of the same court, reported in *State v. Loomis* (Mo.), 20 S. W. Rep. 332, by which division it had been referred to the full bench for determination.

In *State v. Ramsey County Sheriff* the supreme court of Minnesota filed an opinion on January 19, 1892, which is reported in 48 Minn. 286, in which was used this language: "In *Nichols v. Walter*, 37 Minn. 264, it was held that the law was general and uniform in its operation which operates equally upon all the subjects within the class for which the rule is adopted, but that the legislature cannot adopt an arbitrary classification, though it be made to operate equally upon each subject within the class, and the classification must be based upon some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them. In *State v. Donaldson*, 41 Minn. 74, a distinction or classification of dealers in medicines, based on the location of their places of business in respect to distance from drug stores, was held reasonable, and not a mere arbitrary distinction. In *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 224, 8 L. R. A. 419, this court, in dealing with chapter 13, Laws 1887, defining the liability of railway companies to their employés, said, in substance, that not only must the statute treat alike, under the same conditions, all who are brought within it, but, in its classifications, it must bring within it all who are under the same conditions. 'Such law must embrace all, and exclude none, whose condition and wants render such legislation necessary or appropriate to them, as a class.' *State v. Wood*, 49 N. J. L. 88. . . . No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against nuisances occasioned by dense smoke; and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam, or other useful purposes, or, further, whether steam power is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable." There is perceived no reason why a resort to special legislation was necessary in respect to the subject-matter of the act with which we are now dealing. If we are correct in this assumption, the language quoted is specially applicable to the provisions of the statute by which its benefits are withheld from domestic and farm laborers. These views are enunciated with somewhat more of confidence because they are in line with the reasoning of this court in *Atkinson & N. R. Co. v. Baty*, 6 Neb. 87, 29 Am. Rep. 356.

2. The third section of article 1 of the Constitution of this state provides that no person shall be deprived of life, liberty, or property without due process of law. What is implied

by the term "due process of law"? is a question which has received discussion by this court. In *Atchison & N. R. Co. v. Baty*, *supra*, it was held, in the language of the first paragraph of the syllabus, that "legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of a crime, or when the sacrifice of his property is demanded by a just regard for the public welfare." In the discussion of the principles involved in the case from which the above quotation of the first paragraph of the syllabus was taken, Gantt, J., delivering the opinion of this court, said: "The terms 'due process of law,' and 'the law of the land,' one or the other of which is found in all constitutions of the states, are said to mean the same thing, and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. *State v. Doherty*, 60 Me. 509; *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 498; *State v. Simons*, 3 Speers, L. 767. Hence, these terms do not mean merely a legislative enactment, for, if they did, every restriction upon the legislative authority could be at once abrogated, for what more can a citizen suffer, than to be taken, imprisoned, dispossessed of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and his life,—without crime? Yet all this he may suffer if the act of the assembly, simply denouncing these penalties upon particular persons or a particular class of persons, be in itself the law of the land, within the sense of the constitution. *Hoke v. Henderson*, 14 N. C. 15. Webster interprets these terms to mean 'that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore to be considered as the law of the land.' And he says: 'If this be so, acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in every possible form, would be the law of the land. There would be no general, permanent law for the courts to administer, or even to live under. The administration of justice would be an empty form,—an idle ceremony. Judges would sit to execute legislative judgments and decrees and not to declare the law or administer the justice of the country.' 5 Webster Works, 487; *State v. Doherty*, *supra*; *Holden v. James*, 11 Mass. 404, 6 Am. Dec. 174; *Lane v. Dorman*, 4 Ill. 240, 241, 36 Am. Dec. 548; *Com. v. Byrne*, 20 Gratt. 165; *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 243, 4 L. ed. 561. It is, however, true that, subject to the qualified negative of the governor, the legislature possesses all the legislative power of the state; but it is said in *Taylor v. Porter*, 4 Hill, 144, 40 Am. Dec. 274: 'Under our system of government, the legislature is not supreme. It is only one of the organs of absolute sovereignty, which resides in the whole body of the people.' And therefore, as the security of life, liberty, and property lies at the foundation of the civil compact, to say that 'the grant of legislative

power included the right to attack private property would be equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which government was established.' Smith, Const. Const. 434. This one great end of government is the protection of the absolute right of individuals,—the life, liberty, and property of each citizen of the state." In *State v. Loomis*, *supra*, the term "due process of law" was discussed, and applied to subjects kindred to those now under consideration. The court of appeals of Texas, in an opinion filed June 25, 1892, and found in 19 S. W. Rep. 910 (*San Antonio & A. P. R. Co. v. Wilson*), cites with approval the case of *Atchison & N. R. Co. v. Baty*, *supra*. Immediately following and enforcing their approval was a full review of the same subject as had been discussed by Judge Gantt, with a synopsis of the holdings of numerous courts with reference thereto. The length of this opinion forbids an extended quotation from the opinion to which reference has just been made, but its examination will be found to further illustrate and enforce the principles laid down in *Atchison & N. R. Co. v. Baty*, *supra*. The special, practical applications of the principles to which we have just referred refer to the alleged attempt to deprive parties of the right to contract as they see fit, and will therefore be treated under that head.

3. In *Braceville Coal Co. v. People*, there was filed October 26, 1893, by the supreme court of Illinois, an opinion, reported in 147 Ill. 662, 22 L. R. A. 840, in which was the following language: "There can be no liberty protected by government which is not regulated by laws which will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same rights to all others. The fundamental principle upon which liberty is based, in free and enlightened governments, is equality under the law of the land. It has, accordingly, been everywhere held that 'liberty,' as that term is used in the constitution, means, not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Fraser v. People*, *supra*; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 825; *People v. Gilson*, 109 N. Y. 389; *Live-Stock D. & B. Assn. v. Crescent City*, L. S. L. & S. H. Co. 1 Abb. U. S. 388, Fed. Cas. No. 8,408; *Slaughter-House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 894; *Godcharles v. Wigman*, 118 Pa. 481; *State v. Goodwill*, 83 W. Va. 179, 6 L. R. A. 621.

Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion possession, and power of disposition which may be acquired over it; and the right of property preserved by the constitution is the right, not only to possess and enjoy it, but to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has

in his own labor is the common heritage. And, as an incident to the right of acquiring property, the liberty to enter into contracts by which labor may be employed in such way as to the laborer may seem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. . . . We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor shall be performed, and the mode and time of payment. Each are essential elements of the right to contract; and whosoever is restricted in either, as the same is enjoyed by the community at large, is deprived of liberty and property." For a further discussion of these propositions, reference is made to the case entitled *Re Jacobs*, 98 N. Y. 106 50 Am. Rep. 636, *et seq.* A complete review of the authorities upon this point will be found in *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 28 L. R. A. 264, in which the opinion of

the supreme court of Arkansas was filed February 8, 1894. It is the latest case which has come under our observation, and is strictly in line with those above quoted from and cited. A full and careful examination of all the questions presented has satisfied us that sections 1 and 3 of the Act discussed are unconstitutional, for the reasons above assigned. The legislation attempted cannot be defended as a police regulation, as was attempted in argument; for, under pretense of the exercise of that power the legislature cannot prohibit harmless acts, which do not concern the health, safety, and welfare of society. *Millett v. People*, *Fraser v. People*, and *State v. Loomis*, *supra*; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 452; *Re Jacobs*, and *People v. Gillson*, *supra*.

The claim that this act was a proper exercise by the legislature of its police power cannot be sustained. It results that the judgment of the district court is affirmed.

Affirmed.

CALIFORNIA SUPREME COURT (1st Department.)

Mauritz E. LYNN, *Respt.*,

SOUTHERN PACIFIC CO., *Appt.*

(....Cal....)

1. A railroad company which undertakes to transport all the passengers

NORM.—Duty of carrier permitting cars to become overcrowded.

Injuries received on crowded railroad trains.

a. Riding on the platform.

A passenger on a railroad train, injured by the negligence of the railroad company, is not guilty of such contributory negligence as to bar a recovery, where he is on the platform at the time of injury and there is not sufficient room inside the cars for the proper accommodation of passengers. *Lafayette & I. R. Co. v. Sims*, 27 Ind. 59; *Werkle v. Long Island R. Co.* 98 N. Y. 660.

And the same was held in a similar case where he was looking for a seat. *Dewire v. Boston & M. Railroad*, 2 L. R. A. 166, 148 Mass. 343; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418.

So where the aisles of the cars were crowded and there appeared to be no vacant seats and he was injured while on the front platform of a car on a dummy railroad. *Highland Ave. & B. R. Co. v. Donovan*, 94 Ala. 299.

And a passenger was not guilty of contributory negligence where he was injured by the negligence of the company while on the platform of a crowded car, although the statutory notice forbidding passengers from standing on the platforms was in the car, as exemption only applies where accommodation is furnished. *Lafayette & I. R. Co. v. Sims*, 27 Ind. 59; *Willis v. Long Island R. Co.* 84 N. Y. 670, 32 Barb. 405.

These cases sustain the position in *LYNN v. SOUTHERN PACIFIC CO.*

But in *Camden & A. R. Co. v. Hoosey*, 99 Pa. 492, 44 Am. Rep. 120, and *Worthington v. Central Vermont R. Co.* 15 L. R. A. 323, 64 Vt. 107, it was held that no recovery for injuries to passenger could be had where he was on the platform of the cars, and there was standing room inside.

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on board a train, although some are upon platforms, must exercise all additional care commensurate with the perils and dangers surrounding the passengers in such a situation.

2. A railroad company is liable for injury to a passenger thrown from a platform of a car on which he was lawfully riding, when the accident was due to the excess

And where there is standing room inside the car, and a passenger standing on the platform falls off, in attempting to regain money given him by the conductor in making change, which is carried away by the wind, he cannot recover. *Quinn v. Illinois Cent. R. Co.* 51 Ill. 495.

Permitting an excursion train to be overcrowded by an unexpected crowd of passengers is not of itself negligence although greater care is required of the company, and it is not negligent in failing to furnish cars sufficient to seat all that apply; and if at the time of injury to the passenger, there was room for him inside the cars and he voluntarily exposed himself to danger on the platform he could not recover. *Chicago & N. W. Co. v. Carroll*, 5 Ill. App. 201.

And a lame woman entering a car that was full, who was injured in attempting to cross the platforms to reach the car ahead, by falling between the buffers not looking to see where she stepped, could not recover, although the cars started with a jerk just as she was stepping across. *Snowden v. Boston & M. Railroad*, 151 Mass. 220.

See also subhead "Street railroads," *infra*.

b. Riding in other dangerous places.

A recovery was allowed a passenger who was smoking and finding the smoking compartment full entered the forward part used for baggage, and was injured by reason of a rear end collision of the train, where his ticket was taken and he was allowed to remain in that car and he had frequently rode in the same without objection. *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 253.

But where a passenger on an excursion train was compelled to ride in a high box car on account of the crowd and jumped off, after being warned of the danger when the train reached her station, and was injured, she could not recover. *Evans*

give speed of the train, considering the curves and condition of the track which occasion a severe jar or jolt.

3. The right to stand upon the platform of a car exists, where, on the return of an excursion, a passenger with an excursion ticket is unable to get room inside the car, and is not informed that he can be carried on another train.

(June 11, 1894.)

A PPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff, and from an order denying a motion for a new trial in an action brought to recover damages for personal injuries received by plaintiff while a passenger on defendant's train and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. W. H. L. Barnes for appellant.

Messrs. Cope, Boyd, Fidelity & Hoburg, for respondent:

The stoppage of the train at one of its regular stations constituted an invitation to the public to take passage thereon.

Werle v. Long Island R. Co. 98 N. Y. 651.

If a passenger is compelled to ride upon the platform, or other exposed position, by reason of the seats and aisles on the inside being all crowded and occupied, this fact is not negligence upon his part. He is lawfully, under such circumstances, upon the platform. Riding upon the platform voluntarily, and without such necessity, has in some cases been held to be prima facie evidence of negligence.

Werle v. Long Island R. Co. supra; Willis v. Long Island R. Co. 34 N. Y. 670; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345; *Ginna v. Second Ave. R. Co.* 67 N. Y. 596; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418, 6 Duer, 883; *Treat v. Boston & L. R. Corp.* 181 Mass. 871; *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614; *Topeka City R. Co. v. Higge*, 38 Kan. 381.

If the company undertake to carry in any one car more than they can accommodate with seats, so that some are, from necessity, forced to stand upon the platform, and have no opportunity before the train is under way to find seats in other cars, such persons are there by permission of the company, and are lawfully there; and the company can claim no exemption under the statute (General Railroad Law, § 46) no matter how conspicuously their notices may be posted in the interior of the cars.

Colegrove v. New York & N. H. R. Co. and *Willis v. Long Island R. Co. supra.*

The instructions were not excepted to, and afford the law for this case. Indeed, they are the law everywhere.

Geddes v. Metropolitan R. Co. 103 Mass. 295; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 528; *Ellis v. Lake Shore & M. S. R. Co.* 138 Pa. 506.

If a person voluntarily, and without necessity, rides upon the platform he only assumes the risks ordinarily incident to such a position. He does not assume the risks of the negligence or carelessness of the carrier.

Willmott v. Corriann Canal, Street & Co.

ville & C. R. Co. v. Duncan, 28 Ind. 444, 92 Am. Dec. 322.

A person entering a crowded excursion car, and assuming a dangerous position, of riding on the rear part of the frame or box of the open car, with his feet on a seat, when he could have stood up, or found a seat in some other car, is guilty of such contributory negligence as will bar a recovery for damages for death caused by falling off the car. *Jackson v. Crilly*, 18 Colo. 103.

a. Getting on or off the cars.

A passenger prevented from alighting from a train, by the crowding in of passengers, and who is injured as he alights, by the train starting too soon and not by his carelessness in leaving the car while in motion, may recover. *Pennsylvania R. Co. v. Peters*, 116 Pa. 206.

See next subhead.

And a passenger injured in alighting from a crowded car while in motion cannot recover. *Olivier v. Louisville & N. R. Co.* 43 La. Ann. 804; *Chicago & A. R. Co. v. Fisher*, 81 Ill. App. 38. In neither of these cases does the question of crowd seem to be material, although in the first case he was obliged to sit on the platform of the car, and claimed to have been thrown off by the motion of the car.

As to injuries in getting on or off railroad trains, see note to *Carr v. Bel River & E. R. Co.* (Cal.) 21 L. R. A. 354.

Injuries caused by fellow passengers on crowded trains.

A railroad company is liable for injuries caused by crowds at the terminal gates, where such crowds are expected and no provision made for them as opening only one gate where there were five gates, during an excursion. *Taylor v. Pennsylvania Co.* 30 Fed. Rep. 765.

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And where a passenger was pushed or jostled off at his station while the cars were in motion, the question of negligence was for the jury, and if the injury to the plaintiff was occasioned by the surging of the crowd which could not be controlled or by the fact that such a crowd interfered with and prevented the proper management of the train, it was proper to submit to the jury whether appropriate precautions had been taken to guard against danger from the crowd. *Treat v. Boston & L. R. Corp.* 181 Mass. 371.

But a railroad company is not liable for injuries to a passenger caused by his being jostled off the steps of a car while alighting, by the rudeness of another passenger boarding the car. *Ellinger v. Philadelphia, W. & B. R. Co.* 153 Pa. 212.

Nor is a railroad company liable where a person at the station is injured by a stranger rushing through the storm door and causing the same to strike the plaintiff. *Graeff v. Philadelphia & R. R. Co.* (Pa.) 23 L. R. A. 806. See further, *Randall v. Frankford, S. & P. O. Pass. R. Co.*, *Buok v. Manhattan R. Co.*, and *Sheridan v. Brooklyn City & N. R. Co. supra.*

Failure to provide train for crowd.

A railroad company is not excused from carrying passengers according to contract on the ground that there is no room in the train; the contract should be conditioned as to room if it is to be limited, and a ticket holder unreasonably detained and then only carried part of the journey may recover damages. *Hawcroft v. Great Northern R. Co.* 8 Eng. L. & Eq. 662, 18 Jur. 196.

But in *Gordon v. Manchester & L. Railroad*, 52 N. H. 696, 18 Am. Rep. 97, it was held that a railroad company is not liable for failure to stop for a passenger at a station where the cars are so overcrowded from an unexpected rush of passengers

106 Mo. 535; *Geddes v. Metropolitan R. Co.* *supra*.

Garoutte, J., delivered the opinion of the court:

This is an action to recover damages for injuries received by the plaintiff while a passenger upon the road of the defendant. The injuries were of a permanent character and very serious, and the verdict of \$7,500 is not assailed as being excessive. The defendant appeals from the judgment and order denying a motion for a new trial. The record discloses no exceptions taken to the introduction or exclusion of testimony. Neither are there any exceptions taken to the charge of the court. A motion for a nonsuit was made and denied, and this appeal is now before us upon the question as to the sufficiency of the evidence to support the verdict of the

that no more could be accommodated, and the train is sent back for the passengers as soon as possible, and it would have been dangerous to handle the train if more passengers had been taken on board.

And in *Evansville & C. R. Co. v. Duncan*, 28 Ind. 444, 92 Am. Dec. 323, which was a case of personal injury, it was stated that a railroad company is not bound to receive an unusual and unexpected number of passengers beyond what it is bound to provide with safe accommodations.

See also *Chicago & N. W. R. Co. v. Carroll*, 5 Ill. App. 201.

Street railroads.

A passenger on a crowded street-car, injured through the negligence of the street railroad company, is not guilty of such contributory negligence as to bar a recovery although he may be on either platform of the car, or on the side step, or in the aisle. *Griffith v. Utica & M. R. Co.* 43 N. Y. S. R. 335; *Hadenkamp v. Second Ave. R. Co.* 18weeney, 490; *Seymour v. Citizens R. Co. (Mo.)* Feb. 27, 1893; *Lapointe v. Middlesex R. Co.* 144 Mass. 18; *Augusta & S. R. Co. v. Bents*, 55 Ga. 126; *North Hudson County R. Co. v. May*, 48 N. J. L. 401; *Thirteenth & Fifteenth Street Pass. R. Co. v. Boudroun*, 92 Pa. 475, 37 Am. Rep. 707; *Ginna v. Second Ave. R. Co.* 67 N. Y. 506; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 524; *Walling v. Railroad Co.* 12 Phila. 309; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 706; *Brusch v. St. Paul City R. Co. (Minn.)* March 13, 1893.

And the same was held where he was injured by collision with passing vehicles or cars, while standing on the side step or front platform. *Clark v. Eighth Ave. R. Co.* 36 N. Y. 128, 93 Am. Dec. 495; *Geitz v. Milwaukee City R. Co.* 72 Wis. 810; *Topeka City R. Co. v. Higga*, 38 Kan. 381; *Bruno v. Brooklyn City R. Co.* 55 N. Y. S. R. 215; *Gray v. Rochester City & B. R. Co.* 61 Hun. 212. See also *Huelsenkamp v. Citizens R. Co. infra*.

And the same was held in a similar case where he did not know of a double track, and the danger to be apprehended. *City R. Co. v. Lee*, 50 N. J. L. 435.

And a street railroad company cannot escape liability for personal injuries to a passenger, standing on the footboard of a car, where his fare had not been demanded of him, owing to the crowded condition of the car. *Ogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 43.

And it is not contributory negligence for a passenger to surrender his seat to his wife. *Lehr v. Steinway & H. P. R. Co.* 118 N. Y. 555.

Or to a female passenger. *Norris v. Brooklyn City R. Co.* 4 Misc. 294.

And it is not contributory negligence for a passenger on a street-car that is full to stand on the

jury. There being no exceptions to the charge of the court,—and it is possible no just exception could have been made thereto,—the law by which we are to be guided in considering the merits of this appeal is settled, and all investigation upon that point foreclosed; for the law of the case, as far as the decision of this court is concerned, is the law that guided the jury in its deliberations in the trial court.

The undisputed facts of the case may be stated as follows: Upon the 30th day of May, 1891, a legal holiday, the plaintiff was a passenger upon the defendant's train of cars traveling from San Francisco to Shell Mound Park, having purchased a return ticket. The train was an excursion train, there being a picnic at the aforesaid park. Late in the afternoon he boarded a train to return to the city, but, owing to the great number of peo-

front platform at the request of the conductor. *Messel v. Lynn & B. R. Co.* 8 Allen, 234.

So a street railroad company is liable for causing an injury to a passenger by allowing access to the car platform to be blocked by passengers when there is room inside. *Nealle v. Second & Third Streets Pass. R. Co.* 113 Pa. 300.

And a person is not guilty of contributory negligence who is injured by the cars, in running alongside the car from the rear to the front, where the rear platform is crowded and the snow negligently allowed to accumulate on the side of the track by the company causes him to slip. *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170.

So where a passenger was obliged to stand on the front platform of a crowded car, and getting off to assist the driver to replace the car which had jumped the track, was injured in attempting to regain the car, by the driver hastily starting the car, the company was liable. *People's Pass. R. Co. of Baltimore City v. Green*, 55 Md. 84.

And assuming that N. Y. Laws 1890, chap. 565, providing exemption from liability in case of accidents received while riding on the platform of cars, applies to street railroads, which is not decided, such roads are not exempt unless there is at the time sufficient room inside to accommodate the passenger. *Morris v. Eighth Ave. R. Co.* 68 Hun. 32.

And a verdict for the plaintiff was sustained, where she was injured in assisting her daughter to enter by the front platform, the rear platform being crowded, and the evidence was conflicting as to whether she got off while the cars were in motion or the driver whipped up the mules as she was alighting. *Coast Line R. Co. v. Boston*, 83 Ga. 357.

Where a boy passenger was moved by a street-car conductor from his seat to make room for others, and crowded out on the front platform and there pushed off by the hasty departure of a careless passenger and killed by the cars, the street railroad company was liable. *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490, 24 How. Pr. 217.

But a street railroad company is not liable for injuries received by a passenger being injured by others jostling or crowding him, unless the employees could have prevented the same by use of reasonable care. *Jarmy v. Duluth Street R. Co. (Minn.)* Nov. 14, 1892; *Joliet Street R. Co. v. McCarthy*, 42 Ill. App. 49.

And the question of negligence is one for the jury, where a boy 14 years old was knocked off the front platform of a crowded street-car, by the jostling of the car; but it is not negligence *per se* in failing to have guards on the front platform. *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. 524.

ple desirous of returning to the city at that time, he, in company with many others, were unable to secure room inside of the cars, and thereupon stood upon the platform. The exact cause of the accident is a disputed question, but in course of the return trip the plaintiff fell from the platform, and was badly injured.

That portion of the charge of the court which is material to the present investigation is as follows: "I instruct you, therefore, that if, from all the evidence given before you, you believe that the said train stopped at Shell Mound station, the plaintiff was justified in taking passage thereon, unless you also believe the defendant or its servants gave warning to persons there in waiting not

to take passage thereon, and that such warning was understood, or ought to have been understood, by the plaintiff; and, if he took passage thereon without such warning given, he was rightfully a passenger on said train, and it was then the duty of the defendant to furnish him room and accommodations inside of the passenger car; and, further, if you believe that the plaintiff did not in fact hear or know of any warning given, if you believe any was given, then he cannot be affected by such warning, and was justified in taking passage on that train. Keeping in mind what I have already said to you, I further instruct you that if, from all the facts and circumstances given in evidence before you, you find and believe that plaintiff was lawfully

But in *Randall v. Frankford, S. & P. C. Pass. R. Co.*, 139 Pa. 464, it was held that a boy over fourteen years of age, who, finding the rear platform crowded, passed through the car, also full of passengers, and got upon the front platform, placing one foot on the step and leaning back against the dasher, and who was crowded off the car by the rush of passengers and injured by the car, could not recover unless the action of the passengers was of such a disorderly character that the company ought to have prevented it or had the means of preventing it at that time.

See subhead "*Injuries from crowd*," *supra*.

And a boy of eight years, who had forced his way through a crowded car to the front platform, and was injured in jumping off while the car was in motion, could not recover. *Sandford v. Hestonville, M. & F. Pass. R. Co.*, 136 Pa. 84.

It was claimed in this case that he was thrown off by the motion of the car.

And a street railroad company is not liable where a boy left his seat and being unable to get through the crowd on the rear platform, went to the front end and fell or was thrown off; but the evidence failed to prove the injury was caused by the negligence of the company although at that place there was a jolt of the car, and snow had accumulated on the side of the track. *Payne v. Forty-Second Street & G. Street Ferry R. Co.*, 3 Jones & S. 8.

Where the evidence did not show that the injury was caused by the negligence of the company it was held that it is not negligence on the part of a street railroad company to crowd its cars. *Mt. Adams & E. P. Inclined R. Co. v. Beul*, 4 Ohio C. Ct. Rep. 362.

And where there was plenty of standing room inside a street-car and pendent straps for holding on, and the car was going at a medium rate of speed but not slackened at a curve, a passenger falling from the rear platform could not recover for injuries received. *Andrews v. Capitol, N. O. Street & S. W. R. Co.*, 3 Mackey, 127, 47 Am. Rep. 266.

So a passenger standing on the very edge of the platform of a street-car, after an opportunity to obtain a safer place to stand, is guilty of contributory negligence, which bars a recovery when injured by a jolt, throwing him off. *Ward v. Central Park & E. R. Co.*, 11 Abb. Pr. N. S. 411.

And a passenger who is familiar with the surroundings and knows of the proximity of a post to the track, who attempts to step on the platform of a dummy car which is crowded, and the car is moving slowly, and he has been warned of the danger, cannot recover for injuries caused by collision with the post. *Aikin v. Frankford & S. P. C. Pass. R. Co.*, 142 Pa. 47.

And where the court refused to set aside a verdict of \$5,500, for permanent injury from a fractured knee, it was stated that a lady passenger on 24 L. R. A.

a crowded street-car is bound to hold on to straps provided for support, if with reasonable convenience she can, but if she cannot she is bound to use such care and caution as a prudent and cautious woman would under such circumstances. *Whipple v. West Philadelphia Pass. R. Co.*, 11 Phila. 845.

But in *Huesenkamp v. Citizens R. Co.*, 37 Mo. 537, 90 Am. Dec. 369, where a passenger on a platform step of a crowded street-car was crushed by a passing car, an instruction that if he was permitted by the agent or servants of the company to stand on the steps he was not guilty of contributory negligence, was held to be erroneous on the ground that it excluded the idea of voluntary assumption of position, and there was no evidence of direction by the employés.

Elevated railroads.

An elevated railroad company is liable where the guard in closing the gate without notice gave a passenger a violent push that carried him off the platform of the car causing injury, the car being so overcrowded as to cause difficulty in opening and shutting the gate. *Miller v. Manhattan R. Co.*, 73 Hun, 512.

And it is not negligence for a passenger to attempt to board a crowded elevated car, and if he is jostled between the cars by the crowd and is injured in falling through for want of protection, the question of contributory negligence is for the jury. *Merwin v. Manhattan R. Co.*, 48 Hun, 608.

But if there is standing room for a passenger inside the car it is his duty to go inside at the request of the brakeman, and a failure to obey such a request will mitigate the damages claimed for an assault of the brakeman in pushing him in. *Graville v. Manhattan R. Co.*, 105 N. Y. 525, 50 Am. Rep. 516.

And in *Graham v. Manhattan R. Co.*, 59 N. Y. S. R. 279, it was held that a passenger on an elevated railroad who rode on the platform which was so crowded that the gates could not be shut, and stepped off at one of the stations and then resumed his place to finish his journey, could not recover for injuries received as he assumed the risk of injury knowing the danger.

And a company is not liable for the negligence of one passenger towards another causing an injury, where there is no fault on the part of the company, and the passenger attempting to board a train receives injuries caused through collision with those attempting to alight. *Buck v. Manhattan R. Co.*, 15 Daly, 550; *Thomson v. Manhattan R. Co.*, 75 Hun, 548.

See also subhead "*Injury caused by fellow passenger on crowded train*."

As to right of passenger to a seat in a car, see note to *Louisville, N. O. & T. R. Co. v. Patterson* (Miss.) 23 L. R. A. 259.

L. T.

upon that train as a passenger, within the rules just stated to you, upon the return passage from Shell Mound, and that the defendant failed to furnish him room inside the car, by reason of its crowded condition, and that he was obliged to and did for that reason stand and ride upon the platform, and if you believe that, while he was so standing and riding on the platform, the defendant, by its servants, negligently and carelessly managed and ran its said train at such a rate of speed so that, by reason thereof, in passing over a curve in said railroad, . . . that the car upon the platform of which plaintiff was so standing was, by reason of such careless, negligent management of the train, and by such rate of speed, so swayed, shaken, jarred, and jolted that the plaintiff, without any fault or negligence on his part, but by or in consequence of the negligence of the defendant, as charged in the amended complaint, was thrown off from said car and the platform thereof to and on the ground, and thereby injured, your verdict will be for the plaintiff. I also instruct you that if a railroad company receives upon its cars more passengers than it can furnish accommodations for inside the cars, and for that reason some are compelled to stand and ride on the platform, it is the duty of the company to take that condition of things into account in the management of the train and the rate of speed with which it is run. It cannot act in disregard of the actual state of things which it permits or suffers. In that case, the obligation of the railroad company to passengers whom it receives upon crowded cars is that it will furnish such increased and more watchful and solicitous care, skill, and attention as the crowded condition of the cars require. If, therefore, the crowd of passengers applying for passage or crowding upon the cars is so great that it cannot be controlled by the train officers, and thereby over-crowds and overloads the train, it is the right of such officers to hold the train until they can secure the proper control of it; and as between the company and the passengers on board, to whom tickets have been sold for the trip, entitling them to travel thereon, it is the duty of the train officials to do so, and to furnish room inside to all such persons. If they, however, proceed upon the trip without doing so, it is their duty to use the utmost care and diligence of very cautious persons for the safe carriage of the passengers, having regard to the actual location upon the train which the latter are compelled to take. The omission to use such degree of care is negligence on the part of the company."

The verdict must be sustained upon all questions where a substantial conflict of evidence is presented by the record. Measured by this test, respondent's evidence must be taken as true; and it follows that this train was traveling at a very rapid rate of speed, and while so moving, owing to the fact that it was running upon a curved track or over cross tracks, or for both of these causes, a severe jar or jolt was occasioned, which caused respondent to fall from the platform, underneath the wheels of the car. In this re-

gard the plaintiff testifies as follows: "The train on this occasion ran faster than it ever did before. It ran very fast. . . . It ran down to the mole very fast. In my experience it ran faster than it usually did going down there. It continued at that rate of speed up to the time I fell. . . . At the point where I was jolted off, the train was going unusually fast." The manner of the accident is thus described by him: "The way I experienced it, the car was kind of going half over off the track, and gave a sudden jolt, and the way in giving this jolt I lost my hold behind me of this iron rod I had hold of, and I felt myself going, and I fell off, and that was all I knew of it. One of the jolts was made near the switch there [pointing to the diagram]. Well, it seemed the wheels struck, and kind of threw the car half-way over like. That was the sensation I had, and I could hear everybody scream. It broke my hold. I don't remember what situation I went off in, or how I struck." The witness Miss Hilda Treanor says: "After the train left Shell Mound and came down to the Oakland mole, it was running very fast. I remember about the time Mr. Lynn fell off, or was thrown off, the train seemed to lurch a little bit. When he was thrown off, I heard an outcry among the ladies inside of the car. About that time I heard a great many exclamations of surprise; for instance, 'Gracious!' and 'My gracious!' and words meaning the same thing. The lurch of the train partly threw down the persons who were standing within the aisle of the car. It had the same effect upon them as it had upon me. It threw them down. I mean by that I would have fallen upon the floor but for the people standing around me. They went over on the seats against people who were sitting in the seats. As far as I can recollect, people were unbalanced, and I myself would have fallen on the floor had there not been somebody I fell against. As it was, I did not fall right over; and, as far as I noticed everybody standing in the aisle, the same thing happened to them." Captain William Treanor says: "The train seemed to be running extremely fast, as I thought, as it came down the Oakland mole. . . . The train gave a very heavy lurch, and knocked a number of people down who were standing in the aisles where I was. I was standing up, and the young lady just inside the door, and we both got knocked down and fell over. I was facing the forward end of the car, and both of us got knocked over to the right. The women screamed. Some of them said the car must have jumped the track. I cannot remember that the car slowed up prior to that time. . . . The train ran faster than I have been in the habit of feeling trains run. . . . I thought it ran faster than I had even seen it run on that road. . . . But where I saw the lurch down on the mole, I could not positively define the point. It was running at an extraordinary fast rate of speed." The testimony of these witnesses is controlling upon these questions, and applying the law given by the trial court to the jury as to the great care which should be exercised by a common carrier where the

cars were so heavily overloaded as in the present case, the jury were entirely justified in saying that the defendant was guilty of negligence in running its train at the rate of speed that this train was moving; especially in view of the defects in the track or roadbed, whatever they may have been, that caused the jar or jolt to the cars which, as we have seen, so greatly disturbed the passengers. The defendant should not have allowed so many passengers to have gone upon its cars, and, if it was unable to prevent them from so doing, it had the right to refuse to move the train under such circumstances; but if it did not pursue that course, and undertook to transport all passengers that were on board, whether within the cars or upon the platforms, it was under obligations to exercise the additional care commensurate with the perils and dangers surrounding the passengers by reason of the overcrowded condition of the cars.

Was the plaintiff guilty of contributory negligence? In view of the instructions of the court, it is clear that he was not. In speaking as to the claim of the defendant that warning was given, the court instructed the jury: "If you believe the plaintiff did not in fact hear or know of any warning given, if you believe any was given, then he cannot be affected by such warning, and was justified in taking passage on that train." The plaintiff testified in unequivocal terms that he did not hear or know of any warning given, and many other passengers testified to the same effect with reference to themselves. The evidence in this regard is sufficient to create a substantial conflict as to whether in fact the passengers were warned not to crowd the train, and that a second train would soon arrive; but, beyond the question of conflict of evidence, the plaintiff says he heard and knew of no such warning; and, under the law given to the jury which we have just quoted, he had a right under those circumstances to go upon the train; and, if there was no room within the car, he then had a right to stand and ride upon the platform; and, being so situated by the force of circumstances over which the defendant, as we have seen, had complete control, he was a lawful passenger, with all the rights of any other passenger, and entitled to the same care and consideration at the hands of the company. The fact that he was compelled to stand upon the platform, and was thus more unfortunate and more inconvenienced than his friends who were able to crowd within the car, is wholly immaterial. Their legal rights were the same. The duties and obligations of the defendant to them were the same.

It is claimed the verdict is contrary to law, in this: that the court charged the jury that if they found as a fact that other cars, reasonable in number and seating capacity, were produced by the defendant within a reasonable time, prior to or after the time at which plaintiff took his position on the car, and on which plaintiff might have safely ridden, and that plaintiff was apprised thereof, an eager desire on his part to take the overcrowded car in order to reach his destination was not a reasonable cause of necessity. The evidence covered by the instruction substan-

tially stated above is not such as to make the question one of law. It may be said that the evidence is fairly conflicting, both as to the additional accommodations to be furnished and that the plaintiff was apprised thereof. Again, all presumptions are in favor of the verdict; and, if the court's charge includes instructions of law sufficient to support the verdict when applied to the evidence found in the record, then the verdict must be upheld, even though there be no sufficient evidence to support the verdict upon some other theory of the case covered by other instructions of the court. It follows that if the evidence, when considered in the light of the law we have quoted, is sufficient to support the verdict, then the verdict cannot be against law.

We also think the motion for a nonsuit was properly denied. Much that we have already said as to the sufficiency of the evidence to support the verdict is opposed to appellant's contention in this regard. As we have seen, the evidence established a want of proper care in the running of the train at a high rate of speed, and doubly so when we consider that defects in the track or other causes existed which caused the severe jolting and jarring of the cars. Neither was the plaintiff guilty of contributory negligence in riding upon the platform under the circumstances depicted by his evidence. The law given to the jury by the court upon this point is entirely sound.

For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: **Harrison, J.; Van Fleet, J.**

T. D. ROBINSON, Resp't.,

v.

EXEMPT FIRE CO., OF SAN FRANCISCO, App't.

(.....Cal.....)

1. A plaintiff can recover only those benefits accrued at the commencement of the action in a suit for benefits, where he is entitled to a certain sum for each week that he is sick and disabled.
2. A witness may state whether or not a person suing for sick benefits was apparently well when seen by witness at a specified time during the period covered by the complaint.
3. The relieving of a plaintiff from a stipulation submitting the case on a motion for nonsuit and allowing him to file an amended complaint is discretionary and not reviewable on appeal.

(June 2, 1894.)

A PPEAL by defendant from a judgment of the Superior Court for the City and

NOTE.—In accord with the above case as to the limitation of recovery to the amount which had accrued at the commencement of the action, is *Baltimore & O. Employees Relief Assn. v. Post* (Pa.) 2 L. R. A. 44.

County of San Francisco in favor of plaintiff and from an order denying a motion for a new trial in an action brought to recover sick benefits to which plaintiff claimed to be entitled as a member of defendant company. *Reversed.*

The facts are stated in the opinion.

Mr. Davis Louderback for appellant.

Mr. George D. Collins for respondent.

Van Fleet, J., delivered the opinion of the court:

The defendant and appellant is an organization, with certain fraternal and charitable features, whose membership is composed of exempt firemen. Its by-laws provide for the payment of sick benefits to any member who from sickness or accident becomes unable to earn a livelihood. The plaintiff, a member of the organization, brings this action to recover a considerable amount claimed to be due him for sick benefits, and which defendant refused to pay. Trial was had before a jury, and verdict and judgment went for plaintiff. From the judgment and an order denying its motion for a new trial, defendant appeals.

1. The action was commenced in November, 1885, but was not tried until November, 1893. At the trial the court, against the objection of defendant, admitted evidence offered by plaintiff upon the theory that plaintiff was entitled to recover for benefits accruing intermediate the commencement of the action and the date of trial; and the court also charged the jury in accord with this theory, and refused an instruction requested by defendant limiting the plaintiff's right to recover to the benefits accrued at the date of commencing his action, to all of which defendant excepted. These rulings, we think, were clearly erroneous. The idea upon which the lower court seems to have proceeded and the contention of defendant is that the contract sued on is entire, and not severable; that it imposed a duty upon defendant to pay benefits so long as plaintiff remained sick and disabled; that, the defendant having made default before suit, this default worked a breach of the entire contract; and that all damages accruing subsequently from that sickness must be deemed to have originated in the default, to have proximately resulted therefrom, and can be recovered in the action although accruing subsequently to its commencement. But we think respondent mistaken as to the character of the contract between the parties. The contract is not entire in the sense used by respondent. It is, to the contrary, in its nature severable. The obligation it casts upon defendant is distinctly separable into independent parts. It requires defendant to pay plaintiff a certain sum each week that he is sick and disabled. The right of plaintiff to this payment for any one week accrues at the end of that week, and he is entitled to sue immediately upon default in its payment. Such default, however, does not breach the entire contract; the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is obvious that it does not work a

breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them. The accidental circumstance that the plaintiff in this instance continued disabled from the same cause subsequent to the bringing of his action, and that defendant continued to default in payment of benefits, can in no way affect the construction to be put upon the contract. Each default was a separate cause of action in itself, and the damage accruing to the plaintiff therefrom did not flow proximately or otherwise from any previous default. The successive defaults of the defendant, and the damage resulting to plaintiff from each, were as separate and apart as though arising from entirely distinct and widely separated causes of disability. Mr. Parsons, speaking on the subject of the rule of damages applicable to a contract that is severable into parts, says: "It may happen that the injury complained of is the breach of a contract that extends over a considerable space of time, and includes many acts, or it is a tort divisible into many parts. The question then arises whether the action should be for the whole breach or the whole tort, and damages be given accordingly. This must depend upon the entirety of the contract or of the tort. If it be a whole, formed of parts, which are so far inseparable that, if any are taken away, there is no completed breach or tort left, all must be included in the demand and in the damages. But, if they are separable into many distinct breaches or torts, then an action may be brought as if each stood alone, and damages recovered." 3 Parsons, Cont. chap. 8, § 6. This we take to be a correct statement of the rule. If the default of defendant in the payment of any one week's benefits carried with it a breach of the whole contract, defendant could sue for and recover all damages proximately flowing from that breach; and this is the extent to which the authorities relied upon by respondent go. But the breach being separable, as we have seen, and not entire, plaintiff is only entitled to recover those benefits accrued at the commencement of the action.

2. It became a subject of material inquiry at the trial as to the state of health of plaintiff during the period for which he claimed benefits, the main defense of defendant resting upon its denial of the sickness or disability of plaintiff. Many witnesses were examined upon the subject, and a large number of exceptions are urged by defendant to rulings of the court in excluding evidence. The rulings complained of are all upon one general feature of the evidence; that is, as to the physical appearance and apparent state of health of plaintiff. It would not conduce to brevity nor subserve any useful purpose to notice these rulings in detail. Many of them were correct, but some we deem erroneous. Of the latter, one instance will serve to point the rule which should be observed by the lower court on a new trial: A witness who knew plaintiff quite intimately, and saw him frequently, and had conversations with him about his health during the

period covered by his claim against defendant, was asked this question: "Well, now, when you saw him on these occasions walk along, when he noticed you, was he or was he not apparently well?" Plaintiff objected to the question as calling for the opinion of the witness, and the objection was sustained. We think the question was competent, and should have been allowed. It is true, as contended by respondent, that, to a certain extent, the question tended to elicit the opinion of the witness; but it called at the same time for the fact of the plaintiff's physical appearance, as a result of the witness' observation, and that fact the party was entitled to lay before the jury. There are many cases where a witness, though not an expert, may be permitted to state the result of his observation, notwithstanding it involve in a sense his opinion or judgment, such as the apparent state of health of a person, whether a person is drunk or sober, or other characteristic or state which manifests itself to the apprehension of the common observer. It is sometimes difficult to distinguish between that which is purely matter of opinion, and so not admissible, and that which partakes of the nature of a fact by reason of being the result of personal contact and observation by the witness, but this difficulty does not in any sense militate against the rule. There are many matters of importance to the investigation of truth that could not be established or presented to the jury if this were not the rule. Lawson, in his work on Expert and Opinion Evidence, at page 480, lays down the rule that health or sickness is provable by opinion, and cites many authorities from many states to sustain the principle. In *Shaunestown v. Mason*, 82 Ill. 387, 25 Am. Rep. 821, it was held that the fact of disease, when perceptible to the senses, may be testified to by any witness. So, in the case of *Parker v. Boston & H. S. B. Co.*, 109 Mass. 449, the plaintiff sued a

common carrier for personal injuries, and, on the trial, her daughter was permitted to testify that her mother "was decidedly worse than she was two months after the accident." The testimony was held proper, the court saying: "The witness had the means of observing the plaintiff from time to time, and her testimony was as to facts within her observation, and not a mere expression of opinion reached by a process of reasoning and deduction. She stated what she saw,—that the plaintiff was not able to do as much work and was not as well as she was two months after the accident." The same principle has been upheld in this state in a number of cases. See *People v. Lavella*, 71 Cal. 351; *People v. Wreden*, 59 Cal. 392; and *Carpenter's Estate*, 94 Cal. 416. In the instance stated, and several others of like character, we think the court should have allowed the evidence.

8. The court did not err in relieving plaintiff from the effect of his stipulation submitting the case on motion for nonsuit, and allowing him to file an amended complaint. It was a matter purely in the discretion of the court, and, upon the showing made, we cannot say the discretion was abused. *Ward v. Clay*, 82 Cal. 502. Neither did the court err in its ruling as to the statute of limitations, nor on the doctrine of *ultra vires*. As to the latter question, we are satisfied that the objects contemplated by and provided for in the by-laws are clearly within the language of the act conferring upon defendant control of the fire department charitable fund.

We have carefully examined the record, and find no other error. For the reasons above given, *the judgment and order denying a new trial are reversed*, and the cause remanded for a new trial.

We concur: **Garoutte, J.; Harrison, J.**

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Pff.*
in Err.,

v.
C. C. WARD.

(..... Va.....)

1. Obedience to orders will not be deemed contributory negligence, unless the danger was so glaring that no prudent man would enter into it, even when, like the servant, he was not entirely free to choose.
2. The risk of injury from the caving in of the sides of a ditch 13 feet deep and 18 inches wide, while such ditches were not usually dug more than 6 or 8 feet deep, is not assumed by a laborer who does not know of the danger, but goes in under peremptory orders to dig it deeper.

NOTE—Upon the question of reliance upon orders as affecting contributory negligence of employé see *note* to *Orman v. Mannix* (Colo.) 17 L. R. A. 602.

24 L. R. A.

(June 14, 1894.)

ERROR to the Circuit Court for Carroll E. County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed*. The facts are stated in the opinion.

Messrs. Brown & Moore for plaintiff in error.

Mr. R. C. Jackson, for defendant in error: When a servant shows that his injury was in consequence of an increased risk, one not ordinarily incident to his employment, growing out of master's negligence, the burden of proof is upon the master to show that the servant knew of and understood the increased danger.

Swoboda v. Ward, 40 Mich. 420; *Dorsey v. Phillips & C. Constr. Co.* 42 Wis. 588; *Rummell v. Dilworth*, 111 Pa. 848.

It is conceded that as a general rule a serv-

ant cannot recover for injuries resulting from causes seen and known by him.

Iron-Ship Building Works v. Nuttall, 119 Pa. 149.

But when the servant acts under the orders of his master and is injured, the rule is different. For then it cannot be said with any degree of reason that the master and servant stand on equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination and may rely on the skill and knowledge of his master and is not free to act on his own suspicions.

Shortel v. St. Joseph, 104 Mo. 114; 2 Thomp. Neg. 975.

Where a master or superior orders an inferior into a position of danger and he obeys, if injured the law will not charge him with the assumption of the risk unless the danger is so glaring that no man of prudence would have entered into it.

Miller v. Union Pac. Railway, 12 Fed. Rep. 600, 4 McCrary, 115. See also *Shortel v. St. Joseph*, 104 Mo. 114; *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 209.

Mr. William D. Tompkins also for defendant in error.

Fauntleroy, J., delivered the opinion of the court:

After all the evidence had been introduced the court gave four instructions asked for by the plaintiff, which were excepted to by the defendant, and gave six instructions asked for by the defendant, which were excepted to by the plaintiff. The jury found for the plaintiff, and assessed \$1,100 damages. The defendant moved to set aside the verdict and for a new trial, on the ground that the verdict is contrary to the law and the evidence, which motion the court overruled, and entered the judgment complained of, upon the finding of the jury. The defendant excepted to the action of the court, and the evidence is certified. The plaintiff in error assigns for error that the judgment is erroneous, in that the court overruled the motion to set aside the verdict of the jury, was contrary to the law and the evidence, and to grant a new trial, and that the instructions given to the jury on the prayer of the plaintiff are erroneous. The appellee, Ward, received severe and permanent injury by the caving in of the side of a chamber, or "ground-hog-hole," as known in the parlance of railroad track grading, 18 inches wide, and 18 feet deep, and 13 feet into the mass of impending earth to be excavated and removed, in which he was working in the employ of the defendant company, and into which he was specifically and peremptorily ordered to go, and dig and excavate it deeper; after he had dug it, and shoveled out the earth, to even a greater depth than was customary and prudent, by the supervising and authoritative "boss" in charge of the work as the agent of the appellant. The defendant company claims that the evidence fails to show any negligence on the part of the company, and that the plaintiff knew, or ought to have known, of the danger of the place and character of the work, and that he assumed the risk incident to his employment. The evidence is certified, and, in reviewing

the finding of the jury upon the facts, we are confined to the evidence for the appellee where there is any conflict. Abundant evidence was introduced by the plaintiff (who is the appellee here) to show that the place in which he worked, and the method of the work, as ordered and conducted by the defendant, were not reasonably safe; and that the agent of the company in charge of the digging and excavating did not adopt or observe the requisite and usual caution to prevent or guard against the extreme danger of the work into which he specifically and positively ordered the appellee to go, and which proximately caused his severe and lasting injuries. The soil or earth in which the defendant company was constructing its roadbed was treacherous at this place, rotten, and seamy; and the evidence shows that it was known to the company's agent and representative to be dangerous to work in, by sinking chambers and undermining and breaking off the forelead or blocked-out mass. Their foreman, who ordered the appellee to go back into the hog hole, and sink it to the unusual and dangerous depth of 18 feet, knew of the risk of the undertaking, and expressed his fear that he would get his men killed in the chambers by the falling in of the sides of the rotten, loose, and seamy earth; and, only a day or two before the accident which injured the appellee, one of the chambers near by caved in, because of the character of the earth and unsupported sides of the hog hole. After Ward, the appellee, had sunk the chamber in which the accident occurred to the unusual depth to which they had been sinking them, he came out to break off the forelead, as the usual precaution for safety. Long, the standing boss, was peremptorily ordered by Hanks, the walking and chief boss, without a look or a glance of inspection by either of them, to send Ward in again to sink the chamber deeper. Long gave the order to Ward, as coming from Hanks, which Ward obeyed; and, when he had dug and shoveled out the chamber to the depth of 18 feet, one of the unsupported sides fell in, crushed the appellee under the weight of the falling mass, causing to him painful and permanent injury. Here is a distinct act of positive negligence and recklessness of the authoritative agent of the defendant company, by which, proximately and directly, a day laborer, who was bound to obey the orders of his superior, was severely injured,—disabled for life.

It is argued that the appellee, Ward, must be presumed to have known, and was in duty bound to observe, the dangerous character of the work, and therefore he assumed the dangers incident to his employment. He swears positively that he did not know of the danger of his situation and surroundings; and the jury found as a fact that he was not guilty of contributory negligence in obeying the specific and positive order of his superiors to return into the chamber and sink it deeper. Hanks and Long knew of the danger, and the duty of careful and constant inspection of the situation and progress of the work, to detect and provide against danger and injury to the laborer who was digging and shoveling dirt in this narrow, deep, and dark ditch, was

wholly neglected by them, to the serious injury of the defendant's employé. An employé assumes such risks as are incident to his employment, and do not arise or ensue from the negligence of his employer, or his deputies in authority over him and his work; but the evidence in this case establishes the fact that the accident would not have happened but for the gross recklessness of the defendant company's agent. The usual plan of doing this work had been to sink the chamber six or eight feet, "break off" the loosened and undermined forehead or impending mass, before beginning to sink the chamber deeper. Had this been done in this case, there could be but little or no danger of serious injury, because the walls, being low, were not likely to fall; and, if they should commence to fall, the workmen could save themselves by getting out, which it was impossible for Ward to do in a narrow cell, only 18 inches wide, and 18 feet deep, into which he was ordered to work, and to sink the chamber several feet deeper than was usual, and that, too, in earth more dangerous and treacherous than had been encountered in the work before reaching the cut where the accident and injury happened. When the servant shows that his injury was in consequence of an increased risk, and one not ordinarily incident to his employment, but growing out of the master's negligence, the burden of proof is upon the master to show that the servant knew of and understood the increased dangers. *Suoboda v. Ward*, 40 Mich. 424. "If he knew, or reasonably ought to have known, the presence of danger to him in the course of his employment of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to answer the extraordinary risk, as well as the ordinary risk, of his service. But it appears to us that this consequence of his acquiescence ought to rest on positive knowledge of precise dangers assumed, not on vague surmises of possibility of danger." *Dorsey v. Phillips & U. Constr. Co.* 42 Wis. 583.

If an employé, without specific command as to the time and manner, uses an obviously defective implement, the defect alike open to

the observation and within the comprehension of both employer and employé, both stand upon common ground, and no recovery can be had for a resulting injury to either; but when the servant acts under the orders of his master, and is injured, the rule is different, for then it cannot be said with any degree of reason that the master and servant stand on equal footing, even though they have equal knowledge of the dangers. The servant occupies the position of subordination, and may rely upon the skill and knowledge of his master, and is not free to act on his own suspicions. *Iron-Ship Building Works v. Nuttall*, 119 Pa. 149; *Shortel v. St. Joseph*, 104 Mo. 114. "If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even when, like the servant, he was not entirely free to choose.

The same rule has been applied, and with sound reason, where the person injured was ordered into a service of peculiar danger, such as he did not undertake to perform, by another servant standing towards him in the relation of superior or vice-principal; and if he obeys such an order, and is injured, he may recover damages. The law will not declare his act of obedience negligence *per se*, but will leave it to the jury to say whether he ought to obey or not." 2 Thomp. Neg. 975. "Where there is any doubt whether the employé was acquainted, or ought to have been acquainted, with the risk, the determination of the question is necessarily with the jury." *Rummell v. Dilworth*, 111 Pa. 848.

The foregoing principles of law are directly applicable to the facts of this case. Of the instructions given by the court, it is enough to say that they correctly state the law, and there is nothing in them of which the appellant can complain. Our judgment is to affirm the judgment of the circuit court of Carroll county.

Affirmed.

KANSAS SUPREME COURT.

CITIZENS' NATIONAL BANK OF KINGMAN, *Plff. in Err.*,

George F. BERRY *et al.*

(.....Kan.....)

(July 4, 1894.)

"The president of a banking corporation has the power to employ counsel and manage the litigation of the bank, in the absence of any order of the board of directors depriving him of such power.

*Headnote by ALLEN, J.

NOTE.—As to the authority of the president of a corporation generally to control litigation in which it is interested and to appoint attorneys, see *note to Wait v. Nashua Armory Asso.* (N.H.) 14 L. R. A. 380.

24 L. R. A.

ERROR to the District Court for Kingman County to review a judgment denying the right of the president of the defendant corporation to control the litigation in a proceeding which had been instituted against it. *Reversed.*

The facts are stated in the opinion.

Messrs. S. S. Ashbaugh and James Steck, for plaintiff in error:

The president of a bank corporation is, *virtute officii*, clothed with ample authority to attend to and conduct the litigation of the bank. *Boone, Corp.* §§ 144, 216, and cases cited; *Morse, Banks & Banking*, § 143 (b), and cases cited.

Whenever a party having a direct interest in the subject-matter and result of litigation ap-

pears in court and makes known his rights and interests, he has never been denied leave to defend such interest. A moral sense of justice goes side by side with the strict lines of law, and courts are organized upon the theory and for the purpose of doing justice between litigants, rather than making a farce of judicial proceedings and the process of the courts instruments of fraud and oppression.

Messrs. Hay & Hay for defendants in error.

Allen, J., delivered the opinion of the court:

George F. Berry & Co. brought suit against the Citizens' National Bank of Kingman to recover certain sums of money alleged by them to have been paid to the bank as usurious interest, and the penalty provided by the national banking law therefor. An answer containing merely a general denial was filed by Lydecker & Cooper on behalf of the defendant. A demurrer alleging various grounds was filed by R. W. Hodgson, as president. The attorney for the plaintiffs moved to strike from the files Hodgson's demurrer, and Lydecker & Cooper moved for an order requiring Hodgson to show by what authority he appeared for the bank. Hodgson also moved for an order requiring Lydecker & Cooper to show by what authority they appeared. On this motion, affidavits were introduced, from which it appears that Hodgson was president of the bank, and the owner of \$30,800 of the capital stock, the total amount of which was \$50,000; that the corporation had gone into voluntary liquidation in December, 1888; that Lydecker & Cooper had been employed as attorneys of the bank by the board of directors, and had never been discharged as such; and that Lydecker was one of the directors. On hearing these motions, the court ordered the demurrer filed by Hodgson stricken from the files, and sustained the right of Lydecker & Cooper to represent the bank. Thereupon Messrs. Ashbaugh & Steck asked leave to file an answer on behalf of the president of the bank, under employment from him, setting up the fact that Berry and Jett, the plaintiffs, were directors in

24 L. R. A.

the bank at the time of the alleged usurious transaction, and also the facts with reference to the bank having gone into voluntary liquidation, and other matters of defense. The court refused to consider such answer, and held that Hodgson had no right to be heard. The case was then tried, and a judgment rendered in favor of the plaintiffs for \$940.12. Aside from the fact that Hodgson was the party principally interested in the result of the litigation, it appears that he was president of the bank at the time it went into liquidation, and, if the corporate existence of the bank had not terminated, was still its president.

In *Morse on Banks and Banking* (sec. 143) it is said: "Indeed, it is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the president. This solitary function is to take charge of the litigation of the bank. There is no question that this matter belongs to him by virtue of his office. He may institute and carry on legal proceedings to collect demands or claims of the bank. He may appear, answer, and defend in suits against the bank. He may retain and employ counsel on behalf of the bank. See also *Boone, Banking*, § 144, and cases cited.

It is said in the brief that, as the evidence is not all contained in the record, the court cannot consider the case. It is immaterial whether the case contains all the evidence or not, for the substance of the claim of the plaintiff in error is that it was refused a hearing. There is nothing in the record showing that the board of directors had attempted to take away from the president the power to employ attorneys and conduct the bank's litigation. The mere fact that the board of directors had employed counsel would not necessarily take away from the president the right to control a case in court, and to have the bank represented by other counsel, if he saw fit.

It was error for the court to deny the president this right, and *the judgment is therefore reversed*.

All the Justices concur.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan

Abijah EATON, *Plff in Err.*

(.....Mich.....)

Telegraph poles in a highway do not constitute an additional servitude upon the fee for which owners must be compensated.

(McGrath, Ch. J., *dissents*.)

(May 18, 1894.)

ERROR to the Circuit Court for Barry County to review a judgment convicting him of assault and battery for interfering with the employes of a telegraph company who were attempting to set poles in a highway in front of his property. *Affirmed.*

The facts are stated in the opinions.

Messrs. William O. Lowden and Charles G. Holbrook for plaintiff in error.

Messrs. A. A. Ellis and James A. Sweezy, for defendants in error:

It cannot be of any benefit to the respondent in this case, that the incorporation of the Barry County Telegraph Association, at the time of the assault, had not been completed. That is a matter that concerned the state only.

Whipple v. Parker, 29 Mich. 389; *Toledo & A. R. Co. v. Johnson*, 55 Mich. 456; *Nichols v. Ann Arbor & Y. Street R. Co.* 16 L. R. A. 371, 87 Mich. 368; *Whitney v. Wyman*, 101 U. S. 892, 25 L. ed. 1050.

The public nature of transmitting intelligence by the use of electric telegraphs is decided by the legislature in both of the acts above refer-

red to. It is also recognized by the congress of the United States in an Act made March 1, 1884, making all public roads and highways "military or post roads," and giving to any company the right to erect electric telegraph lines thereon under certain conditions.

U. S. Rev. Stat. § 3964, 5263, 5668; *Pennsylvania Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1, 24 L. ed. 709.

Highways, within and through a state, are constructed by the state, and are under legislative control.

Cooley, Const. Lim. p. 588.

When the highway is not restricted in its dedication to some particular mode or use, it is open to all suitable methods.

Macomber v. Nichols, 84 Mich. 216, 23 Am. Rep. 522; *Starr v. Camden & A. R. Co.* 24 N. J. L. 597; *Boston v. Richardson*, 18 Allen, 146; *Com. v. Temple*, 14 Gray, 69; *Chase v. Sutton Mfg. Co.* 4 Cush. 152.

No right to take the private property of the owner of a fee in the highway is conferred by the telegraph acts of this state; all that is given is the right to use the land to place posts upon, the whole beneficial use of which had been previously taken from the owner for the use of the public, and for which the owner has been paid the full market value of the land, for the perpetual easement, with no reduction for the reversionary interest.

Detroit v. Chaffee, 68 Mich. 635; *Detroit City Railway v. Mills*, 85 Mich. 658; *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 7; *Macomber v. Nichols*, 84 Mich. 213, 23 Am. Rep. 522; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62, 81 Am. Rep. 806; *Nichols v. Ann Arbor & Y. Street R. Co.* 16 L. R. A. 371, 87 Mich. 369;

NOTE.—*Telegraph or telephone poles as additional burden on highway.*

The numerical weight of authority is in favor of the proposition that telegraph and telephone poles constitute additional burdens upon a highway which entitles the abutting owner to compensation at least in the case of country roads.

Some of the cases have made the old distinction between cases in which the fee is in the abutting owner and those in which the fee is in the public, but such distinction in these cases is likely to fall with the growing tendency of late cases to ignore it in all cases of encroachment upon the rights of abutting owners.

Poles are an additional servitude on a country road. *Eels v. American Teleph. & Tele. Co.* 65 Hun, 516; *Blashfield v. Empire State Teleph. & Tele. Co.* 71 Hun, 532; *Western U. Tele. Co. v. Williams*, 3 L. R. A. 429, 86 Va. 696; *Smith v. Central District Printing & Tele. Co.* 2 Ohio Ct. Ct. Rep. 259; *Board of Trade Tele. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453.

The legislature has no power to authorize the use of a street for telegraph poles, and a company cannot therefore invoke the power of the court to restrain abutting owners from interfering with its poles, although it has erected them under authority of the legislature. *Metropolitan Teleph. & Tele. Co. v. Colwell Lead Co.* 87 How. Pr. 365, 18 Jones & S. 483.

Telephone poles are an additional burden, when the fee is in the abutting owner and he may recover damages, and although the fee is in the pub-

lic, if he sustain direct and immediate injuries by reason of the construction of the line in the street. *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36.

In *Willis v. Erie Tele. & Teleph. Co.* 37 Minn. 347, the members of the court were evenly divided upon the question, thereby affirming a judgment of the lower court against the company.

Compensation to abutting owners is a condition precedent to the right to erect the poles. *Dusenbury v. Mutual Tele. Co.* 11 Abb. N. C. 440.

In *Broome v. New York & N. J. Teleph. Co.* 42 N. J. Eq. 141, a mandatory injunction was granted to compel the removal of poles which had been set without obtaining lawful authority to set them from public authorities who had power to grant it. In *State v. New York & N. J. Teleph. Co.* 51 N. J. L. 82, commissioners were appointed to assess damages for the erection of poles upon the street.

If the proposed poles will interfere with or obstruct the light, air, or access to any buildings which the abutting owner may erect, or render more difficult the access to his premises under any use to which they may be applied, compensation must be made before they can be erected. *Clausen v. Baltimore & O. Tele. Co.* New York Daily Reg. Sept. 19, 1884.

Compensation must be made, although the fee is in the public. *Stowers v. Postal Tele. Cable Co.* 12 L. R. A. 864, 66 Miss. 552.

So it has been held that where the grant to the public is of a right of way for a public road, reserving the fee in the owner of the adjacent prop-

Grand Rapids Street R. Co. v. West Side Street R. Co. 48 Mich. 438; *People v. Fort Wayne & E. R. Co.* 16 L. R. A. 752, 92 Mich. 522; *Dean v. Ann Arbor Street R. Co.* 98 Mich. 830.

In these cases the fee of the land, over which the street or highway passed, remained in the abutting owners.

The court is supported in these opinions by—

People v. Kerr, 27 N. Y. 188; *Kellinor v. Forty Second Street & G. Street Ferry R. Co.* 50 N. Y. 206; *Mahady v. Bushwick R. Co.* 91 N. Y. 148, 48 Am. Rep. 661; *Elliott v. Fair Haven & W. R. Co.* 32 Conn. 579; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Roake v. American Teleph. & Teleg. Co.* 41 N. J. Eq. 85; *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 383.

Highways and streets in cities are also used as a convenient place for placing gas and steam pipes, for heating and lighting; immense sewers may be dug therein for the drainage of private estates, and the soil removed and water mains therein placed.

Angell, Highways, § 312; *Com. v. Lowell Gas Light Co.* 12 Allen. 75; *Murray v. Berkshire County Comrs.* 12 Met. 455; *Pulatine v. Kreuger*, 121 Ill. 74; *Detroit City Railway v. Mills*, 85 Mich. 654; *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 12; *Boston v. Richardson*, 18 Allen. 140; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264.

Another important use for which highways are laid out and established is the communication of intelligence and transmission of information.

Julia Bldg. Assn. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; *Pierce v. Drew, supra*; *State v. Flad*, 28 Mo. App. 185.

The electric telegraph is simply a different and valuable method of communicating intel-

lence, the placing of telegraph poles upon the highway is an additional burden for which he is entitled to compensation. *Pacific Postal Teleg. Cable Co. v. Irvine*, 49 Fed. Rep. 112.

But in Louisiana it is held that where the fee is in the public abutting owners in front of whose premises poles are erected under the authority of the municipality cannot ask for their removal if they do not materially obstruct them in the free use of their property, or invade some vested right, and do not inflict on them injury which is not common to all other persons, and they cannot ask to have the poles abated as a nuisance. *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63.

And in Massachusetts it is held that even the owner of the fee is entitled to no compensation. *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 7.

In *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398, the court held that erecting telegraph poles in the street was not an additional burden entitling the abutting owner to compensation, if the street was a city street, although in making the erection the company cut into a base ment constructed by the abutting owner under the sidewalk. In that case the court makes a distinction between a country road and a city street.

That case is recognized as authority in *St. Louis v. Bell Teleph. Co.* 2 L. R. A. 273, 96 Mo. 623, which was a prosecution against a telephone company for violating a city ordinance regulating the rate of charges.

An abutting owner cannot maintain a suit for injunction unless he suffers special damages different from that suffered by the public at large. *Gay v. Mutual Union Teleg. Co.* 12 Mo. App. 485.

ligence and transmitting information for which highways were originally designed and the land appropriated.

It was in common use before Michigan became a state, or established this highway.

See 22 Encyclopedia Britannica, pp. 112, 118.

When the land was originally appropriated for highways, that which was taken was not merely the privilege of exercising the uses for which they were intended, by the then common methods, for either traveling, conveyance of passengers or freight, or the transmission of intelligence, and that the public was not foreclosed from the benefits of possible inventions and discoveries thereon. The tendency of modern decisions is to extend the public easement, rather than to restrict it.

Omaha Horse R. Co. v. Omaha Cable Tramway Co. 30 Fed. Rep. 324; *Detroit City Railway v. Mills*, 85 Mich. 652; *Angell, Highways*, § 112; *Pulatine v. Kreuger, supra*; *People v. Kerr*, 27 N. Y. 188; *Elliott v. Fair Haven & W. R. Co.* 32 Conn. 579; *Com. v. Temple*, 14 Gray, 69; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Pierce v. Drew*, 186 Mass. 75, 49 Am. Rep. 12; *Fulton v. Short Route R. Transfer Co.* 85 Ky. 640; *Moss v. Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *Stanley v. Davenport* 54 Iowa, 463, 37 Am. Rep. 216; *State v. Flad*, 28 Mo. App. 185.

Unless there is a clear infraction of the constitutional provision, the practical construction which the people have placed upon it must be adopted by the court.

Cooley, Const. Lim. 6th ed. 81; *People v. Hammond*, 18 Mich. 256; *Westinghausen v. People*, 44 Mich. 265; *People v. Goodwin*, 22 Mich. 500; *Frey v. Michie*, 68 Mich. 323; *Detroit City*

ent from that suffered by the public at large. *Gay v. Mutual Union Teleg. Co.* 12 Mo. App. 485.

In *Forsythe v. Baltimore & O. Teleg. Co.*, 12 Mo. App. 494, the authority of *Gay v. Mutual Union Tel. Co.* was recognized, but the company was enjoined from erecting a broken and unsightly pole.

In District of Columbia it is held that the inconvenience which would be caused by the erection of poles in the highway to the owners and occupiers of stores situated thereon is not such as to cause equity to enjoin them as a private nuisance. *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424.

The mere stretching of wires in front of property which are attached to poles in front of adjoining property will not authorize a preliminary injunction. *Roake v. American Teleph. & Teleg. Co.* 41 N. J. Eq. 85.

But even where the right to set the poles is recognized the tendency is to compel the companies to do as little damage as possible. The cutting of trees to clear the way for the electric line may entitle the landowner to damages as in the case of *Dailey v. State*, post, 724, although in that case the Ohio court adds the weight of its dictum to the authorities holding poles an additional burden.

There is no right to cut trees on private property for the purpose of making a right of way for a telegraph or telephone line. *Memphis Bell Teleph. Co. v. Hunt*, 16 Lea, 456, 57 Am. Rep. 257.

Even though a fire alarm telegraph company has the right to place its poles and wires in the street, it cannot cut trees on adjoining property unnecessarily. *Tisot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 693.

H. F. F.

Railway v. Mills, 85 Mich. 646; *Pierces v. Drew*, 186 Mass. 78, 49 Am. Rep. 10; *Pickard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 128; *Com. v. Parker*, 2 Pick. 550; *Holmes v. Hunt*, 122 Mass. 506, 23 Am. Rep. 381.

Long, J., delivered the opinion of the court:

Respondent was convicted of an assault and battery upon L. B. Bently. It appears that Bently, in company with three other men, were in the act of digging holes to set telegraph poles in the highway in front of the farm of defendant. Defendant forbade them doing so, and ordered them to desist, which they refused, whereupon he pushed Bently down a slight embankment. It is not claimed that any serious harm was done him, or that respondent used any more force than necessary to stop the work. It was claimed on the trial that Mr. Bently and his companions represented, and were the employés of, a certain company, known as the Barry County Telegraph Association, incorporated under the provisions of chapter 101 of Howell's Statutes, and that they informed respondent that they were erecting a telegraph line along the highway, and were acting for an association, and that the state gave them the right to do so. The articles of association of the company were not filed with the secretary of state until after the assault complained of, but they had been signed in due form of law, and were subsequently acknowledged and filed as provided by law. The statutes of this state relating to electric telegraph lines, so far as they appear to be material to this case, may be briefly summarized as follows: Chapter 100, How. Stat., is, "An act authorizing any person to construct lines of electric telegraph in the state of Michigan." It is Act No. 4 of the Session Laws of 1847, as amended in 1849 and 1878. Section 1 provides: "That any person or persons may be and they are hereby authorized to construct and maintain lines of electric telegraph, together with all necessary fixtures appurtenant thereto, from point to point upon and along any of the public roads, highways . . . of this state, or upon or over the land of any individual—the owner of any land through which said telegraph line may pass, and railroad corporation on whose right of way the same may be constructed, having first given consent: provided, that the same shall not in any instance be so constructed as to incommode the public in the use of said roads, highways, railroads or bridges. . . ." Chapter 101, being Act No. 59 of the Session Laws of 1851, as amended in 1863, 1878, and 1875 is, "An act to authorize the formation of telegraph companies." Section 5 provides that: "Such association is authorized to enter upon, and construct, and maintain lines of telegraph through, along and upon any of the public roads and highways, or across or under any of the waters within the limits of this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines: provided, that the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously in-

terrupt the navigation of said waters: and provided further, that this act shall not be construed to authorize any such association to injure, deface, tear, cut down, or destroy any tree or shrub planted along the margin of any highway in this state, or purposely left there for shade or ornament. . . ." Section 6 provides for the appointment of commissioners by the circuit court to assess damages, on the application of any person through whose land said lines shall pass, who shall consider himself aggrieved or damaged thereby.

The principal question in this case is whether these acts conflict with article 15, § 9, of the Constitution, which provides, "The property of no person shall be taken by any corporation for public use without compensation being first made or secured in such manner as may be prescribed by law." Is the placing of telegraph poles along a public highway an additional servitude upon the land of the adjacent proprietor? Public highways are under legislative control. They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon the use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods. Cooley, Const. Lim. p. 588. It has been settled in this state that lands to be taken or granted for public highways are so taken or granted for all the purposes for which they may be used for the benefit of the public for the passing or repassing of travelers thereon, for the transportation of passengers by stage coach, omnibus, or street cars propelled by horses, steam, or electricity, and that the laying of tracks for such street cars is not an additional servitude upon lands of adjacent proprietors. In *Detroit City Railway v. Mills*, 85 Mich. 634, the defendant threatened to cut down and destroy the poles erected for stringing wire for the use of an electric street railway, and the claim was made by the defendant that he had the right to remove such poles because they were an additional servitude. It was held that he had no such right; that the erection of poles for such a road was in the furtherance of public travel; and that, to constitute an additional servitude, there must be an injury to the present use and enjoyment of the land. See also *People v. Fort Wayne & E. R. Co.* 92 Mich. 523, 16 L. R. A. 753; *Dean v. Ann Arbor Street R. Co.* 98 Mich. 380. It is difficult to see any distinction between the use of the highway for electric railway poles and poles erected for the use of telegraph or telephone companies. In commenting upon this claimed distinction, Judge Dillon, in his work on Municipal Corporations (4th ed. p. 893, note), says: "The distinction is so fine as to be almost impalpable." These telegraph construction acts have been in force in this state for many years, and this is the first time in the history of the state, so far as I have discovered, where it has been claimed that the placing of such poles in the highway is an additional servitude. We are aware that

in some states the doctrine is laid down that the placing of such poles creates additional servitude upon the fee, but there are many cases holding the other way. *Pierce v. Drew*, 186 Mass. 79, 49 Am. Rep. 7, and *Julia Bldg. Assn. v. Bell Telph. Co.* 88 Mo. 258, 57 Am. Rep. 398, hold that additional servitude is not created; and, we think, upon better reasoning. These cases accord with the views of this court in *Detroit City Railway v. Mills*, *supra*, and other cases in this state relative to the use of the street for street-railway purposes. If damage follows from the erection of such poles, the acts provide a method of settling that question.

We think there is nothing in the claim that the articles of association were not filed at the time of the assault. Under chapter 100, any private person may erect telegraph poles along the highway, under certain restrictions.

When these lands were taken or granted for public highways, they were not taken or granted for such use only as might then be expected to be made of them, by the common methods of travel then known, or for the transmission of intelligence by the only methods then in use but for such methods as the improvement of the country, or the discoveries of future times, might demand. The parties setting these poles were acting under color of legal right. The statute under which they acted is not in conflict with the provisions of the constitution above cited. It would be a great calamity to the state if, in the development of the means of rapid travel, and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid, or a pole set. The legislature certainly has never so regarded this provision of the constitution, and never till now, when more than 40 years have

elapsed since the passage of these acts, has any one supposed that such a construction was to be placed upon the provisions of the constitution.

The conviction must be affirmed.

Grant, Montgomery, and Hooker, JJ., concurred with **Long, J.**

McGrath, Ch. J., dissenting:

I cannot concur in the opinion of *Mr. Justice Long*. I think that *Mr. Dillon*, in his work on *Municipal Corporations* (4th ed. § 898a), lays down the correct rule. He says: "On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended, as it may be, especially in cities, with serious damage and inconvenience to the abutting owner, is not a street or highway use, proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof." The theory upon which it has been held that the construction of street-railway tracks in streets is not an additional servitude is that the purpose of the tracks is to facilitate travel upon the street, and the cases which support the right to erect trolley poles have been put upon the ground that the poles and wires are directly ancillary to such use of the street. This class of cases make a distinction between trolley poles and wires, which are incidents of that system of transportation, and telegraph and telephone poles, which are not used to facilitate the use of the street. It is with reference to this attempted distinction that *Mr. Dillon* makes use of the language quoted by *Mr. Justice Long*, and found in 2 *Dillon on Municipal Corporations*, 4th ed. p. 893, *note*. I think that the judgment should be reversed.

OHIO SUPREME COURT.

R. J. DAILEY et al., Plffs. in Err.,

v.

STATE of Ohio.

(.....Ohio.....)

- *1. An owner of land adjoining a public highway whose title extends to the center of the road, who has cultivated shade trees, planted partly on his own land and partly in the line of the highway within the bounds of his deed, has a property interest in such trees, and the right to their enjoyment subject only to the convenience of public travel.**
- 2. The legislature may authorize the construction of a telegraph line by a telegraph company upon a public**

***Headnotes by the Court.**

NORM.—As to how far telegraph and telephone poles constitute an additional burden on a highway, together with the rights of their owners to cut trees to make place for them, see note to the preceding case of *PEOPLE v. EATON*, *ante*, 721. 21 L. R. A.

highway, in such manner as not to accommodate the public in the use of such highway, but authority so given does not empower such company to injure the property of an adjoining land owner, nor to appropriate any of his property rights in the highway except upon the condition that compensation be first made. Nor is warrant given to injure such property, nor to appropriate such property rights without compensation, by the Act of Congress of July 24, 1866, known as section 5203, *et seq.*, of the Revised Statutes of the United States.

- 3. The property right of such owner in trees thus cultivated by him is a proper subject of legislation for its protection. And one who, having knowledge of the rights of such land owner in the trees proceeds, against the protest of such owner, heedlessly, recklessly, and carelessly to injure them, may be prosecuted under section 6800 of the Revised Statutes, for a wrongful injury to property.**
- 4. The simple fact that the land owner did not, at the time the telegraph line was built, although aware of the pur-**

pose to build, object and prevent its construction by injunction proceedings, will not estop him, after the expiration of ten years from the date of such construction, from asserting his property interest in the highway and in the trees growing upon and in front of his premises.

(May 21, 1894.)

ERROR to the Circuit Court for Portage County to review a judgment affirming a judgment of the Court of Common Pleas convicting defendants upon an indictment for wrongfully cutting shade trees in a highway. *Affirmed.*

Statement by Spear, J.:

At the September term, 1893, of the court of common pleas of Portage county, the plaintiffs in error, R. J. Dailey, William Donahue, Edward Lingle, and S. W. Kennedy, were tried upon an indictment which charged that, on the 22d of September, 1892, they "wrongfully, unlawfully, and without lawful authority, did injure eight maple trees, the property of one E. E. Taylor, standing and growing upon land not that of said R. J. Dailey, William Donahue, Edward Lingle, and S. W. Kennedy, nor of each, either, nor of any of them, by cutting and severing from said trees, and from each and all of them, certain limbs and branches belonging thereto, and by otherwise injuring and defacing each and all of said trees and the bark thereof, contrary to the form of the statute," etc., etc.

The record shows that E. E. Taylor owned lands adjoining, and to the center of, a public highway. The road was about sixty-six feet in width, and had been established for over fifty years. His frontage was about one third of a mile. The trees, some sixty in number, were planted by Mr. Taylor about forty years since, chiefly inside of the fence which was on the line of the highway. In the year 1882, a telegraph company, without obtaining consent of Mr. Taylor, or in any way appropriating a right to do so, erected its line upon the highway in front of his premises placing the poles from twelve to sixteen feet from the fence line. The poles were about one hundred and thirty feet apart, and on them were fastened cross-arms six feet in length, upon which were stretched fourteen wires.

The defendants (now plaintiffs in error) were employes of the Postal Telegraph Cable Company, and acted under orders from the company in cutting the trees. At the time of the occurrence Mr. Taylor objected, telling the men that the trees were his as the owner of adjoining lands; that they had no right to cut them, and ordered them to desist. They replied that the branches interfered with the working of the line; that they had been directed to trim, and would do so. The trimming marred the symmetry of the trees, tended to make them one-sided, and injured them.

The Postal Telegraph Cable Company, which now operates the line, is a corporation organized under the laws of the state of New York, in the year 1886, having lines extending through many of the states, and into 24 L. R. A.

Canada. On March 17, 1886, the company filed with the Postmaster General of the United States its acceptance, by resolution duly adopted, of the requirements of section 5263, and following, of the Revised Statutes of the United States, and of all the restrictions and obligations required by law, in order to make its line an instrument of interstate commerce. When the company took possession of this line does not appear.

The defendants were found guilty. Sentence followed, which, upon error to the circuit court was affirmed. To reverse these judgments the present proceeding in error is brought.

Messrs. Woolf & Moore and I. T. Siddall, for plaintiffs in error:

The plaintiffs in error were justified in the belief that the land owner had waived his right to have appropriation of said land or right of way, and all objection to the maintenance of said line in the position it then occupied in a proper manner, which included the moving of obstructions from the wires of the same, and were justified in the belief that Mr. Taylor was desirous that the proper care and protection of this public improvement should be exercised by the company.

Hargis v. Kansas City, O. & S. R. Co. 100 Mo. 210.

The company had a right to occupy said road under the authority given it by the federal government.

See U. S. Rev. Stat. 2d ed. 1878, §§ 5263, 5266, 5268, 5269, p. 1019; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Rotherman v. Western U. Telg. Co.* 127 U. S. 411, 32 L. ed. 229; *Pennacola Telg. Co. v. Western U. Telg. Co.* 96 U. S. 1, 24 L. ed. 708.

The consent of Mr. Taylor to the erection of that telegraph line had been obtained, and the state of Ohio, the defendant in error, in this case, could not and cannot interfere with the proper maintenance and use of that telegraph line, existing, as it did, under the authority of the federal government.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Robbins v. Shelby County Taring Dist.* 120 U. S. 489, 30 L. ed. 694; *Bouman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700; *Leisy v. Hardin*, 185 U. S. 100, 34 L. ed. 123, 3 Inters. Com. Rep. 86; *Thompson, Electricity*, p. 11, § 9.

Shade trees must be so planted, maintained, and cared for as that they will not encroach upon said highway to such an extent as "to incommode the public in the use of said road or highway."

Cincinnati Inclined Plane R. Co. v. City & Suburban Telg. Assn. 13 L. R. A. 534, 48 Ohio St. 390; *State v. Cincinnati Gas Light & Coke Co.* 18 Ohio St. 262; *Weller v. McCormick*, 3 L. R. A. 798, 53 N. J. L. 470; *Ex parte Conway*, 48 Fed. Rep. 77.

The state, by an act of the legislature, had granted the right of the telegraph companies to occupy the public highways of the state, provided they did not interfere with public use, and the United States had granted the

same right to persons, companies, or corporations for like purposes.

These were ample to justify these men in making the claim they did and sufficient to warrant them in forming an honest belief that frees acts done under that claim and in harmony with that belief from criminality.

State v. Homes, 17 Mo. 879, 57 Am. Dec. 269; 14 Am. & Eng. Encyclop. Law, p. 12, and note; *Desty*, Am. Crim. L. §§ 34b, 35b, 144a, and notes; *Palmer v. State*, 45 Ind. 388; *Lossen v. State*, 62 Ind. 437.

If lines of telegraph are authorized to be constructed and maintained along the public roads of the state, it of necessity carries with it authority to do whatever is necessary to be done to enjoy the full benefit of their proper use.

Little Miami & O. and Xenia R. Cos. v. Dayton, 23 Ohio St. 517; 19 Am. & Eng. Encyclop. Law, p. 457.

There can be no difference whether the public highway be a county or township road, in which the fee is in the abutting land owner, or the streets of a city or village, the fee of which is in the municipality; so far as the rights of abutting land owners as against a telegraph company operating its line are concerned, they are the same.

Cincinnati & S. G. A. R. Co. v. Cummins, 14 Ohio St. 546; *Bingham v. Doane*, 9 Ohio, 167; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 551; *Sullivan v. North Hudson County R. Co.* 51 N. J. L. 543; *Com. v. Temple*, 14 Gray, 69; *Boston v. Richardson*, 13 Allen, 140.

The use to which the state has put the public roads, in authorizing telegraph lines along them, is not inconsistent with the original purpose, does not supersede, defeat, or in any manner interfere with such former use and therefore may be authorized.

Com. v. Lovell Gas Light Co. 12 Allen, 75; *Atty Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Cincinnati v. Penney*, 21 Ohio St. 499, 8 Am. Rep. 78; *Moses v. Pittsburgh, F. W. & C. R. Co.* 21 Ill. 517; *Frith v. Durruque*, 45 Iowa, 406; *Brown v. Duplessis*, 14 La. Ann. 854; *Elliott v. Fair Haren & W. R. Co.* 32 Conn. 579; *Little Miami & O. and Xenia R. Cos. v. Dayton*, 23 Ohio St. 519; *Com. v. Erie & N. E. R. Co.* 27 Pa. 354, 67 Am. Dec. 471; *St. Joseph & D. O. R. Co. v. Dryden*, 11 Kan. 186; *New Albany & S. R. Co. v. O'Daily*, 12 Ind. 551; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398; *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Ford v. Chicago & N. W. R. Co.* 14 Wis. 619, 80 Am. Dec. 791; *Denver v. Bayer*, 7 Colo. 113; *Cincinnati & S. G. A. R. Co. v. Cummins*, *supra*; *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 624; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168.

Mere damage to private property does not entitle the owner to compensation, unless the public by its own acts have invited, as it were, owners of property to improve the same under a belief that no change will be made by which such property will be injuriously affected.

Scovill v. Geddings, 7 Ohio, pt. 2, p. 211; *Hickox v. Cleveland*, 8 Ohio, 544, 82 Am. Dec. 24 L. R. A.

780; *Crawford v. Delaware*, 7 Ohio St. 400; *Cincinnati v. Penny*, *supra*; *People v. Kerr*, 27 N. Y. 183; *Chicago v. Rumsey*, 87 Ill. 343; *Hoboken Land & Imp. Co. v. Hoboken*, *supra*; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 386.

The direct injury which may be done to private property by lowering or raising a street does not come within section 4, article 8, of the Constitution of Ohio. Private property is not taken for public uses, but a damage or inconvenience only is sustained by private property.

Crawford v. Delaware, and *Scovill v. Geddings*, *supra*.

The business of maintaining telegraph lines is certainly one of a public nature, and the Supreme Court of the United States has held that congress may prevent obstructions of telegraph communications by hostile state legislation.

Pensacola Tele. Co. v. Western U. Tele. Co. 96 U. S. 1, 24 L. ed. 708; *Western U. Tele. Co. v. Seay*, 132 U. S. 473, 33 L. ed. 409, 2 Inters. Com. Rep. 726; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 153; *Ratterman v. Western U. Tele. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59; *Ex parte Conway*, 48 Fed. Rep. 77.

The constitutional rights of Mr. Taylor are not involved, and the constitutionality of the legislation upon this subject cannot be called in question in this case.

Brent v. State, 43 Ala. 297; 19 Am. & Eng. Encyclop. Law, p. 456.

In no case can a person be liable to an action as for a tort for an act which he is authorized by law to do.

Callender v. Marsh, 1 Pick. 435; *Scovill v. Geddings*, 7 Ohio, pt. 2, p. 211; *Akron v. MeComb*, 18 Ohio, 230, 51 Am. Dec. 453; *Crawford v. Delaware*, 7 Ohio St. 404; *Little Miami R. Co. v. Whitacre*, 8 Ohio St. 591; *Story v. New York Elev. R. Co.* 90 N. Y. 160, 43 Am. Rep. 146; *People v. Kerr*, 27 N. Y. 183; 2 Dill. Mun. Corp. § 552; *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 625; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 14 L. ed. 249.

The state is bound by its legislation.

People v. Metropolitan Teleph. & Tele. Co. 81 Hun, 596; *Sessuns v. Batts*, 34 Tex. 335.

After so many years of silence, has Mr. Taylor the right to prevent the maintaining of this line, or can he insist that obstruction to its use shall not be removed.

Goodin v. Cincinnati & W. Canal Co. 18 Ohio St. 169, 98 Am. Dec. 95; *Pittsburgh & W. R. Co. v. Perkins*, 49 Ohio St. 231; *Wellington, Petitioner*, 16 Pick. 87, 26 Am. Dec. 631; *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 281, 16 L. ed. 488; *Ireland v. Palestine, B. N. P. & N. W. Turnp. Co.* 19 Ohio St. 378.

The legislature may authorize telegraph lines to occupy a portion of the highway.

Irwin v. Great Southern Teleph. Co. 37 La. Ann. 68; *People v. Squire*, 107 N. Y. 596; *American Rapid Tele. Co. v. Hess*, 13 L. R. A. 454, 125 N. Y. 641; *People v. Baltimore & O. R. Co.* 117 N. Y. 150; *Rauenstein v. New York, L. & W. R. Co.* 18 L. R. A. 768, 136 N. Y. 535; *Roberts v. Wisconsin Teleph. Co.* 77 Wis. 589.

Mr. S. F. Hanselman, for defendant in error:

The construction and maintenance of a telegraph or telephone line upon a highway is a new and additional burden upon the fee, to which, when the highway was established, it was not contemplated it should be subjected, and for which the owner is entitled to additional compensation.

Smith v. Central Dist. Printing & Teleg. Co., 2 Ohio C. Ct. Rep. 259; *Cincinnati Inclined Plane R. Co. v. City & Suburban Teleg. Asso.*, 19 L. R. A. 534, 48 Ohio St. 390; *Cincinnati & S. G. A. R. Co. v. Cumminsville*, 14 Ohio St. 523; *Hudson River Teleg. Co. v. Waterliet Turnp. & R. Co.* 121 N. Y. 397.

The adjoining owner owns the fee of the highway, subject only to the easements to which the public had a right.

McClelland v. Miller, 28 Ohio St. 502, 86 Ohio Laws, 101.

There is no estoppel.

Pittsburgh & W. R. Co. v. Perkins, 49 Ohio St. 326; *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 343.

The defendant telegraph company gets no more rights under the statutes of the United States than it has under the statutes of the states, or whether its rights are enlarged thereby.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *Thompson, Electricity*, §§ 17, 18.

Spear, J., delivered the opinion of the court:

The conviction was had under section 6880 of the Revised Statutes, which provides that: "Whoever wrongfully, and without lawful authority, cuts down or destroys, or by girdling, or any other means, injures any vine, bush, shrub, sapling, or tree, standing or growing upon land not his own, or severs from the land of another, or injures, or destroys, any product standing or growing thereon, or other thing attached thereto, shall be fined in any sum not more than one hundred and fifty dollars, or imprisoned not more than thirty days, or both."

Objection was made at the trial to the admission of any evidence under the indictment. Exceptions were also taken to the refusal to charge divers propositions tendered by counsel for defendants. But the principal question in the case is raised by the exception to the following instruction given by the court to the jury, viz.:

"Upon the question as to the rights of the telegraph company, the court says to you that at the time of the erection of the poles and the construction of the telegraph line, whether in 1882 or 1884, the land upon which this highway was situated was the property of Mr. Taylor, subject to the right of way for public use for highway; that is, for travel and keeping it in repair as a highway."

"As between Mr. Taylor and other individuals or corporations it could be used for no other purpose without entitling him to compensation for such use; and the entry of this telegraph company upon his land without compensation to him, or without an

agreement between him and such corporation, if you find this corporation did so enter, was not a rightful entry or occupancy; and as to the trees growing upon this land at the time such company constructed its lines, as between him and such corporation he had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company. The United States could not, nor has it attempted to take away by any statute that right. Mr. Taylor's right to maintain the trees in the ordinary way was an absolute right, and this right could be taken from him in no way until such time as they acquired the right to maintain such lines by prescription, which means actual occupancy for twenty-one years or more, or by appropriation or agreement; and for this company, by its agents without first acquiring the right, to enter upon this land and to cut the trees growing thereon, would be proceeding without lawful authority."

If this instruction is wrong the conviction cannot stand.

It is maintained by the plaintiffs in error that the charge is erroneous because the Postal Telegraph Cable Company derived authority by force of sections 8454, and following, of the Revised Statutes of Ohio, and of section 5263, and following, of the Revised Statutes of the United States (by which its line is made an instrument of interstate commerce), to enter upon and occupy the highway for its telegraph line, and was therefore rightfully there for the purposes of its business and that as it appears that what was done by the employees of the company in the way of trimming the trees of Mr. Taylor was done to prevent the branches from interfering with the operation of the telegraph line, their acts could not be in violation of any right of Mr. Taylor, inasmuch as he could not be possessed of any right to intrude, by growing trees or otherwise, upon the right of occupancy and use thus acquired and enjoyed by the company. Such acts would not be, within the meaning of our criminal statute, wrongful, nor could the land, as respects the company thus rightfully in occupancy of the highway, be esteemed the land of another within the meaning of section 6880.

The sections of the Ohio statutes cited give authority to any magnetic telegraph company to construct telegraph lines from point to point along and upon any of the public roads and highways, etc., etc., but the same shall not incommode the public in the use of such highway. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or by appropriation, for the purpose of making preliminary examinations and surveys, with the view to the location of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way over such lands and adjacent lands sufficient

to enable it to construct and repair its lines. But no such company shall, without the consent of the owner thereof in writing, enter any building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard, or in any inclosure within which an edifice is situated, nor erect any telegraph pole, pier, abutment, wires, or other fixtures so near to any edifice as to occasion injury thereto, or risk of injury in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental tree.

The sections of the United States statutes cited give to any telegraph company organized under the laws of any state the right to construct, maintain, and operate lines of telegraph over and along any of the military or post roads of the United States, but the lines must not interfere with the ordinary travel on such roads; and before any company can exercise any of the powers or privileges conferred such company shall file its written acceptance with the postmaster general of the restrictions and obligations required by law. A later section declares "That all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

It is apparent that the only limitation expressed upon the right to maintain lines of telegraph upon the public highways is that they shall be so constructed as not to interfere with the public use of the highway. But the statute nowhere undertakes to deal with the private right of ownership in the highways, and the question arises whether it was the legislative purpose to give rights to telegraph companies inconsistent with the rights of the owner of adjoining lands in the highways.

Whatever may be the rule in other states, we have supposed that the question of the right in the highway of a land owner whose title extends to the center of the road, is not an open one in Ohio. The question has been the subject of adjudication in a score of cases decided by this court, notably in the following: *Bingham v. Doane*, 9 Ohio, 167; *Crawford v. Delaware*, 7 Ohio St. 459; *Cincinnati & S. G. A. R. Co. v. Cummins*, 14 Ohio St. 523; *Hatch v. Cincinnati & I. R. Co.* 18 Ohio St. 123; *McClelland v. Miller*, 28 Ohio St. 502; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 843.

Perhaps the principle is not better stated than in *Lawrence R. Co. v. Williams*, *supra*, opinion by Gilmore, *Ch. J.*, as follows:

"As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel, or plank the road in such a manner as to make it most convenient and safe for use by the public, for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man and beast and by vehicles drawn by animals, without fixed tracks

or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases, it reverts to him free from incumbrance.

"In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along and upon a public highway. . . . In such case, the rights of the public, and the rights of the owner, are entirely distinct; and the consent, express or implied, of one to the appropriation, would not bind or affect the rights of the other. . . . The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use, to which the highway has been diverted, imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right to so divert the use, and impose additional burdens on the land, could only be acquired by the corporation by agreement with the owner, or by appropriating and making compensation therefor, in the mode prescribed by law."

Applying the doctrine of this holding to the case at bar, it is manifest that the learned trial judge did not err in his charge bearing upon the property right of Mr. Taylor in the highway, but that, on the contrary, the law upon that subject was correctly stated to the jury. And, if right upon that point, the result would seem to follow, as further charged by the judge, that the land owner "had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company." The rule of law rests upon the clear ground that the appropriation of the public highways for the purpose of telegraph lines was a new use. The highways were originally dedicated for the purposes of public travel, and not for the purpose of telegraph lines. Hence the new use imposed an additional burden. The statutes of Ohio grant to telegraph companies secondary and subordinate, rather than co-ordinate, rights, with travelers, which fact is apparent in the provision that the lines are to be so constructed as not to interfere with the public use of the highways. *Cincinnati Inclined Plane R. Co. v. City & Suburban Tel. Assn.* 48 Ohio St. 890. The presence in the statute of provision for the protection of private rights where lines are built on private lands, and the absence of such provision where the highways are used, is strong indication, as it seems to us, that the purpose was to avoid any interference with the rights of the adjoining land owner. And the conclusion seems inevitable, taking

the language of the entire statute upon the subject, that, whatever grant of right in the highways is given telegraph companies as against the public, no right is attempted to be given them as against individuals. The question of legislative power, therefore, to authorize a telegraph company to take the interest of the adjoining land owner in the highway without compensation, need not be considered.

It follows that before the telegraph company could possess a right in such measure as to interfere with the right of the land owner in the highway it would be required to acquire that right in some one of the ways known to the law. It is not pretended that any such method has been resorted to. Hence, the entry upon the land by the company, was, as to such right, not a rightful entry. There was no error, therefore, in the trial judge giving the instruction upon that subject already quoted.

The court also said to the jury "that in doing these acts, if these men in good faith honestly thought from the circumstances that they had the right to cut the trees as they did, they could not within the meaning of the law be held to be guilty of a crime in this case, even though they had no right or lawful authority so to do; however, if you find they acted heedlessly, recklessly and carelessly, without honestly believing they had the right to do it, then as to this branch of the case they would be liable." And this is assigned as error, because, as is urged, if the defendants honestly, though mistakenly, believed they had a right to cut the trees, the question of recklessness would not enter into the consideration, and they could not be guilty. We see no error in this instruction to the jury. Indeed it is probably more favorable to the defendants than they could well ask. If, with the information from Mr. Taylor, as to his ownership of the land and of the trees, and in the face of his protest, they chose to go on and do the injury complained of, it was for the jury to say whether or not they acted "heedlessly, recklessly and carelessly," and if they did so act, then the cutting was "wrongful," within the meaning of the statutes. That the cutting, if it injured the tree, would inflict pecuniary injury on Mr. Taylor was apparent on the face of things. The trees were of value to the enjoyment of the property. Not only as a matter of sentiment on the part of the owner who had planted them and had watched their growth for near half a century, but as an improvement which added money value to the farm, had Mr. Taylor an interest in preserving them from injury, and in invoking the aid of the criminal law, where the superior force of the telegraph company made it impracticable for him to personally protect his own. That, too, was the time for him to stand for his own. The right in the company, if it existed, to set poles as near as one hundred and thirty feet from one another, with cross-arms six feet in length, and to put upon them fourteen wires, implied the right to place the poles as near together as the company might desire, and to put on them cross-arms of any length, and string a

corresponding number of wires. And if there was the right to cut branches where necessary to the working of the line, there would arise an equal right to cut down the trees themselves in case a like necessity appeared. The land owner made resistance so soon as his property rights were directly assailed, but he did not resist any too soon.

It is contended that the claim of the telegraph company to lawful possession as an instrument of interstate commerce is sustained by the holding of the Supreme Court in *Pensacola Teleg. Co. v. Western Union Teleg. Co.* 96 U. S. 1, 24 L. ed. 708. In that case it is held that the powers conferred upon congress to regulate commerce among the several states, and to establish post-offices and post-roads, are not confined to the instrumentalities of commerce, or of the postal service known or in use when the constitution was adopted, but keep pace with the progress of the country, and were intended for the government of the business to which they relate at all times and under all circumstances, and it is the duty of congress to take care that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation. And further, that the Act of July 24, 1866 (sec. 5263 *et seq.*) which declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and is not limited in its operation to such military and post-roads as are upon the public domain. And, as conclusion, that the statute of Florida, so far as it grants to the Pensacola company the exclusive right of establishing and maintaining lines of electric telegraph as therein specified, is in conflict with that act, and therefore inoperative as against a corporation of another state entitled to the privileges which that act confers; and, further, that a telegraph company of another state, which has secured the right of way by private arrangement with the owner of the land, and duly accepted the restrictions and obligations required by that act, cannot be excluded by the Pensacola company.

But this is very far from holding that a telegraph company which accepts the terms of the United States statute thereby acquires any right as against the individual property right of the citizen. True, the holding is that the telegraph is an instrument of interstate commerce; that telegraph companies are subject to the regulating powers of congress, in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. But how does this advance the argument? It is made plain, we think, by what has preceded that the state cannot grant to a railroad company any right in a public highway which invades the individual right of the owner of adjoining

land; such right may be acquired by due process of law; it cannot be legally seized by brute force. It is to be noted, also, that the Western Union Company whose right is vindicated by the decision cited, "had secured a right of way by private arrangement with the owner of the land," and hence the property rights of the citizen were in no way involved in the case. So solicitous, however, was the eminent jurist who wrote the opinion (*Chief Justice Waite*) that no unwarranted impression should be created, that he took pains to guard against it, when speaking of the statute, by use of the following language: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted."

It is manifest that the case is not an authority supporting the contention of the plaintiff in error.

Beyond this it is urged that, by not resisting the erection of the poles and the stringing of the wires when the line was placed along the highway some ten years before, Mr. Taylor is, in some way, estopped from now asserting his private rights, and hence it could not be made a criminal offense to invade those rights. *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95, is cited in support of this contention. The doctrine of the *Goodin Case* was held in

Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 488, to "rest upon its own peculiar facts, and is not to be extended," and in the recent case of *Pittsburgh & W. R. Co. v. Perkins*, 49 Ohio St. 331, it is again observed, respecting the same case, that "what is there said must be confined to the facts of that case." If, however, the doctrine of the *Goodin Case* be at all applicable to the facts of the case at bar, it would only prevent a proceeding on the part of the land owner to compel a removal of the line. It could not work a transfer of the right of the land owner in the road to the telegraph company. That result, by reason of mere acquiescence, could not be accomplished short of twenty-one years. The private right, therefore, would not be extinguished. And, if not extinguished, that property right was still susceptible of protection by the criminal law. But, aside from this, even if the *Goodin Case* applies here, why should the land owner be estopped? The holding in the *Goodin Case* proceeds upon the theory that the owners must have been fully aware of the appropriation proceedings, and that their property was being seized and despoiled, and upon the additional fact that large sums had been expended on the faith of their apparent acquiescence. In the case at bar it is not shown that at the time of the erection of the telegraph line the danger of interference with, or injury to, private property, was apparent, nor that expense has been incurred relying upon apparent acquiescence, nor, indeed, that any large sum has been expended at all.

Our conclusion is that the owner of the adjoining land was the owner of the trees, and had the right to their full enjoyment subject only to the convenience of public travel; that his property in the trees was a legitimate subject of protection by state legislation, and that the criminal arm of the law was properly invoked for his protection.

Other questions are argued, but we find none presented by the record of sufficient gravity to justify the use of time and space in their discussion.

Judgment affirmed.

GEORGIA SUPREME COURT.

PORT ROYAL & AUGUSTA R. CO. *et al.*, *Plffs. in Err.*,
v.

Henry B. KING *et al.*

(.....Ga.....)

*As the principal corporation owning the railroad was created by the state of South Carolina, and as all the railroad, except a small part, is located

*Headnote by LUMPKIN, J.

in that state, and was in the hands of a receiver by virtue of legal proceedings instituted in that state, and still pending when the same receiver was appointed, by the order now excepted to, to take charge of so much of the property as is situated or found within this state, there was no abuse of discretion by the judge in passing this order. It is best for the interests of all concerned that the control and management of the whole railway should be in the same hands, and that the small fraction of the line located in this state should continue to be used and worked in connection with the main body of the road. So long as courts exercising juris-

NOTE.—The benefit of a liberal application of the principle of comity is well illustrated by cases like the above where hostility between the courts and receivers might result in serious damage to the interests of the owners of the property.
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As to the authority of a receiver out of the jurisdiction of the court which appointed him, see note to *Re Schuyler's Steam Tow-Boat Co.* (N. Y.) 20 L. R. A. 391.

diction in South Carolina continue in possession of the main body by the hands of a receiver, it would be wise and judicious to invest that receiver, and allow him to remain invested, with authority to manage the part of the road located in this state also. If the company should hereafter be reinstated in the possession of that part of its property located in South Carolina, application can then be made to the superior court of Richmond county, or to the judge thereof, for a like reinstatement of the company in the possession of so much of its property as is located in Georgia.

(November 27, 1893.)

ERROR to the Superior Court for Richmond County to review a judgment in favor of plaintiffs in an action brought to procure the appointment of a receiver for the Port Royal & Augusta Railroad Company, and to enjoin the Central Railroad & Banking Company of Georgia from exercising control over said road. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Lawton & Cunningham, Denmark & Adams, J. Ganahl and J. C. C. Black for plaintiffs in error.

Messrs. W. J. Verdier, Alex. C. King and Smythe & Lee, for defendants in error:

The right of minority stockholders to bring an action of this kind is well established.

Alexander v. Searcy, 81 Ga. 536; *Clarke v. Central R. & Bkg. Co.* 15 L. R. A. 683, 50 Fed. Rep. 345; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 49, 35 L. ed. 64; *Eurle v. Seattle, L. S. & E. R. Co.* 56 Fed. Rep. 909.

Lampkin, J., delivered the opinion of the court:

Upon the petition of Henry B. King *et al.*, stockholders of the Port Royal & Augusta Railway Company, the judge below appointed one Averill permanent receiver of the railway and other assets of the company in the state of Georgia, and granted an injunction restraining the Central Railroad & Banking Company of Georgia, until further order, from operating the Port Royal & Augusta Railway, or voting certain stocks and bonds held or controlled by the Central, or in any manner interfering with the property, assets, or management of the Port Royal Railway. To this action of the court both companies excepted. The following facts appeared on the hearing: On the 21st day of December, 1857, the state of South Carolina granted a charter to the Port Royal Railroad Company, whose purpose was to construct a line of railway from the waters of Port Royal harbor, in that state, to Augusta, in the state of Georgia. Afterwards, on the 19th day of December, 1859, the general assembly of this state passed "an act to charter the Port Royal Railroad," the preamble and first section of which act were in the following words: "Whereas, the legislature of South Carolina has, by public statute, incorporated a company to build a railroad from the waters of Port Royal harbor, in the neighborhood of Beaufort, to the Savannah river, in the direction of the city of Augusta, and it is deemed proper to confer upon the same company corporate powers in Georgia, and to

grant the right to construct the portion of railroad in this state: Be it therefore enacted," etc., "that such persons as may be made a body corporate by the public law of South Carolina to build a railroad between Port Royal and Augusta are hereby created a body politic in this state; and they shall have the right to continue and construct their road from the boundary between the two states, by the nearest and most practicable route, to the city of Augusta; provided, that they shall cross the river at or below Augusta, by a drawbridge; and provided, there shall be created thereby no obstruction to the free navigation of the Savannah river and its branches." Acts 1859, p. 324.

After the railroad was built, it was sold at judicial sale, and the purchasers thereof filed certificates in the offices of the secretaries of state of both Georgia and South Carolina, incorporating themselves as the "Port Royal & Augusta Railway Company." The entire length of the railroad is 112 miles, of which there are within the limits of the state of Georgia about three and half miles only, the remainder of the line lying wholly within the state of South Carolina. Before the appointment of Averill as receiver, and the granting of the injunction by his honor, *Judge Roney*, Averill had, under proceedings instituted in the court of common pleas for the county of Beaufort, in the state of South Carolina, been appointed receiver of the Port Royal & Augusta Railway Company of that state; and all its property therein had, by virtue of this appointment, been placed under his management and control. An effort had been made to transfer the litigation over this company and its property to the United States court in that state, concerning which there seemed to be a difference of opinion between the state and federal judges, but as to which the United States judge had not fully made up his mind. He had, however, passed an order directing that Averill, the receiver of the state court, remain in possession and control of the property until a final decision upon the question of removal should be made by him. The foregoing is a brief summary of all the facts which we deem material to a proper disposition of the case now presented for our determination.

It will thus be seen that, without reference to the question of a possible conflict of jurisdiction between the state and federal courts of South Carolina, Averill, when *Judge Roney* acted, was, under the authority of both these courts, rightfully in possession of, and exercising control over, all the property of the Port Royal Company lying in the state of South Carolina. In the exercise of his discretion, *Judge Roney* appointed Averill receiver of the property of the company situated in the state of Georgia, and he thus secured the management and control of the entire property of the company in both states. The record before us is voluminous, and, in the argument of the case, a large number of important and interesting questions, both of law and of fact, were raised and discussed by the learned counsel on both sides. We deem it unnecessary, however, to go into them, because, in our judgment, the case, so far as we may properly deal with it, is really a very simple one. It is

a most obvious proposition that a railway cannot be successfully and profitably operated when cut up into sections or fragments, and a different person placed in control of each. Indeed, it would hardly be possible for the business of a railway thus dismembered to be properly carried on at all; and undoubtedly it would greatly embarrass the management of the greater part of a line of railway if a small fragment of it, at one of its termini, was under different, and perhaps antagonistic, control. The present case affords such an instance; for, although, as before stated, the line of the Port Royal & Augusta Railway extends for a distance of 112 miles, scarcely more than three and half miles of that line are within the limits of this state. Nevertheless, this small fragment is none the less important to the successful operation of the whole line than were it many more miles in extent, for it serves as a connecting link, and enables the company to reach Augusta,—an essential terminal point, because affording connections with other lines of railway. Certainly, in any view of this case, considerations of economy, safety, and efficiency dictate and demand that the entire property and business of the company should be under one and the same management. Surely it cannot be denied that it is best for the interests of all concerned, whether stockholders, creditors, patrons, or the public generally, that the small fraction of the line located in this state should be used and worked in connection and in harmony with the main line of the road, and this could be successfully accomplished only in the manner indicated. That the South Carolina company was the main corporation, and that the Georgia corporation was merely ancillary to it, is clearly shown by the language used by the legislature in the preamble and first section of the Georgia charter, already quoted in the above statement of facts. It is clear, we think, that the courts of South Carolina are best entitled to entertain and exercise jurisdiction over the affairs of this corporation in their present complicated state; and so long as those courts, by the hands of a receiver, continue in possession of the main body of the road and its property, it would, in our judgment, be unwise and improper to fetter and embarrass that receiver by depriving him of control over so much of the company's property as lies within the state of Georgia. There can be no question, we think, that, instead of so doing, the courts of this state should take such action as will leave him with full authority to manage the entire property. This is true, not merely upon the doctrine of comity of states, but also because it is manifestly the best course to be pursued in the premises. We would be going an extreme length to hold that the trial judge abused his discretion in passing the order complained of. Not only was there no abuse of discretion, but the action taken by him was eminently wise and proper. It will be within his power, in the future, to give such direction and pass such orders as may become necessary to carry into effect the policy herein outlined with regard to the property and control of this company. If the company should hereafter be reinstated in the possession of that part of its property located in South Carolina, it will

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then be time enough to make the proper application for a like reinstatement of the company in possession and control of its property located in Georgia; and, should this contingency arise, the company will doubtless be granted appropriate and effectual relief.

Judgment affirmed.

T. M. PATTON, *Plff. in Err.*,

vs.
STATE of Georgia.

(.....Ga.....)

"Irrespective of the question whether a dog is or is not 'private property,' the willful and malicious killing of one is not an indictable offense under section 4637 of the Code. That section relates to the injury or destruction of inanimate property, and does not apply to injuring or killing animals of any kind.

(January 27, 1894.)

ERROR to the Superior Court for Banks County to review a judgment convicting defendant of malicious mischief for killing a dog. *Reversed.*

The facts are stated in the opinion.

Measrs. H. H. Perry and F. M. Johnson for plaintiff in error.

Mr. R. B. Russell, Sol. Gen. for the State.

Lumpkin, J., delivered the opinion of the court:

As will be perceived from the headnote, we have decided this case without reference to the question whether a dog is or is not "private property." It may not, however, be unprofitable to notice how this question has been dealt with in other jurisdictions. In *Com. v. Maclin*, 8 Leigh, 809, it was, in the general court of Virginia, by a divided bench, decided that a statute making it indictable to knowingly and willfully destroy or injure any tree, or other timber, or property real or personal, belonging to another, did not authorize a criminal prosecution for the killing of a dog. In the case of *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 428, it was held that dogs were not recognized in law as belonging to the class denominated "domestic animals," and, consequently, that a demurrer to an indictment founded upon a statute providing for the killing or wounding of "domestic animals" ought to have been sustained. In a dissenting opinion by Appleton, *Ch. J.*, in that case, he eulogized the dog in the following language: "He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been, there has been his dog. Cuvier has asserted that the dog was, perhaps, necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the

*Headnote by LUMPKIN, J.

NOTE.—As to the right to kill dogs, see *note* to *Hubbard v. Preston* (Mich.) 15 L. R. A. 249.

brute to the possession of the dog. He is the friend and companion of his master, accompanying him in his walks; his servant, aiding him in his hunting; the playmate of his children; an inmate of his house, protecting it against all assailants." And later on the chief justice quoted approvingly the following poetic tribute to dogs:

They are honest creatures,
And ne'er betray their masters, never fawn
On any they love not.

On the other hand, in *Wilson v. Wilmington & M. R. Co.*, 10 Rich. L. 52, Munro, J., alluded to the dog as an animal whose nature is carnivorous, and who is prompted by instinct and appetite to roam at large in the forest in the pursuit of game, or upon a sheep-killing expedition; and finally stigmatized him as a "yelping cur," whose presence upon a railroad track should not arrest in its progress a train of cars freighted with products or passengers. In *United States v. Gideon*, 1 Minn. 292 (Gil. 238), it was decided that the malicious killing of a dog was not an indictable offense under a statute providing that "every person who shall willfully and maliciously kill, maim, or disfigure any horses, cattle, or other beasts, of another person," shall be punished, etc. Turning now to the "Old North State," it was held in *Latham's Case*, 85 N. C. 33, that an indictment for malicious mischief in killing a dog would lie. In this case no statute upon which the prosecution could be sustained was mentioned. In Indiana it was held in *State v. Sumner*, 2 Ind. 377, that the malicious killing of a dog was an indictable offense, under a statute providing that every person who shall maliciously destroy any property shall be fined, etc. This ruling was followed in the later case of *Kinsman v. State*, 77 Ind. 132. In New Hampshire in the case of *State v. McDuffie*, 84 N. H. 533, 69 Am. Dec. 516, it was held that under a statute providing for the punishment of any willful and malicious act, whereby any tree, or the real or personal estate, of another should be injured, an indictment would lie for the willful and malicious killing of a dog. It will thus be seen that in other states, under statutes varying in their terms, the question whether a dog is such property as to be the subject of a prosecution for malicious mischief has been decided both ways. Those who may be interested in further investigating the status of the dog as property may consult with profit: *Dodson v. Mock*, 20 N. C. 141, 33 Am. Dec. 677; *Perry v. Phipps*, 32 N. C. 269, 51 Am. Dec. 387; *Hartridge v. Miles*, 11 Kan. 480, 15 Am. Rep. 355; *Parker v. Mize*, 27 Ala. 480, 62 Am. Dec. 776; *Wheatley v. Harris*, 4 Sneed, 469, 70 Am. Dec. 258; *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 Am. Rep. 476, and the numerous authorities cited in these cases, and notes to the same.

Before discussing the ground upon which we have based our decision in the present case, we will remark that we do not think it probable the legislature of this state ever regarded the dog as being, in a general sense, property, concerning which a criminal offense could be committed. After provision is made in the sixth division, title 1, of the Penal Code, for the indictment and punishment of larcenies of

various domestic animals, section 4402 provides as follows: "All other domestic animals which are fit for food, and also a dog, may be subjects of a simple larceny; and any person or persons who shall steal any such animal or animals shall be punished," etc. If a dog had been considered as property, as are domestic animals fit for food, it is not likely that it would have been deemed necessary to provide specially that the stealing of one should be simple larceny; and we find nothing in our criminal statutes suggesting any reason why this animal should be regarded as a subject-matter of crime in any instance where it is not expressly so declared. But whether a dog be property or not, we are convinced, after considerable deliberation, that the willful and malicious killing of one is not an indictable offense under section 4627 of the Code, upon which the indictment in this case was based. In section 4612, the legislature undertook to deal with animals the maiming or killing of which it intended to make indictable. As this section originally stood, it was indictable to maliciously kill a hog; but not indictable to maliciously maim one; and the legislature saw proper, by an act passed in 1881 (Acts 1880-81, p. 73), to make this latter act indictable also, so that now it is malicious mischief either to maliciously maim or to kill any of the animals mentioned or designated in that section. It does not in its terms expressly include dogs, and we are satisfied it was never intended by the legislature that the provisions of this section should apply to the dog. The word "maim" does not include any injuries to animals, not causing death, which exceed or fall short of technical maiming. This court, in *Bailey v. State*, 65 Ga. 410, distinctly held that the word "maim," as used in this section, was intended to be understood in its technical signification, and, consequently, that the mere shooting of a cow was not rendered criminal by the statute. In the chapter of the Penal Code relating to fraudulent or malicious mischief there are numerous sections which relate to the destruction or injuring of inanimate property. Section 4605 relates to tearing, burning, or in any other way destroying any deed, etc.; section 4607 to cutting down, removing, or destroying any beacon or buoy; section 4611 to injuring or destroying bridges, etc.; section 4613 to injuring or destroying turnpike gates, etc.; section 4615 to injuring or destroying trees. These instances are not exhaustive, but will be sufficient to illustrate our meaning. The words "destroy" and "injure" are appropriate when used with reference to offenses committed upon inanimate things; but, as has already been seen, when providing what should be malicious mischief as to living animals, the words "maim" and "kill" were used in section 4612, and in that section we find neither the word "injure" nor the word "destroy." In section 4627 the words "injuring" and "destroying" are used. We think, in the first place, that section 4612 was intended to be exhaustive of the classes of animals upon which the offense of malicious mischief could be committed, and that no act is indictable under that section except the "maiming" or "killing" of one of the animals therein specified or designated; and, also, that the words "all other acts of willful or mali-

scious mischief . . . not herein enumerated," as used in section 4627, were not intended to refer to acts done to animals of any kind; and, secondly, that the words "injuring or destroying any other public or private property," as used in the section last mentioned, were intended to apply exclusively to inanimate property. If the willful and malicious killing of a dog would be indictable under that section, it is obvious that the willful and malicious injuring of one would also be indictable. We have already seen, in *Bailey's Case*, *supra*, that the injuring of a cow, otherwise than by maiming, was not criminal under section 4612 of the Code. Under this decision, it would necessarily follow that the injuring of a horse, however badly it might disable or disfigure him, would not be indictable under that section, unless the injury amounted to maiming. If,

therefore, the contention of the state in this case is sound, the mere injuring of a worthless, bobtailed, benchlegged sice, if done maliciously, would be malicious mischief, as has been shown, it would not be malicious mischief but wanton cruelty to grossly mar the appearance and beauty of the most magnificent and valuable blooded horse in the state. Sustaining the position held by the state would inevitably lead to the above result, and its absolute absurdity demonstrates that it could never have been intended by the law-making power. The demurrer to the indictment, alleging that it set forth no crime against the laws of this state, ought to have been sustained; and, as this was not done, the judgment, after conviction, ought to have been arrested.

Judgment reversed.

SOUTH DAKOTA SUPREME COURT.

Arthur L. CARTER

Thomas THORSON, Secretary of State.

(.....S. Dak.....)

*1. Chapter 99, Laws of 1891, divides the public printing of the state into classes, and directs the secretary of state, as *ex officio* commissioner of public printing, to advertise for bids for doing the same, and to make contracts with the best and lowest bidders for doing such printing as the state may require. Held, that a contract so made does not "incur an indebtedness" on the part of the state, within the meaning of section 9, article 11, of the Constitution, prohibiting the incurring of indebtedness "except in pursuance of an appropriation for the specific purpose first made."

2. Such contract imposes no obligation upon the state to have any work done, but in effect, simply designates the parties who are entitled to do whatever work of theseveral classes the state may require, and fixes the compensation therefor, if any shall be so required and done.

3. Except as made by the constitution itself, the legislative department alone has power to make appropriations from the state treasury for the payment of state indebtedness.

4. The primary thought and purpose of said section 9, article 11, prohibiting the incurring of indebtedness, except in pursuance of appropriations, was to confine the creation of indebtedness to such subjects and to such amounts as were expressly approved by that department of the government which would be required to provide for its payment.

5. Without deciding that under circum-

*Headnotes by KELLAM, J.

NOTE.—As to the public purposes for which money may be appropriated, see note to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474.

As to control over appropriations and the manner of making them, see note to *Henderson v. State Soldiers & Sailors Monument Comrs.* (Ind.) 13 L. R. A. 169.

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stances could this provision be held to control the power of the legislature to incur or to direct the incurring of indebtedness. —It is held that such provision was not intended to, and consequently does not, prevent the legislature from incurring, or immediately directing the incurring of indebtedness for the usual and current administration of state affairs without first having made an appropriation for the specific purpose.

(June 13, 1894.)

APPLICATION for a writ of prohibition to prevent the defendant from letting contracts for the state printing. *Denied.*

The facts are stated in the opinion.

Mr. J. W. Carter for plaintiff.

Mr. John L. Pyle, with Mr. Coe L. Crawford, *Atty. Gen.*, for defendant:

The language of the constitution is, "No indebtedness shall be incurred." The word "incur" is held to mean "to become liable or subject to."

See 10 Am. & Eng. Encyclop. Law, p. 398.

An "indebtedness" is a pecuniary obligation.

Id. 399.

But the state contends that this "indebtedness, is not "incurred" until some work has been performed at the request of some officer or tribunal of the state requiring printing to be done. The performance of such work might create an obligation on the part of the state to pay but could not under many authorities be held to constitute an indebtedness within the meaning of the constitution.

See *East St. Louis v. East St. Gas Light & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Weston v. Syracuse*, 17 N. Y. 110; *Garrison v. Howe*, Id. 458; *Wentworth v. Whitmore*, 1 Mass. 471; *People v. Arguello*, 37 Cal. 524; *Direly v. Cedar Falls*, 27 Iowa, 227; *Grant v. Davenport*, 26 Iowa, 398; *French v. Burlington*, 42 Iowa, 618; *Burlington Water Co. v. Woodward*, 49 Iowa, 58; *Smith v. Dedham*, 144 Mass. 177; *Crowder v. Sullivan*, 13 L. R. A. 647, 128 Ind. 486.

Where a statute provides that a specific

thing shall be done and paid for, and points out the method of ascertaining the amount, and directs that a warrant shall be issued for the same, this is a sufficient appropriation of the amount within the meaning of the constitution.

State v. Kenney, 10 Mont. 485, and 11 Mont. 558, and cases cited; and see also *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 691.

Kellam, J., delivered the opinion of the court:

This is an application to this court for a writ of prohibition enjoining defendant, as secretary of state and *ex officio* commissioner of public printing, from letting contracts for the public printing for the state under chapter 99, Laws 1891. It is unnecessary to refer in detail to the statements of the petition for this writ, for it is conceded by both sides that the allowance or disallowance of the writ must depend upon whether, under our constitution, the legislature can empower the secretary to make such contract until an appropriation is made to pay for the work which may be done under it. The law referred to divides the public printing of the state into five classes, and authorizes the secretary of state, as *ex officio* commissioner of public printing, to advertise for proposals to do the same and to make contracts for such work with the best and lowest bidders. The five classes are as follows: "First class. Printing and binding all bills for the two houses of the legislature and such resolutions, petitions, and memorials as are required to be printed for daily use of the legislative assembly. Second class. Printing and binding the journals of the two houses of the legislature and such reports, communications, and other documents as enter into and make up the journals. Third class. Printing and binding of reports of state officers, of penal and charitable, educational and other public institutions and other documents ordered by the legislature, together with the executive documents and legislative manual. Fourth class. Printing and binding general laws and joint resolutions, revised codes and supreme court reports. Fifth class. Printing of circulars and blanks for state officers and all other printed matter not in pamphlet form and not included in the foregoing classes." The secretary has duly advertised and received and opened bids, and, being about to make contracts with the successful bidders, this writ of prohibition is sought, forbidding the making of such contracts, on the sole ground that, no "appropriation for the specific purpose" of meeting the expense of such printing having been made, the secretary could not, without violating the express injunction of the constitution, make such contracts on the part of the state. The constitutional prohibition relied upon by plaintiff is contained in section 9, article 11, of the Constitution, and is as follows: "No indebtedness shall be incurred, or money expended by the state, and no warrant shall be drawn upon the state treasurer, except in pursuance of an appropriation for the specific purpose first made. The legislature shall provide by suitable enactment for carrying this section into effect."

It is conceded that the secretary is proceed-

ing in strict pursuance of the terms of the law, but, as already intimated, plaintiff's contention is that to make such enactment a valid operative law, carrying authority to the secretary, was beyond the power of the legislature, unless, prior to or simultaneously with its passage, they also make an appropriation for the specific purpose of defraying any indebtedness that might be incurred under it; and so an important question is, Has the legislature, by this law, attempted to empower the secretary to incur an indebtedness on the part of the state?

The law, by section 2, fixes a schedule of maximum prices for the several kinds of work enumerated in the five classes. Section 3 makes the secretary *ex officio* commissioner of public printing, with power to supervise and measure the work, and adjust the accounts for doing the same; section 4 requires him to advertise for bids or proposals to do the work covered by the five classifications, and to make contracts therefor with the lowest and best bidders, and section 5 provides that on the assembling of the legislature he shall submit to that body estimates of the probable cost of the printing for the ensuing two years. The purpose of the law is plain, and its procedure orderly and business like; and neither should be defeated, unless in contravention of the rule of the constitution. The objection is, and probably can be urged, only as to the work included in the first, second, and fourth classes; that covered by the third and fifth classes being provided for in the General Appropriation Act of 1893, except as to the item of supreme court reports, which will be specially noticed later. It will thus be seen that the work, the payment for which no appropriation has been made, is that which is to come immediately and directly from the legislature next to meet; but neither as to this, nor that of either of the other classes, does the contract which the secretary is authorized to make assume to create an indebtedness against the state. It simply determines and provides who shall do, and be entitled to do, the work, in either class, that may be required, and what prices shall be paid for it, if done. The making of such a contract does not incur an indebtedness. We are referred to no constitutional or statutory requirement that the reports of state officers, or the other items enumerated in classes 3 and 5, shall be printed; and surely the legislature may do as it pleases about printing its bills introduced, and its daily journals, except as the latter are required by the constitution to be published "from time to time." This provision, being constitutional, would not yield to the requirement for an antecedent appropriation. The legal effect of making such contract is hardly more than to designate a public printer of the different classes of work named. It confers upon the contractor the right to do all the work, at the prices designated, which the state requires, of the kind designated in his contract; and, upon the state, the right to have so done such work as it may require. It thus fixes the relation of the parties, and their respective rights and duties, and may prove the foundation upon which an indebtedness growing out of further facts may finally rest; but we do not think it incurs an indebtedness.

within the meaning of this constitutional prohibition.

There is, however, another view which we are disposed to take of this constitutional provision. The form of this prohibition is very suggestive of at least its primary purpose and scope. No indebtedness must be incurred, unless in pursuance of an appropriation previously made. Does this mean that the legislature itself can involve the state in no indebtedness for any purpose, unless, before doing so, it has made an appropriation for that specific purpose? Might the secretary of state, or an employé of the legislature, properly ignore a legislative direction, legal in form, to supply their chambers with thermometers, or clocks, or window shades, or ventilating appliances, because no appropriation for the same had first been made? With the legislature rests the right and the duty of determining within constitutional limits, when, and for what purposes the public moneys of the state shall be paid out. Within such limits, their judgment is supreme. What they approve and appropriate for must be paid, and, except as provided in the constitution, nothing else can be paid. In this respect all other departments and agents of the state are subordinate to them. We think the primary thought and purpose of this provision were to prohibit any other department, officer, or agent of the state from involving the state in any expense or indebtedness which the legislature had not previously approved and authorized by an appropriation. It was intended to keep the indebtedness of the state, and the power to incur indebtedness, strictly within and under the control of that department which would be required to provide for its payment. It was not only appropriate and reasonable, but apparently requisite, that the legislature, to which must be looked for the means to meet indebtedness, should be allowed to control the making of indebtedness. The closing sentence of the section emphasizes this thought,—“The legislature shall provide by suitable enactment for carrying this section into effect.” It would appear that the object of the provision which was immediately in view by the makers of the constitution was thus to be secured, and the prohibition made practically effective, by means of legislation. But the legislature could provide no enactment which would be a check upon or control itself, for what it did or passed it could at any time undo or repeal, either expressly or by implication. The legislature showed its understanding of the meaning of this section, and of its duty under it, by enacting chapter 111 of the Laws of 1891, making

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it a misdemeanor for any state officer, or other agent of the state, “to create or attempt to create any indebtedness against the state without express authority so to do.” Acting upon this theory, and within the limits of their constitutional power, as they evidently thought, and as we think, they expressly and specifically authorized and directed the secretary of state to make a contract for a year with the best and lowest bidders for such public printing as the state might require, postponing the making of a specific and sufficient appropriation therefor until the indebtedness should be actually created, and its amount known to them. We think the long-term contract which the legislature authorized the secretary to make for the publication of the reports of this court, involves the same question. By express direction of the legislature the contract runs until October 1, 1898, and yet no appropriation was made, except for the then ensuing two years. The fact that a confessedly partial and inadequate appropriation was made would not, it seems to us, satisfy the principle upon which plaintiff's contention must rest, to wit, the unconstitutionality of the incurrence of an indebtedness, no provision for the payment of which had first been made. So far as the particular question here discussed is concerned, we entertain no doubt of the validity of either contract. Without undertaking to say that under no circumstances could this provision be held to affect or control the power of the legislature to incur, or to direct the incurrence of, indebtedness against the state,—a question we leave to be discussed and decided when fairly presented,—we are entirely satisfied that the prohibition was never intended to, and consequently does not, forbid or prevent the legislature from immediately authorizing or directing the incurring of an indebtedness in the current and usual administration of state affairs. This has been the view of the legislature since the organization of the state, and at every session it has directed the purchase of articles of convenience, on the credit of the state, without an appropriation having first been made. To hold that this section of the constitution prohibits the legislature from doing this would, we think, be to construe and use it as it was never intended to be construed and used, but the interpretation which would allow indebtedness to be so incurred would certainly allow the making of the contracts challenged by plaintiff.

Application for a peremptory writ of prohibition is denied.

KANSAS SUPREME COURT.

Harry TALCOTT, *Plff. in Err.*,

v.

FIRST NATIONAL BANK OF LARNED.

(.....Kan.....)

1. A pass-book given by a bank to a depositor is not a written contract, but is prima facie evidence that the bank received the amounts at the dates therein stated, and binds the bank like any other form of receipt, and is open to explanation by evidence *alibunde*.

2. When an appeal is taken to the district court from the judgment of a justice of the peace, and full pleadings are filed in that court, the parties are bound thereby; and if it appears from the answer of the defendant that no counterclaim, set-off, or other defense

*Headnotes by HORTON, Ch. J.

NOTE.—*Entries in bank book as contracts.*

The authorities all seem to agree that an entry in a bank pass-book is not a contract, and also that it has some weight as evidence, but there is a slight diversity of opinion as to how far it is conclusive evidence.

The majority of the cases may perhaps be said to hold that the entry is made a receipt, in other words that entries in a pass-book are only prima facie evidence against the banker. *Commercial Bank of Scotland v. Rhind*, 1 Macq. H. L. Cas. 443.

In *Com. v. Reading Sav. Bank*, 133 Mass. 16, 43 Am. Rep. 495, it is said "that as between the depositor and the bank it may be shown that an entry in the pass-book is an error and that the depositor is not entitled to receive the sum stated or that it has been paid, or has been taken from the bank by legal process, can hardly be controverted."

In *Davis v. Lenawee County Sav. Bank*, 53 Mich. 168, it is stated that the bank book is no contract, and is only one of the means of indicating the state of the funds.

The entry may be explained or contradicted by parole evidence. *Branch v. Dawson*, 36 Minn. 193.

The entry in the pass-book is prima facie evidence that the bank received the amount entered and the burden is on it to overcome such evidence, to defeat a recovery for such amount. *Asher v. National Park Bank*, 7 Alb. L. J. 43.

The above rules are supported by the transactions which are of such frequent occurrence and from which has been formulated the rule that if a check which is not good is received and the amount credited on the pass-book of the customer, the bank upon discovering the error may charge the amount back to the depositor. *National Gold Bank & T. Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697.

So when a wrong entry is alleged by the banker to have been made in the pass book and the customer denies the error, the question is one for the jury. *Snead v. Williams*, 9 L. T. N. S. 115.

In *Shaw v. Picton*, 4 Barn. & C. 715, 7 Dowl. & R. 301, and *Shaw v. Dartnall*, 5 Barn. & C. 57, 9 Dowl. & R. 54, agents for the grantees of annuities gave their customers pass-books in which they entered the state of the accounts, and the agents having become bankrupt the question arose as to whether or not the accounts as represented in the books could be disputed, and the court in each instance

is alleged, and it is shown by the pleadings, including the allegations in the answer of the defendant, that the plaintiff is entitled to judgment, the court may render judgment upon the pleadings, on the motion of the plaintiff.

(June 9, 1894.)

ERROR to the District Court for Pawnee County to review a judgment in favor of plaintiff in an action brought to recover back the amount which had been paid upon a check which overdrew the drawer's account. *Affirmed*.

Statement by HORTON, Ch. J.:

April 14, 1890, the First National Bank of Larned, in this state, commenced an action before a justice of the peace in Pawnee county against Harry Talcott, on a check, of which the following is a copy: "The First National

allowed them to be explained and varied in the interest of the bankrupt to a certain extent.

Another class of cases have given the entry a much stronger effect than the above.

In *Manhattan Co. v. Lydig*, 4 Johns. 377, 4 Am. Dec. 280, it is said that if the entry is made at the time of the deposit, it is conclusive on the bank as an original entry.

But it is not conclusive on the depositor. *Mechanics & Farmers Bank v. Smith*, 19 Johns. 115.

If made at the time of the deposit, it is an original entry which the bank cannot dispute. But if made afterwards the entry may be inquired into. *Heppburn v. Citizens Bank of Louisiana*, 2 La. Ann. 1007, 46 Am. Dec. 564.

Entries in the pass-book bind the bank as admissions. *Wasson v. Lamb*, 6 L. R. A. 191, 120 Ind. 514.

The bank must be bound by the entries on the pass-book, in the absence of fraud or collusion. *Mechanics & T. Bank v. Banks*, 11 La. 290.

But if the entries in the pass-book are made from the ledger and are erroneous, they may be corrected. *McLean County Bank v. Mitchell*, 58 Ill. 53.

In *Featherston v. Norris*, 7 S. C. N. S. 472, the question was considered as to the weight of entries in the pass-book as between the depositor and a third person. In this case it was a pass book turned over by an official to his successor, and it was held to be prima facie good as a voucher.

A similar ruling was made in *Featherston v. Norris*, 14 S. C. 324, and *State v. Norris*, 15 S. C. 241.

The pass-book may be admissible as between the banker and the depositor, but not as against third persons, unless on some peculiar grounds, as that of original entries in the merchants' account book. *Wills Point Bank v. Bates*, 72 Tex. 137.

In *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181, which is sometimes cited upon this subject, the question was as to the effect of balancing of books.

The effect of the entry with reference to the statute of limitations does not seem to have received much attention.

In *Locke v. First Nat. Bank of Gonio*, 65 N. H. 370, it was held the right of action to recover a deposit was barred in six years. But there is nothing to show that any different period of limitation was provided for written and parole contracts.

H. P. F.

Bank. Larned, Kansas, 3-17, 1890. Pay to the order of Harry Talcott, two hundred dollars \$200.00. Harry Talcott." Talcott filed an answer, and, for his fourth defense, alleged: "And for a further defense, and as defendant's bill of particulars and set-off, defendant says: That on the 2d day of January, 1885, this defendant opened a running account with said plaintiff, by depositing with said plaintiff the sum of \$200, and receiving from said plaintiff a pass-book, in which a receipt for the said sum of \$200 was duly entered. A copy of said pass-book is hereto attached, marked 'Exhibit A,' and made a part hereof. That afterwards, on the 28th day of January, 1885, defendant made another deposit with this said plaintiff, of \$200, receiving therefor, as a receipt, a pass book from said plaintiff, in which the said sum of \$200 was duly entered as being received by said plaintiff, and credited to defendant. Said account, a copy of said pass-book, marked 'Exhibit B,' is hereto attached, and made a part hereof. That afterwards, on the 28th day of September, 1885, defendant made another deposit with the said plaintiff, of \$103.60. A receipt for said sum of \$103.60 plaintiff duly entered in the pass book first given by plaintiff to defendant, as is shown by 'Exhibit A,' heretofore referred to, and attached hereto, and made a part hereof. That defendant drew divers checks from the 2d day of January, 1885, to the 15th of December, 1885, to the amount \$302.80, which were duly paid by plaintiff in amounts as is more fully shown and set out in 'Exhibit A,' heretofore referred to, attached hereto, and made a part hereof. That on the 15th day of December, 1885, defendant wishing to close his said account with the said plaintiff, made a demand upon said plaintiff, at their place of business in the city of Larned, for the balance of \$200.80, due to this defendant from said plaintiff. That said plaintiff refused, and has at all times refused, to pay this defendant, up till the 17th day of March, 1890, the said balance due him. That on said 17th day of March, 1890, there was due this defendant from said plaintiff the sum of \$200.80, with interest thereon from the 15th day of December, 1885, at 7 per cent per annum, amounting to the sum of \$59.65, making a total due this defendant of \$260.45. That on the said 17th day of March, 1890, defendant drew and presented to plaintiff the check for \$200 sued on in this action, and which is set out in plaintiff's bill of particulars and received the money thereon, which said sum of \$200 this defendant has applied on the said sum of \$260.45 due this defendant from said plaintiff on that said day. That there is now due this defendant a balance on said account of \$60.45, with interest from March 17th, 1890, at the rate of 6 per cent per annum until paid."

Exhibit B.

First National Bank in Account with Harry Talcott.

1885.	Dr.	Cr.
Jan. 28. Dept.		\$200.

First National Bank of Larned, Kansas, in Account with Harry Talcott, Esq.

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Exhibit A.

First National Bank in Account with Harry Talcott,		Cr.	Dr.
1885.			
Jan. 2. Dept.	200. Check		125
Sept. 28. Dept.	103.60		28.90
	"		46.16
	"		50
	"		25
	"		19
	"		1.25
	"		2.53
	"		5
	"		80
	Balance		
		303.60	303.60

Dec. 15. Balance 80
First National Bank of Larned, Kansas, in Account with Harry Talcott.

The bank filed a reply, pleading the three years' statute of limitations. Before the justice of the peace the bank recovered a judgment of \$200. Talcott appealed to the district court. On the 18th of September, 1890, the district court sustained the statute of limitations of three years, and rendered judgment against Talcott upon the pleadings, in favor of the bank, for \$210.26. Talcott excepted and brings the case here.

Messrs. H. C. Johns, William G. Fairchild, and Thomas W. Johns, for plaintiff in error:

Talcott's claim was upon a contract in writing and was not barred by the statute of limitations.

It was evidenced by two pass books made by the bank and delivered to him. At the top of the pages it reads:

"Dr. First National Bank, in Account with Harry Talcott, Cr."

Then follows a statement of the items—debts and credits—the amounts deposited and checked out—on opposite pages. This is a contract in writing. It contains all the essential elements of a contract—the names of the parties, showing which is debtor and which creditor, dates and amounts from which a balance is easily struck. The law supplies the rest—fills up the blanks.

Jassou v. Horn, 64 Ill. 379; *Schalucky v. Field*, 124 Ill. 617; *Pratalongo v. Larco*, 47 Cal. 378; *Story, Const. § 1015*; *Banks v. Chan. P. Harris Mfg. Co.* 20 Fed. Rep. 669.

The statute of limitations did not begin to run until December 15, 1885, the time the demand was made by Talcott.

Wood, Lim. Act. 40, p. 315; *Finkbone's App. 86 Pa. 368*.

As a matter of law these two bank books must be taken as parts of an unsettled and continuing mutual account between Talcott and the bank.

Waffle v. Short, 25 Kan. 503; *Chambers v. Marks*, 25 Pa. 296; *Gilbert v. Newton Board of Education*, 45 Kan. 33; *Gerard Bank v. Bank of Pennsylvania Twp.* 39 Pa. 93, 80 Am. Dec. 507.

In *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, a bill of goods was made on a printed blank with the names of the vendors printed at the top, giving the name of the vendee and list of goods and prices, and it was held a sufficient writing, without more to constitute a "bargain," and in *Packard v. Richardson*,

17 Mass. 132, 9 Am. Dec. 128, the court says: "A bargain is a contract or agreement," etc.

Where mutual accounts are kept and an account current is rendered of mutual transactions, it "is a contract in writing sufficient under the statute."

McFarson's App. 11 Pa. 510; *Pratalongo v. Laro*, 47 Cal. 344; *Miller v. Fichthorn*, 31 Pa. 255; *Reid v. Kenworthy*, 25 Kan. 701.

Mr. C. N. Sterry, for defendant in error: In the course of business between depositors and banks, it is customary to have a pass-book in which the bank enters the amount received from the depositor at the time of the deposit; or afterwards this entry does not constitute a contract, but simply constitutes an acknowledgment for a receipt on the part of the bank.

1 Morse, Banks & Banking, 3d ed. § 290; *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163; *First Nat. Bank of Union Mills v. Clark*, 17 L. R. A. 580, 184 N. Y. 368.

Horton, Ch. J., delivered the opinion of the court:

By section 18 of the Civil Code, it is provided that, "after the cause of action shall have accrued," "an action upon any agreement, contract, or promise in writing" must be brought "within five years," and "an action upon a contract not in writing" "within three years." It is claimed that as the alleged set-off, being evidenced by a bank or pass-book, was upon an "agreement, contract, or promise in writing," the statute of three years was no bar. The trial court ruled otherwise. The pass-book was balanced December 15, 1895. This action was commenced April 14, 1890,—more than four years after that date. The authorities are that the entry in a pass-book, "by the proper officer, of the amount and date of the deposit, is prima facie evidence that the bank received the amount, and binds the bank, like any other form of receipt. But the entry is only a receipt, and is open to explanation by evidence *aliunde*, and if shown to be a mistake, is no longer binding upon the bank. The receipt is also open to correction in favor of the depositor, if it be erroneous."

2 Am. & Eng. Encyclop. Law, pp. 102, 103, and cases cited; Morse, on Banks & Banking, in volume 1, 3d ed. § 290, says: "A bank book is prima facie evidence, but no more and is open to explanation by parol evidence, for it is not a contract." In *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163, the court observed that "the bank book is no contract, and is only one of the means of indicating the state of the funds." The reasons why a pass-book given to the depositor, and its entries therein, do not constitute a contract in writing, are fully stated in the authorities cited. See also, *Mechanics & Farmers Bank v. Smith*, 19 Johns. 116; *Asher v. National Park Bank*, 7 Alb. L. J. 43; *Anderom v. Leverich*, 70 Iowa, 741. The case of *Jessoy v. Horn*, 64 Ill. 379, is not applicable, because in Illinois the statute provides that actions brought upon "evidence of indebtedness in writing" have the same limitation as actions upon contracts in writing. A pass-book is "evidence of indebtedness in writing," but not a contract in writing. As against the ruling of the trial court, the case of *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, is cited. The action

in that case was upon a written instrument in the nature of a certificate of deposit, properly signed by the party executing the same. It was more than a mere receipt, for it embodied an agreement. *Elliott, J.*, speaking for the court, said: "The instrument declared on is a contract. It is a written contract. It cannot be contradicted or varied by parol evidence." "It is by no means certain whether it is not a regular certificate of deposit." "As the contract is a written one, not subject to variation by parol evidence, the agreement to pay the money must exist in it, or not exist at all." Many other cases are referred to, of similar kind, but it would not do to hold that an entry on a deposit slip or in a pass-book is such written contract that all oral negotiations and stipulations are merged in the receipt or writing. *First Nat. Bank of Union Mills v. Clark*, 184 N. Y. 368, 17 L. R. A. 580.

It is further claimed that within the decision of *Waffle v. Short*, 25 Kan. 508, there was an open, running, and mutual account between the parties, and that the statute of limitation did not commence to run until after the payment of the check of March 17, 1890. The bill of particulars of the bank did not state any mutual or other account. The action was brought to recover \$200 upon the check. The answer and set off alleged that the pass-book was balanced on December 15, 1895. On that date Talcott made a demand upon the bank for the balance he claimed to be due. The statute began to run from the demand. He did not follow up his demand for more than four years. Not until his claim was barred. After the demand of Talcott, on the 15th of December, 1895, and after the statute of limitation had fully run between the parties, there was no open, running, or mutual account existing between them. It is true that Talcott alleged that he applied the \$200 upon his account with the bank; but after that account had been closed, and demand had been made, and the statute of limitation had run, neither party had any cause of action thereon.

It is intimated in the brief of plaintiff below that Talcott obtained credit of \$200 on his pass-book, to which he was not entitled, but the record does not show this. Talcott's delay in attempting to collect the balance claimed by him until the statute of limitation had run is not explained. When an appeal is taken to the district court from the judgment of a justice of the peace, and full pleadings are filed in that court, the parties are bound thereby; and if it appears from the answer of the defendant that no counterclaim, set off, or other defenses are alleged, and it is shown by the pleadings, including the allegations in the answer of the defendant, that the plaintiff is entitled to judgment, the court may render judgment upon the pleadings, on the motion of the plaintiff. Talcott, in his answer, admitted he executed the check, and received from the bank \$200 thereon. His answer alleged a set-off barred by the statute of limitation. Therefore, the trial court properly rendered judgment upon the pleadings in favor of the plaintiff below.

The judgment of the District Court will be affirmed.

All the Justices concur.

NEW HAMPSHIRE SUPREME COURT.

Re Marilla M. RICKER.

(.....N. H.....)

1. In New Hampshire the legal disabilities of married women have been so far removed that marriage does not disqualify a woman for admission to the bar.
2. The details of the common law as to the appointment of attorneys-at-law are not in force in New Hampshire, being inapplicable to the situation and circumstances of the inhabitants of that state.
3. The requirement of an official oath and a license does not preclude women from being admitted to the bar.
4. An attorney-at-law is not an officer of the government, such that the right of admission to the bar will depend on eligibility to public office.
5. Women are not excluded from admission as attorneys-at-law by the common-law rule which denies them the right to vote or hold public office.

(June, 1890.)

PETITION for permission to practice as an attorney-at-law. *Permission granted upon compliance with the requirements.*

The case sufficiently appears in the opinion. *Mmes. Marilla M. Ricker in propria persona, and Lelia J. Robinson* for petitioner.

Doe, Ch. J., delivered the opinion of the court:

"Any citizen of the age of twenty-one years, of good moral character and suitable qualifications, on application to the supreme court, shall be admitted to practice as an attorney." Gen. Laws, chap. 218, § 2. "The word 'citizen,' when used in its most comprehensive sense, doubtless includes women; but a woman is not, by virtue of her citizenship, vested by the constitution . . . with any absolute right independent of legislation to take part in the government, either as a voter or as an officer, or to be admitted to practice as an attorney. . . The word 'citizen,' in the statute under which this application is made, is but a repetition of the word originally adopted with a view of excluding aliens." *Robinson's Case*, 181 Mass. 876, 877, 882, 41 Am. Rep. 239. Under a statute like ours, in all respects that are material in the present inquiry, it was held in that case that an unmarried woman is not entitled to be examined for admission as an attorney. The ground of the decision was that by the law of England, which was our law from the first settlement of the country until the American Revolution, no woman could, in person, take an official part in the government of the state, except as queen, or overseer of the poor, without express authority of statute. No case is known

in which a woman was admitted to practice as an attorney, solicitor, or barrister. Although an attorney-at-law is not, in the strictest sense, a public officer, he comes very near it. He is required to take the oaths to support the constitutions, and an oath of office, which has remained without substantial change since the time of Lord Holt. By admission he becomes an officer of the court, and holds his office during good behavior, subject to removal. His office concerns the public, for it is for the administration of justice. Whenever the legislature has intended to make a change in the legal rights or capacities of women, it has used words clearly manifesting its intent, and the extent of the change intended. In making innovations upon the long established system of law on this subject, the legislature has proceeded with great caution,—one step at a time. The whole course of legislation precludes the inference that any change in the legal rights or capacities of women is to be implied, which has not been clearly expressed. There has been no legislative or judicial action having any tendency to prove such a change in the law and usage prevailing in 1776 as to admit women to the exercise of any office that concerns the administration of justice. This ground of decision was adopted in *Leonard's Case*, 12 Or. 93, 58 Am. Rep. 828. The same conclusion was reached in *Bradwell's Case*, 55 Ill. 535, 537-541, where it was held that authority to license attorneys was derived from a statute. "Although an attorney-at-law," says the court, "is an agent . . . when he has been retained to act for another, yet he is also much more than an agent. He is an officer of the court, holding his commission, in this state, from two members of this court, and subject to be disbarred by this court for what our statute calls 'mal-conduct in his office.' He is appointed to assist in the administration of justice, is required to take an oath of office, and is privileged from arrest while attending court. . . . At the time this statute was enacted, we had, by express provision, adopted the common law of England. . . . Female attorneys-at-law were unknown in England. . . . When the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women. . . . This step, if taken by us, would mean that in the opinion of this tribunal every civil office in this state may be filled by women. . . . The great body of our law rests on ancient usage. . . . The mere fact that women have never been licensed as attorneys-at-law is, in a tribunal where immemorial usage is as much respected as it is and ought to be in courts of justice, a sufficient reason for declining to exercise our discretion in their favor until the propriety of their participating in the offices of state and the administration of public affairs

NOTE.—By the above decision New Hampshire has been added to the constantly growing list of states in which women are accorded the right to admission to practice at the bar. In connection with the great research into the history of the rights and

status of attorneys which is exhibited in the above case, see the note to *Re Leach* (Ind.) 21 L. R. A. 701, in which are collected the modern decisions upon the right of women to admission to the bar and also the late statutes upon that subject.

shall have been recognized by the lawmaking department of the government. . . . If we could disregard in this matter the authority of those unwritten usages which make the great body of our law, we might do so in any other, and the dearest rights of person and property would become a matter of mere judicial discretion."

In *Goodell's Case*, 39 Wis. 232, 20 Am. Rep. 42, it was held that the statute left the admission of attorneys to the discretion of the court, and a motion to admit Miss Goodell was denied on the ground that it is public policy not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. The practice of the law, like military service, is not one of the many employments that are fit for women. Discussions are habitually necessary, in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. "If these things are to come, says the court, "we will take no voluntary part in bringing them about."

In *Lockwood's Case*, 9 Ct. Cl. 346, it was held that admission to the bar is admission to an office which a woman is without legal capacity to hold; and the opinion was expressed that women are as well fitted for military service as for the practice of law. "In cases of misconduct by an attorney," it was said (page 353), he may be attached by the court, and imprisoned; but, if the attorney were a married woman, she might come in, and say that the misconduct occurred in her husband's presence, and that at common law it was by his compulsion. She might misapply the funds of a client, or be guilty of gross neglect or fraud, and the husband be sued at common law for the wrong. In *Hall's Case*, 50 Conn. 181, 47 Am. Rep. 625, the construction given to a statute by a majority of the court allowed women to be admitted to the bar. Upon re enactments of an old statute, general compilations and revisions, and circumstantial evidence, contextual and extraneous, it seems to have been held that the legislature had changed the law.

The common-law disabilities of a married woman, whose legal existence, for some purposes and to some extent, was merged in that of her husband, may have made it inexpedient that she should be a member of the legal profession. Her application for admission might formerly have been denied on the ground that she "would be bound neither by her express contracts, nor by those implied contracts which it is the policy of the law to create between attorney and client." *Bradwell's Case*, 55 Ill. 535, 536; *Alton v. Gilmanton*, 2 N. H. 520; *Leighton v. Sargent*, 27 N. H. 460, 468-472, 59 Am. Dec. 8-8; *Toule v. Hatch*, 43 N. H. 270; *Varnum v. Martin*, 15 Pick. 440; *Tarbell v. Dickinson*, 8 Cush. 345, 350, 351.

A form of a declaration in assumpsit against an attorney is: "For that whereas, . . . in consideration that the plaintiff . . . had then retained and employed the defendant, as then being an attorney, to prosecute and conduct a certain action, . . . for reasonable fees and reward to be paid by the plaintiff to the defendant, he, the defendant, then promised the plaintiff to use

due and proper care and skill; . . . nevertheless, the defendant, not regarding his said promise, did not, nor would, use due and proper care and skill." 1 Saunders, Pl. & Ev. 268.

A married woman, who could defeat such a suit by pleading and proving her coverture at the time of making the contract, might not be a competent attorney. In this state, legal disabilities have been so far removed that marriage does not disqualify a woman for admission to the bar. Gen. Laws, chap. 183, § 12; Laws 1879, chap. 57, § 27; *Harris v. Webster*, 53 N. H. 481, 483, 484; *Laton v. Balcom*, 64 N. H. 92, 95; *Seaver v. Adams*, 66 N. H. 142, 143.

"An act of parliament cannot alter by reason of time, but the common law may, since *cessante ratione cessat lex*." Potter's Dwar. Stat. 122; *Cole v. Lake Co.* 54 N. H. 242, 285.

"The constitution . . . vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them, and admission to the bar appears to be a judicial power. It may therefore become a very grave question, for adjudication here, whether the constitution does not intrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts." *Goodell's Case*, *supra*; *Spland's Case*, 133 Pa. 527, 540.

The constitutional question need not now be considered. If our statute of attorneys is an exercise of legislative power, it makes no change in the common law applicable to this case. It removes none of the legal disabilities of women, and destroys none of their rights. *Orr v. Quimby*, 54 N. H. 619, 626, 635, 636. If its provisions are not operative as a statute, they have nevertheless been acquiesced in and acted upon, and may well be regarded as having the force of rules of court, for the adoption of which a written order is not necessary. *Fullerton v. Bank of U. S.* 26 U. S. 1 Pet. 604, 618, 7 L. ed. 230, 234; *Duncan v. United States*, 32 U. S. 7 Pet. 435, 451, 8 L. ed. 739, 745. Independently of any statute, every court of record may make such rules for the transaction of its business as do not contravene the laws of the land. Bacon, Abr. Am. ed. 1868, "Courts of U. S." c. The power is incidental; that is, implied as a means of accomplishing the purpose for which the court is established. *Boody v. Watson*, 64 N. H. 177. The provision that "the court may from time to time establish rules and orders of practice, consistent with the laws, for conducting and regulating its business, and prescribe forms of proceedings in all cases not provided for" (Gen. Laws, chap. 208, § 6), is an enactment of common law. In the absence of written law establishing a different state of things, authority to make reasonable rules for the admission and removal of members of the bar "is necessarily inherent in every court, in order to enable it to discharge its duties,—as much so as the power to preserve order." *Bryant's Case*, 24 N. H. 149, 158; *Manning v. French*, 149 Mass. 391, 393, 399; *State v. Winton*, 11 Or. 456, 460, 50 Am. Rep. 486; *Ex parte Burr*, 22 U. S. 9 Wheat. 529, 531, 6 L. ed. 153.

Griffin v. Thompson, 48 U. S. 2 How. 244, 267, 11 L. ed. 553, 258; *King v. Sheriffs of York*, 8 Barn. & Ad. 770, 777, 782.

"The relations between the court and the attorneys and counselors who practice in it, and their respective rights and duties, are regulated by the common law; and it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." *Secombe's Case*, 60 U. S. 19 How. 9, 13, 15 L. ed. 565, 566.

"The profession of an attorney and counselor is not like an office created by an act of congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the constitution. Attorneys and counselors are not officers of the United States. They are not elected or appointed in a manner prescribed by the constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such, and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. Their admission or their exclusion . . . is the exercise of judicial power. . . . The legislature may undoubtedly prescribe qualifications for the office, . . . as it may . . . prescribe qualifications for the pursuit of any of the ordinary avocations of life." *Ex parte Garland*, 71 U. S. 4 Wall. 333, 378, 379, 18 L. ed. 366, 371.

"The court, in some instances, will order an attorney to pay costs to his own client for neglect, or to the opposite party for vexatious or improper conduct. And if a rule be made upon an attorney for the delivery of writings, or payment of costs, etc., and it be not obeyed, the court will enforce it by attachment." 1 Tidd, Pr. 58. At common law an attorney was always liable to be dealt with in a summary way for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint, indictment, or information was ever necessary, as the foundation of such proceedings. Usually, they are commenced by rule to show cause, or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney, by their own observation. No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the facts, to which the attorney is summoned to answer; in

other cases, by an order to show cause why he should not be stricken from the rolls. And, when the court judicially know of the misconduct of an attorney, they will, of their own motion, order an inquiry to be made by a master, without issuing any process whatever. . . . Nor can a judgment of removal be properly . . . considered as a punishment for a crime or offense." It is not a bar to a criminal prosecution. The power of removal is necessary, "not as a mode of inflicting a punishment for an offense, but in order to enable the courts to prevent the scandal and reproach which would be occasioned to the administration of the law by the continuance in office of those who had violated their oaths or abused their trust, and to take away from such persons the power and opportunity of injuring others by further acts of misconduct and malpractice." *Randall's Petition*, 11 Allen, 473, 479, 480; *Randall v. Brigham*, 74 U. S. 7 Wall. 523, 539, 540, 19 L. ed. 235, 292, 293; *Kimball's Case*, 64 Me. 140, 147; *Austin's Case*, 5 Rawle, 191, 204, 28 Am. Dec. 657; *State v. Winton*, 11 Or. 456, 466, 50 Am. Rep. 486; *Cohen v. Wright*, 23 Cal. 293, 320.

The question tried in such a case is "whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion;" whether "he is an unfit person to practice as an attorney." *Brounall's Case*, Cowp. 829, 830. The issue of fitness for the office of an attorney is as general and comprehensive as the question raised by a petition to the legislature for the removal of a military or judicial officer by address. An adjournment of the hearing, after adverse evidence is received, gives an opportunity for defense, as ample as would be furnished by a formal specification of charges filed before the hearing begins. As attorneys are peculiarly exposed to groundless accusations, and may suffer irreparable injury from a public trial of the question of removal on an order to show cause, even if it ends in their complete vindication (4 Campbell, Ch. Just. 136, 137), such an order is not made unless manifestly required by the public interest. *Meux v. Lloyd*, 2 C. B. N. S. 409, 411.

"Barristers or counselors at law, in England, were never appointed by the courts at Westminster, but were called to the bar by the Inns of Court." *Cooper's Case*, 23 N. Y. 67, 90. "The original institution of the Inns of court nowhere precisely appears, but it is certain that they are not corporations, and have no constitution by charter from the crown. They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar is delegated to them from the judges, and in every instance their conduct is subject to their control, as visitors." *King v. Benchers of Gray's Inn*, 1 Dougl. 353, 354. That case was an application for a mandamus to compel the defendants to call the petitioner, Hart, to the degree of a barrister at law. A mandamus was refused on the ground that the ancient and usual way of redress was by appeal to the twelve judges, as visitors. The power of admission, inherent in courts, having been immemorially exercised by the Inns, with the assent

of the judges, and subject to their revision, its qualified delegation could be inferred from the circumstances. No one is called to the bar who is not a member of an inn. On the question of admission to an inn, there is no appeal from the benchers. As visitors, the judges have jurisdiction only over actually admitted members of an inn. "This court has no power to compel the benchers of this society to permit any individual to become a member of the society, or to assign any reasons why they do not admit him." *Abbott, Oh. J.*, in *Kino v. Benchers of Lincoln's Inn*, 4 Barn. & C. 855, 859. "Every individual . . . has not an inchoate right to be admitted a member of any of these societies. They make their own rules as to the admission of members; and, even if they act capriciously upon the subject, this court can give no remedy in such a case, because in fact there has been no violation of any right. This case is analogous to that of a college." *Bayley, J.*, in the same case.

When "the fixing of the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot," brought the legal profession together, "they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the 'inns of court and of chancery.') . . . Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first styled 'apprentices,' . . .), who answered to our bachelors, as the state and degree of a serjeant . . . did to that of doctor." 1 Bl. Com. 22, 23.

"Of advocates or (as we generally call them) counsel, there are two species or degrees,—barristers and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court. . . . From both these degrees some are usually selected to be his majesty's counsel learned in the law. . . . These king's counsel . . . must not be employed in any cause against the crown without special license. . . . A custom has of late years prevailed of granting letters-patent of precedence to such barristers as the crown thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and pre-eminence as are assigned in their respective patents; sometimes, next after the king's attorney-general, but usually next after his majesty's counsel then being. These . . . rank promiscuously with the king's counsel, and, together with them, sit within the bar of the respective courts, but receive no salaries, and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted), may take upon them the protection and defense of any suitors, whether plaintiff or defendant, who are therefore called their clients, like the dependents upon the ancient Roman orators. Those, indeed, practiced gratis, for honor

merely, or, at most for the sake of gaining influence; and so, likewise, it is established with us that a counsel can maintain no action for his fees, which are given, not as *locatio vel conductio*, but as *quiddam honorarium*,—not as a salary or hire, but as a mere gratuity. . . . Counsel guilty of deceit or collusion are punishable by Stat. Westminster 1 (8 Edw. I. chap. 28) with imprisonment for a year and a day, and perpetual silence in the courts." 3 Bl. Com. 20–29. This statute did not impair the common-law power, of disbarment delegated by the courts to the inns to which the members of the bar respectively belong, and exercised by them subject to the appellate jurisdiction of the visitors from whom the power was derived. We are told that in the reign of Henry VI. there were ten lesser inns, which were called 'inns of chancery,' each containing at least one hundred students, and some a great many more. These were designed as places of elementary studies. Here they learned the nature of original and judicial writs, which were then considered as the first principles of the law, and for this reason these inns were denominated from the chancery. When young men had made some progress here, and were more advanced in years, then they were admitted into the inns of court. Of these there were four in number. . . . The degree of serjeant at law was considered in a very respectable light. None could be a judge in the king's bench or common pleas, but one who had been first a serjeant, nor was a person to be called to the degree of serjeant till he had been in the general study of the law . . . at least for sixteen years, which probably meant from his first entrance at an inn of chancery." 4 Reeve, Eng. Law, ed. 1787, 120, 121.

"Barristers, in England, are the highest class of lawyers who have exclusive audience in all the superior courts. Every barrister must be a member of one of the four ancient societies called 'Inns of Court,' viz. Lincoln's Inn, the Inner and Middle Temples, and Gray's Inn. . . . Associations of lawyers acquired houses of their own, in which students were educated in the common law. . . . These schools of law are now represented by the inns of court, which still enjoy the exclusive privilege of calling to the bar, and, through their superior order of benchers, control the discipline of the profession. . . . Subject to an appeal to the common-law judges, as visitors, they may reject the petition of a student to be called to the bar, or expel from their society and from the profession any barrister or bencher of the inn. . . . The peculiar business of barristers is the advocacy of causes in open court, but . . . a great deal of other business falls into their hands. They are the chief conveyancers, and the pleadings . . . are, in all but the simplest cases, drafted by them. There is indeed a separate class of conveyancers and special pleaders, being persons who have kept the necessary number of terms qualifying for a call, but who, instead of being called, take out licenses to practice under the bar. There are still a few persons who act under such special licenses. But, in general, conveyancing and special pleading form part of the ordinary work of a junior barrister. The highest rank

among barristers is that of king's or queen's counsel. They lead the case in court, and give opinions on cases submitted to them; but they do not accept conveyancing or pleading, nor do they admit pupils to their chambers. Precedence among queen's counsel, as well as among our barristers, is determined by seniority. The order of serjeants at law still exists, but no new appointments have recently been made, and it will probably be allowed to become extinct, the title of queen's counsel being generally preferred. Serjeants rank after queen's counsel. . . . Barristers cannot maintain an action for their fees, which are regarded as gratuities, nor can they, by the usage of the profession, undertake a case without the intervention of an attorney." 3 Encyclopædia Britannica, 894, 895.

"There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney. . . . But . . . there is no rule of law by which it can be enforced. . . . This being a matter of procedure, the judges . . . might . . . have laid down a general rule, . . . but no such rule is to be found." *Doe v. Hale*, 15 Q. B. 171, 182, 183, 225. In early times, personal communication between counsel and client "was necessary for there were no attorneys. . . . It was not until after the Statutes of Merton (20 Hen. III. chap. 10), Westminster (8 Edw. I. chap. 33), and Gloucester (6 Edw. I. chap. 1), that suitors were allowed to appear at pleasure by attorney. The counselor was for many centuries the only person known as a 'lawyer.'" Argument of counsel in *Kennedy v. Brown*, 18 C. B. N. S. 677, 698.

"It has been understood in this country that the fees of a physician are honorary, and not demandable of right." *Othorley v. Bolcot*, 4 T. R. 317, 318. "Physicians and counsel usually perform their duties without having a legal title to remuneration. Such has been the general understanding." *Veitch v. Russell*, 8 Q. B. 923, 936. "Attorneys are responsible to their clients for negligence or unskillfulness, but no action lies against the counsel for his acts, if done bona fide for his client. In this respect, therefore, the counsel stands in a different position from the attorney." *Swinfen v. Swinfen*, 1 C. B. N. S. 884, 408. "An advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may indeed occur where, on an express promise (if he made one), he would be liable in assumpsit; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which, not merely the client, but the court in which the duty is to be performed, and the public at large, have an interest. . . . A counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it. . . . No action will lie against counsel for any act honestly done in the conduct or management of the cause." *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890, 920, 922, 923. "A promise by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no 24 L. R. A.

binding effect. . . . The relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation. . . . If the authorities were doubtful, and it was necessary to resort to principle, the same proposition appears to us to be founded on good reason. . . . The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz. the administration of justice." *Kennedy v. Brown*, 18 C. B. N. S. 677, 727, 786, 787. "I cannot allow that the counsel is the agent of the party." *Best, Oh. J.*, in *College v. Horn*, 3 Bing. 119, 120; *Pollock, C. B.*, in *Swinfen v. Chelmsford*, 5 Hurlst. & N. 890, 907.

"In hearing motions, the course formerly was to begin every day with the senior counsel within the bar, and then to call to the next senior in order, and so on, . . . and to proceed again in the same manner upon the next and every subsequent day, although the bar had not been half, or perhaps a quarter, gone through upon any one of the former days; so that the juniors were very often obliged to attend in vain, without being able to bring on their motions, for many successive days. This practice bearing hard upon junior counsel, Lord Mansfield introduced a different rule." 1 Tidd, Pr. 461.

"The most valuable privilege formerly enjoyed by the serjeants (who, besides the judges, were limited to fifteen in number) was the monopoly of the practice in the court of common pleas." 8 Bl. Com. 27, *Sharswood's note*. In 1834 the king, by warrant, ordered that the right of practicing, pleading, and audience in the common pleas should cease to be exercised exclusively by the serjeants, and that all barristers should have equal right in that court with the serjeants. 10 Bing. 571. The order was obeyed till 1839, when, on motion made by Wilde, in behalf of four other serjeants and himself, the exclusive privilege of the serjeants was restored, on the ground that it was a legal right, of which they could not be deprived without an act of parliament. Wilde contended that: "The rank and office of serjeant were as ancient, and rested on the same foundation, as those held by their lordships. There was no evidence of the existence of the court without them. They were as ancient as the law itself." Newton, an apprentice (a barrister not raised to the degree of serjeant), was heard on the other side. "The learned serjeant," he said, "had contended that the crown had no power to issue a warrant which interfered with the privileges of the serjeants. By what authority, then, was it that these learned gentlemen claimed to be entitled to those privileges? By virtue of the royal writ by which they were raised to the degree of the cof. . . . They derived their appointment from the supreme executive power, and the same authority had an equal right to empower other members of the bar to enjoy equal privileges. The royal warrant was of as much force in authorizing barristers to practice in this court as the royal writ which constituted certain members of the profession serjeants at law."

"The authority of the state, degree, and

office of a serjeant at law," says Tindal, *Ch. J.*, delivering the opinion of the court, "is as high, at the least, as the existence of the court itself. . . . They are called to the state and degree of serjeant by writ, which, of itself, is a strong argument of the antiquity of their office. . . . By their oath of office, which has existed from the earliest time,—an oath by which no other barrister is bound to give attendance in any particular court,—they bind themselves 'to give due attendance for the service of the king's people in their causes.' As early as any authentic records exist, the serjeants are found to be practicing in the court of common pleas; and there is no evidence of any other barrister being allowed to practice . . . in that court. . . . From time immemorial, the serjeants have enjoyed the exclusive privilege of practicing, pleading, and audience in the court of common pleas. Immemorial enjoyment is the most solid of all titles. . . . The warrant of the crown can no more deprive the serjeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself. The rights and privileges of the serjeant, and the rights and privileges of the peer of the realm, stand upon the same foundation,—immemorial usage." *Re Serjeants at Law*, 6 Bing. N. C. 187, 195, 232, 235. "The degree of serjeant was deprived of its most profitable . . . advantage (exclusive audience in the court of common pleas) by the Statute of 9 & 10 Vict. chap. 54, which extends to all barristers the privileges of serjeants in" that court. 3 Bl. Com. 27, Stewart's note.

English attorneys at law (called "solicitors" since the Judicature Act of 1873 took effect) are not members of the bar, and are not heard in the superior courts; and the power of admitting them to practice, and striking them off the roll, has not been given to the lords of court. "That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, . . . and they ought to be protected where they act to the best of their skill and knowledge. But every man is liable to error. . . . A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged with the debt. The counsel, indeed, is honorary in his advice, and does not demand a fee. The attorney may demand a compensation. But neither of them ought to be charged with the debt, for a mistake." *Pitt v. Yalden*, 4 Burr. 2060, 2061. "An attorney is supposed to be always present in court; and on that account has many privileges belonging to him in common with the other officers of the court. Where an attorney is plaintiff, he is entitled to sue in his own court, by attachment of privilege, and may lay the venue in Middlesex. Where he is defendant, he must be sued in his own court by bill, even as acceptor of a bill of exchange, and cannot be arrested or holden to special bail. . . . An attorney is also, by reason of the supposed necessity of his attendance in court, exempt from all offices that require personal service, . . . and formerly he was not liable to serve in the militia. . . . These privileges are allowed, not so much for the benefit of at-

torneys, as of their clients, and are therefore confined to attorneys who practice, or at least have practiced within a year." 1 Tidd, Pr. 264-266.

"An attorney-at-law . . . is one who is put in the place, stead, or turn of another, to manage his matters of law. Formerly, every suitor was obliged to appear in person, to prosecute or defend his suit, . . . unless by special license under the king's letters patent . . . But . . . it is now permitted in general, by divers ancient statutes, whereof the first is Stat. Westminster, 8, chap. 10, that attorneys may be made to prosecute or defend any action. . . . These attorneys are now formed into a regular corps. They are admitted to the execution of their office by the superior courts of Westminster Hall, and are, in all points, officers of the respective courts of which they are admitted. . . . No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court. An attorney of the court of king's bench cannot practice in the court of common pleas, nor vice versa. To practice in the court of chancery it is also necessary to be admitted a solicitor therein." 3 Bl. Com. 25, 26.

"'Attorney,' in English law, signifies, in its widest sense, any substitute or agent appointed to act in 'the turn, stead, or place of another.' The term is now commonly confined to a class of qualified agents who undertake the conduct of legal proceedings for their clients. By the common law the actual presence of the parties to a suit was considered indispensable; but the privilege of appearing by attorney was conceded in certain cases by special dispensation, until the Statute of Merton and subsequent enactments made it competent for both parties, in all judicial proceedings, to appear by attorney. Solicitors appear to have been at first distinguished from attorneys, as not having the attorney's power to bind their principals; but latterly the distinction has been between attorneys, as the agents formally appointed in actions at law, and solicitors, who take care of proceedings in parliament, chancery, privy council, etc. In practice, however, and in ordinary language, the terms are synonymous. . . . The qualification necessary for admission on the rolls of attorneys and solicitors" are fixed by statute. "They may act as advocates in certain of the inferior courts. Conveyancing, formerly considered the exclusive business of the bar, is now often performed by attorneys. Barristers are understood to require the intervention of an attorney in all cases that come before them professionally, although in criminal cases the prisoner not unfrequently engages a counsel directly, by giving him a fee in open court." 3 Encyclopædia Britannica, 62.

"The court, by common law, had no power to admit an attorney . . . to practice. . . . It was the policy of the common law, in order that suits might not multiply and increase, that both plaintiff and defendant should appear in person. . . . While the justices could not permit a person to appear by attorney, the king, by the plenitude of his prerogative, might appoint an attorney, and give any person a right to appear in this manner. Letters-

patent would issue out of chancery, or under the privy seal, commanding the justices to admit such and such a person as attorney for another, in regard to the particular suit in question. . . . Such an attorney was simply an attorney in fact. . . . The power of clients to appoint attorneys was conferred in England by Stat. Westminster, 2 (3 Edw. I. chap. 42), in certain cases. The object of this legislation was to confer the right to appear by attorney without applying to the king. . . . In those cases to which the statute and succeeding acts did not extend, the courts were very rigid in applying the former rule. . . . The character and qualifications of an attorney were not all involved by these statutes. He was simply an attorney in fact. Any one could, by legal principles, be an attorney. The king might send a message to the courts to receive such person as the party may name. . . . The courts say in one case (Year Book, 21 Hen. VI. 30 . . .) that by the rules of law an outlaw or an attainted clerk may be an attorney in a suit, though such persons could not themselves bring actions. They reason why they could appear as attorneys was because they sued *in autre droit*. . . . Lord Coke tells us that the introduction of attorneys was a great and lamentable innovation upon the common law. 2 Inst. 250. The king, for a time. . . . attempted to regulate the matter. In 20 Edw. I., he directed the justices to provide and appoint, according to their discretion, attorneys in every county. Seven score he thought enough for all England; but the justices, in their discretion, might increase the number. . . . The idea that attorneys held offices undoubtedly grew out of the limitation of their number in the ordinance of King Edward I. These measures, however, did not reach the evil. The legislature passed, in the reign of Henry IV., the model act upon this subject, and from which all subsequent legislation has derived an impress. 2 Inst. 215. This act, after reciting in the preamble the mischiefs growing out of the former system, proceeds as follows: That all attorneys shall be examined by the justices, and that by their discretion their names shall be put upon the roll, and that they be good, virtuous, and of good fame, and be received and sworn well to serve in their offices. And the other attorneys shall be put out by the discretion of the justices, and if any of the attorneys do die the justices shall make another in his place. 4 Hen. IV. chap. 18. . . . Before this statute, no regulations had been made, either to define the qualifications for an attorney, or to point out who should be at liberty to undertake the office. . . . This statute is very important, both for what it enacts and what it discloses. It shows that an attorney at that time held an office; that no system of testing attainments or character existed. . . . Attorneys now for the first time go on the roll. They become attorneys of record, and cease to be mere attorneys in fact. . . . Coke (in 4 Inst. 76) laments the increase of attorneys beyond the number allowed by law. . . . Several parliaments passed statutes decreasing the number of attorneys. 2 Coke, Inst. 250." Argument of Theodore W. Dwight in *Cooper's Case*, 23 N. Y. 67, 69-76.

"Attorney" is an ancient English word, and

signifieth one that is set in the turn, stead, or place of another; and of these some be private, . . . and some be public, as attorneys-at law, whose warrant from his master is, '*Poni loco suo talem attorneyatum suum*,'—which setteth in his turn or place such a man to be his attorney. . . . The authority to deliver seisin . . . must be by deed, for 'letter d'attorney' is as much as a warrant of attorney by deed, for *litters* do signify sometime a deed. . . . Few persons are disabled to be private attorneys to deliver seisin; for monks, infants, feme covert, persons attainted, outlawed, excommunicated, villeins, aliens, etc., may be attorneys. A feme may be an attorney to deliver seisin to her husband." Co. Litt. 51b, 52a. "In another place [128a], Lord Coke cites a passage from the Mirror which excludes both infants and femes covert from being attorneys. . . . But that is quite reconcilable with the doctrine here; for there public attorneys for prosecuting suits at law are meant, whose office cannot be properly executed without considerable knowledge and discretion; but here Lord Coke, in the first part of the sentence, confines himself to private attorneys to deliver seisin, which is an act so merely ministerial that it may be done by the most ignorant." Hargraves, *note*, 332. "What manner of men attorneys ought to be, or rather what they ought not to be, hear what antiquity hath said: '*Attorneyes poient estre tous ceux, aux queux ley voils suffer. Femmes ne poient estre attorneyes, ne enfans, ne serfs, ne nul que est en garde ou autrement faut de foy, ne nul crimineux, ne nul es-voigne, ne nul que n'est a la foy le roy, ne nul que ne poet este counter*,' etc. Mirror, chap. 2, § 21." Co. Litt. 128a. The authority of a private attorney "must be by deed, that it may appear that the attorney has pursued his commission. Of this all persons are capable. . . . this being only a naked authority." Bacon, *Abr. Attorney*.

"Forasmuch as in a writ of assise, attaints, and *juris utrum*, the jurors have been often troubled by reason of the essoins of tenants, it is provided that after the tenant hath once appeared in court, he shall be no more essoined, but shall make his attorney to sue for him, if he will." Westminster, I., chap. 43. "By the policy of the common law, that suits might not increase and multiply, . . . both plaintiff and defendant, demandant and tenant, in all actions, real, personal, and mixed, did appear in person, . . . because the writs do command the tenant or defendant to appear, which was always taken in proper person; and the entry in every action for the demandant or plaintiff is, '*Et praedictus petens*' or '*Querens obtulit se & dicit*,' which was ever understood in proper person. But when this and other statutes had given way to appear by attorney, it is not credible how . . . suits in law (for the most part unnecessary and for trifling causes), when the parties themselves might sit quiet at home, increased and multiplied; so dangerous and ill success have ever had the breach of the maxims, and ancient rules of the common law." 2 Co. Inst. 249.

"Our lord the king of his special grace granteth that such as have land," in certain cases, "may make a general attorney to sue for them . . . which attorney or attorneys

shall have full power in all pleas moved during the circuit, until the plea be determined, or that his master remove him." Westminster, 2, chap. 10. "Here," says Coke, "is an act of grace . . . for where the king, by his prerogative, before this and other statutes, might by letters-patents, or by writ under his great seal, grant to any demandant or plaintiff, tenant or defendant, to make attorney in any action, and command the judges to admit such persons to be attorneys for him, now justly is this act stilled an act of grace, for that the king gave his royal assent to this law for the quiet and safety of his subjects, giving them power hereby to make attorneys in cases herein expressed, whereby the king lost such profit of the great seal as he formerly received in such cases" 2 Co. Inst. 377, 378.

It seemeth that before the statutes which gave power unto a man to make an attorney, the justices would not suffer that the plaintiff or the defendant or the demandant or the tenant should make attorney in any action, . . . because the words of the writ do command the defendant for to appear, etc., and that was always taken to be in proper person. The form of entry in every action for the plaintiff or demandant is: '*Et praed. quer. obtulit se . . . & praed. def. non venit; ideo praeceptum est vic. quod,*' etc., by which it is taken that the plaintiff was to appear in proper person. But now, by the statutes, he may make attorney in a court-baron, or other courts; and may make attorney for suit personal at the hundred or other court-baron; but for suit real at the leet, or at the sheriff's torn, he cannot do it by attorney, but he ought to do the same in proper person. But it seemeth that the king by his prerogative, and before the statutes, might give warrant unto a man to make attorney in every action or suit, . . . and that he may direct his writs or letters unto the judges of courts, commanding them to admit and receive such persons by their attorney, and that the judges are bound to do the same. . . . And if tenant for life be impleaded in a *praecipis quod reddat*, he in the reversion may pray to be received to defend his right upon the default of the tenant, or upon his faint pleading, and there he cannot pray to be received by his attorney. But if he bring a writ unto the justices out of the chancery, testifying that he hath made attorney there, and rehearse the cause whereof, that is to say, because he is sick, or other reasonable cause, and commanding them to receive such person by attorney for him in the reversion, the court ought and is bound to receive him by his attorney. . . . And the king, by his letters-patent, may license a man to make a general attorney '*in omnibus placitis motis and morendis, and in quibuscunque cur,*' and by his letters-patent he may express who shall be attorney, etc., or may grant to make attorney whom or who he will. . . . And the king, by his writ, may send to any person to receive attorney for another, such person generally as the other will name, or such persons specially, and that may be as well for the demandant or plaintiff as for the defendant or tenant. And the king may give authority unto one person to receive attorney for another in all pleas, and in all courts for two or three years. And the king may grant a *dedimus potestatem* to re-

ceive attorney for another, for a special cause recited in the writ, because he is languishing or lame, or decrepit, etc., or such other like special cause. Or he may grant a *dedimus potestatem*, in the generality to receive attorney for another in all pleas, without expressing any cause in certain wherefore he doth so. And also it appeareth by the register that the king, by his letters-patent, may grant unto the prior of St. John's of Jerusalem that he may make two of his friars, and name them, etc., in his place, which is in the place of a proctor; that the two friars shall make attorney for the prior in every action which is pendant, or to be brought against him in any court, etc., and for to challenge his liberties, and for to defend them. And also the king, by his letters-patent, may grant unto an abbot . . . that he may make a general attorney for all pleas, and in all courts; and the said abbot may remove him and put others in his room as often as it shall seem good and needful for him so to do. And so by this it doth appear that the king may grant unto all his subjects to make attorneys in the same manner, without putting or showing any cause in the letters-patent. And it appeareth by the register that the king may grant the same as well by letters-patent under his privy seal as by letters-patent under his great seal. And when the king makes a general grant unto an abbot, or unto any other, to make such general attorneys, then it seems the abbot shall come into the chancery, or shall send his deed under his seal unto the chancellor, witnessing that he hath made such and such persons his attorneys, etc. And thereupon the chancellor shall make letters-patent unto the abbot, testifying that he hath made such and such persons his attorneys in all pleas and courts; and upon these letters-patent, showed unto the court, the judge ought to admit and receive those persons for attorneys for the party, and these letters-patent shall be entered upon record in the chancery. And the king may send his writ unto the justices of the common pleas, or unto the justices in eyre, or other justices whatsoever, testifying that such a one hath made his general attorney in all pleas and quarrels moved against him or by him, and also to challenge his franchises or to defend his franchises, commanding the justices by the writ that they receive him for attorney, etc. There is another writ, also, in the register, that the king, by his writ, shall command his justices in eyre that they admit and receive the claim of such a one to certain liberties, which he shall make and claim before them by his attorney, because himself cannot be personally before them at the day. There is another form of writ to the justices, that they admit such a one by his attorney, whom the said party shall make his attorney by letters-patent under his seal. And a man may make his attorney before the justices without making an attorney in chancery, or without suing any writ unto the justices, commanding them to admit any attorney for the party plaintiff or defendant, as the common course is at this day for an attorney for every party to appear in every manner of action that they can appear by attorney, and put in their warrant without any such writs, if not that they be in writs of entry in the post, or writ which is by

covin between the parties, or a writ of right. Then the justices, in discretion, do not admit any man to appear an attorney for the party defendant unless the defendant do, before some justice, confess him to be his attorney, and that the justices do record the warrant, or otherwise, that he bring a writ out of the chancery testifying that he hath there made attorney, commanding them for to receive him for his attorney. But there are divers cases in which the justices will not admit the defendant by attorney; as, if he came in by *ceps corpus*, they will not admit him by attorney, until he hath pleaded some plea, and then, in discretion, they use to suffer the defendant to make attorney. . . . And a man shall not make an attorney against the king in any action sued by the king. Upon a *rescous* returned by the sheriff, and an attachment awarded upon it against him, the defendant shall not make attorney, but, upon his appearance, shall be presently committed unto the Fleet. But if the king send a privy seal unto them, commanding them that they admit attorney for him, the court ought to receive the attorney without appearance in proper person. . . . In a *præmunire* the defendant shall not make attorney without a special writ directed to the justices. After a *capias ad computandum* awarded, the defendant shall not make attorney. . . . He who pleads misnomer shall not make attorney. . . . A feme covert may be attorney for her husband. . . . And see in the register . . . writs directed unto the bailiffs of hund, to receive and admit such persons by attorney in court, which the party will make under his seal, or otherwise; and also writs of *dedimus potestatem* to remove attorneys made, and to put others in their places. . . . And if a man make attorney in chancery to answer and defend in other courts, he may come in chancery, and remove him, and make others his attorneys; and thereupon he shall have a writ unto the justices of the court where the attorney is, testifying that he hath removed him, and made another his attorney, commanding them for to receive him, etc. There is . . . in the register . . . a writ directed unto the justices to receive an attorney for a woman who prayed to be received for the default of her husband. . . . There is another writ in the register directed unto the justices for him in reversion, where tenant for life is impleaded, commanding them for to admit attorney for him in the reversion, if the tenant for life make default, as he conceived he will. . . . because that he in the reversion hath such an infirmity that he cannot pray to be received in proper person. And the like writ for a feme covert, who hath a reversion, and the tenant for life is impleaded, and she conceiveth that her husband will not pray to be received, etc. But in the writ it shall be mentioned that the feme is decrepit, or hath some other infirmity, that she cannot conveniently come to be received in proper person. . . . If a man be attorney for another in a plea real, . . . and afterwards, by covin between the attorney and the demandant, the attorney makes default for which the land is lost, the tenant who lost the land shall have a writ of deceit against the attorney. . . . An attorney shall have an action of debt against his client for

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money which he hath paid unto any person for his client, for costs of suit, or unto his counsel, etc." Fitzh. Nat. Brev. 25-27, 96, 121.

"The first colonists of New England were fishermen and farmers. Their leaders were clergymen, and, though they brought with them a general idea of English law and English liberty, the registers of writs were sealed books to them, as much as they are to us at this day. Instead of attempting to follow the forms of the register, they devised processes of their own. The recital of some of them will show that no reverence for any ancient forms existed among the courts here. . . . Judgments by default for want of any appearance after due service of a single proper process was an original invention of New England, and has existed here since a very early date after the first settlement of the country. . . . We are not aware of any objection to this ancient New England usage. . . . The foundation of the English common law, with its infinite niceties, was nothing more than usage, and usage here holds as high a place in our esteem as usage there. Indeed, we regard the ignorance of the first colonists of the technicalities of the common law as one of the most fortunate things in the history of the law, since, while the substance of the common law was preserved, we happily lost a great mass of antiquated and useless rubbish, and gained in its stead a course of practice of admirable simplicity, and one which seems to us far better than the most improved codes of practice which have been recently introduced elsewhere." *Boston, O. & M. R. Co. v. State*, 22 N. H. 215, 230, 281.

The extracts from Fitzherbert, *Natura Brevium*, relating to the exercise of royal prerogative before the statutes allowed appearance by attorney, present a sample of what has been lost. No prerogative or statute was ever necessary in this state to enable litigants to appear by their agents. The law regulating the admission of attorneys is a part of the law of procedure, and our common law allows such procedure as justice and convenience require. *Boody v. Watson*, 64 N. H. 162, 171-173, 178, 179. Justice requires that a party should be permitted to conduct his cause in person (subject to reasonable requirements of propriety), or by any agent of good character, and that the test of the agent's character should not be so rigorously applied as to imperil the constitutional right to a fair trial. But no one should commonly practice as an attorney without the mental and moral qualifications adequate for a business in which the administration of justice is deeply concerned, and in which his unfitness would naturally bring serious disaster upon his employers and himself. These rules of our common law of procedure have been affirmed by the legislature. Gen. Laws, chap. 218, §§ 1, 2. As a mass of details, the English law on the subject, being inapplicable to our situation and circumstances, is not in force in this state; and, if no relevant and decisive general principle of that law has been adopted here, this case must be determined by the common law that grows out of American conditions. *Concord Mfg. Co. v. Robinson*, 66 N. H. 1, 6, 7, 18 L. R. A. 679; *State v. Saunders*, 66 N. H. 39, 72, 78, 18 L. R. A. 646.

In *Oliver v Ingram*, 2 Strange, 1114, "two points were made: (1) Whether a woman was capable of being chosen sexton [of a parish]; and (2) whether women could vote in the election. As to the first, the court seemed to have no difficulty, . . . nor did I think proper to argue it, there having been many cases where offices of greater consequence have been held by women, and there being many women sextons now in London. . . . As to the second point, 4 Co. Inst. 5, was cited to show women could not vote for members of parliament or coroners. . . . But the court, notwithstanding, held that this being an office that did not concern the public, or the care and inspection of the morals of the parishioners, there was no reason to exclude women who paid rates from the privilege of voting. They observed, here was no usage of excluding them stated, which perhaps might have altered the case." "I am clearly of opinion," said Lee, *Ch. J.*, delivering the judgment of the court, "that a woman may be sexton of a parish. Women have held much higher offices, and, indeed, almost all the offices of the kingdom, as queen, marshal, great chamberlain, great constable, champion of England, commissioner of sewers, keeper of a prison, and returning officer for members of parliament. (2) As to the second point, it would be strange if a woman may herself fill the office, and yet should be disqualified to vote for it. The election of members of parliament and of coroners stands on special grounds. No woman has ever sat in parliament, or voted for members of parliament, and we must presume that when the franchise was first created it was confined to the male sex. There was no reason for such a restriction respecting the office of sexton, whose duties do not concern the morals of the living, but the interment of the dead." 3 Campbell, *Ch. Just.* 68.

In 1797 a woman and two men, being the only householders of "the township of the monastery of Ronton Abbey," "an extra parochial place," were appointed overseers of the poor. *King v. Stubbs*, 2 T. R. 896, 406. "We think," says Ashurst, *J.*, delivering the opinion of the court, "that the circumstances of one of the persons appointed being a woman does not vitiate the appointment. The only qualification required by 48 Elizabeth is that they shall be substantial householders. It has no reference to sex. The only question, then is whether there is anything in the nature of the office that should make women incompetent, and we think there is not. There are many instances where, in offices of a higher nature, they are held not to be disqualified, as in the case of the office of high chamberlain, high constable, and marshal, and that of a common constable, which is both an office of trust, and likewise, in a degree, judicial. So in the case of the office of sexton. As to the case in Viner's Abridgment, title *Poor*, 415 (*Rev. v. Moor*), that is no conclusive authority. It is to be collected from the case that there were other persons in the parish proper to serve; and, if so, the court held that the justices had not acted improperly in refusing to approve of a woman. Where there are a sufficient number of men qualified to serve the office, they are certainly more proper, but that is not the

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case here; and therefore, if there is no absolute incapacity, it is proper in this instance, from the necessity of the case. And there is no danger of making it a general practice, for, as the justices are invested with a discretionary power of approbation, it is not likely that they will approve of such an appointment when there are other proper objects."

In *Hearle v. Greenbank*, 1 Ves. Sr. 298, 8 Atk. 695, a testator had devised realty to trustees to the use of his daughter, a married minor, during her life, with power, "notwithstanding her coverture," to dispose of it as she should think fit; and, while a minor, she made a will, devising it in pursuance of the power. Hardwicke, *Ld. Ch.*, holding that the power was not executed, said: "There are some kind of powers an infant may execute, as where he is a mere instrument or conduit pipe, where no prudence or discretion is required, or where his right is not affected. 1 Co. Inst. 52a. 'Few persons are disabled to be private attorneys to deliver seisin: for monks, infants, feme covert, etc., may be attorneys.' As this opinion of Lord Coke is delivered, it seems at first as if he meant only to deliver seisin, which is merely a ministerial act; although the latter words are general. Yet he himself (1 Co. Inst. 128a) says that an infant cannot be an attorney. It is therefore pretty much undetermined how far infants can be attorneys, unless to deliver seisin or such a ministerial act. But that is different from these kind of powers. . . . It is said that a feme covert may execute a power, which was so determined in *Rich v. Beaumont*, 6 Bro. P. C. 152, upon the execution of a power created before she was covert, and so in a case before Lord King. So a power to a feme covert to make leases is good. . . . I take it in law that the disability of an infant with respect to the real estate is more favored, and a stronger disability, than that of feme covert. In Hob. 95, there are some cases put, and there is a marginal note very material. And here I will take notice that the notes in Hobart are allowed to be his own. The note is this: 'Coverture was not at common law so far protected as infancy, and some other disabilities, as non sane memory, etc.,' the ground of the disability being not from want of judgment, but from being under the power of her husband,—she having as much judgment as if discoverd. . . . The disability of an infant arises from want of judgment."

"A grant of an office requiring skill, to an infant to be exercised *in presenti*, is void. . . . Offices merely ministerial, which do not require particular skill and knowledge, and exercisable by deputy, may be granted to any person, and even to women. Thus, a woman may have the office of the custody of a castle. And Lord Coke [4 Inst. 8, 11] mentions an instance of a woman's having the office of forester in fee simple; but he observes that she could not execute the office herself, but was obliged to appoint a deputy, during the eyre, who should be sworn." The Earl of Hereford held manors of the king "by the service of being constable of England, and had issue,—two daughters. Upon a question how the daughters, before marriage, could exercise the office, it was resolved that they might make

their sufficient deputy to do it for them, and after marriage the husband of the eldest might do it alone. . . . The following question was put to the judges: 'The late Duke of Ancaster having died seised of the office of great chamberlain of England, leaving two sisters, does the said office belong to the eldest alone, or to both? . . . Or does it devolve upon the king to name a proper person to execute the office during the incapacity of the heir?' The judges delivered their unanimous opinion "that the office belonged to both sisters; . . . that both sisters might execute it by deputy, to be appointed by them." 8 Cruise, Dig. 123-126.

Cobbett v. Hudson, 15 Q. B. 938, "was an action against the keeper of the queen's prison for a false return to a habeas corpus. On the trial, before Pollock, C. B., . . . the plaintiff, who was in custody, did not appear by either counsel or attorney, or in person; but his wife appeared, and proposed to conduct the cause on his behalf. The lord chief baron, after conference with Erle, J., refused to permit this; and the plaintiff was nonsuited. . . . The plaintiff, in person, now moved that the nonsuit might be set aside. . . . Lord Campbell, Ch. J. 'We cannot say that the lord chief baron was wrong in refusing to hear the wife of the plaintiff, as an advocate. The nonsuit was regular. The plaintiff was called, and appeared neither by counsel or attorney, nor in person, but his wife claimed to appear for him. The question, therefore is whether, as of right, the wife of a party may insist on appearing on his behalf in a civil cause. There is no such rule in a civil suit. The first day I sat here, Mrs. Cobbett desired to make a motion on behalf of her husband for a habeas corpus; and I heard her without the smallest scruple, as my illustrious predecessor, Hale, heard the wife of John Bunyan. 2 Campbell, Ch. Just. 210-218. On each of those occasions the liberty of the subject was in question; and in such a case great inconvenience might arise from refusing to hear the wife, or any person, on behalf of the party who was under restraint. But a proceeding at *nisi prius* is very different. There can be no similar necessity there for the wife's appearance as counsel to conduct the cause for her husband. There would at least be opportunity for applying to a gentleman of the bar, and we know that on such an occasion any member of the bar would come forward without any *honorarium*, and see justice done. And this would be much better than that the wife of a party should come in to court to wrangle at *nisi prius*, and engage in scenes inconsistent with the character of her sex. I think the lord chief baron and my Brother Erle did right.' Coleridge, . . . Wightman, and Erle, JJ., concurred. Rule refused."

"The real question . . . is whether an infant is by law capable of discharging the duties of a deputy of the sheriff specially deputed to serve and return a particular writ of attachment. . . . It seems always to have been held that an infant could not be a juror. . . . So he could not be an attorney of a court, . . . nor administrator of an estate, . . . nor could he act as an executor until he arrived at the age of seventeen years. . . . An infant could not execute the office of a judge," nor "hold the

office of clerk of a court, where it was part of the duty of the office to receive the money of the suitors. . . . But, notwithstanding these disabilities, there are many things which can be legally done by an infant. . . . Females at the age of twelve, and males of the age of fourteen years, may dispose of personal property by will. . . . It has long been settled that infants were capable of holding certain ministerial offices. . . . Upon a thorough examination of the adjudged cases, . . . we are satisfied that the principle they establish is that some offices can, and some cannot, be held by infants. Offices where judgment and discretion and experience are essentially necessary . . . are not to be intrusted in the hands of infants. But they may hold offices which are merely ministerial, and which require nothing more than skill and diligence. . . . The service and return" of the writ "seem . . . to be as merely ministerial [*Mechem*, Pub. Off. §§ 657-659] as any that can be conceived." *Moore v. Graves*, 3 N. H. 408, 410-412. The liability of the sheriff was held to be ample protection for all who might be injured by the acts of negligence of the special deputy.

The appointment or election of a person to a public position, the payment of his wages by taxation, and the importance of his work, are not conclusive proof that his public duty is, in the ordinary sense, a public office. A teacher of a public school, who is selected by the school board, but is not an officer (*Lander v. Seaver*, 32 Vt. 123, 76 Am. Dec. 156), is paid by the district. A register of deeds, who is an officer, is paid, like a physician or attorney, by individuals who happen to need his services. "As morality and piety . . . will give the best and greatest security to government," the legislature is empowered to authorize "the several towns, parishes, bodies corporate or religious societies . . . to make adequate provision . . . for the support and maintenance of public . . . teachers of piety, religion, and morality. Provided . . . that the several towns, parishes, bodies corporate, or religious societies shall . . . have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance." Bill of Rights, art. 6. This is the substance of the Act of 1714, which was an enactment of previous custom. *Hale v. Everett*, 53 N. H. 139, 231, 16 Am. Rep. 82. From an early day in the history of the province, until 1819, the town minister was chosen by the majority of voters in town meeting. His salary was paid from the town treasury. His employment as teacher, in a meeting-house built and controlled by the town for public use, was public. In a certain sense it was official, like that of a teacher of a public school. But it was nonofficial in such a sense that women could legally be called to it. In the exercise of their parochial right of electing ministers, towns were as unrestricted as voluntary religious societies are now. If women had never been teachers of public schools, they could be employed as such, notwithstanding the usage, and without an alteration of the law, because that public employment has not been understood to be an office. Not being an office, in the ordinary sense, it is open to women at common law,

whatever the usage may have been. "The relation that subsists between a minister and the town [by which he is elected] is civil. That which subsists between a minister and the church is spiritual." "Public teachers of religion and morality, chosen by a town, 'are, to every purpose, civil officers of the state,—as much so as schoolmasters and magistrates." *Muzzy v. Wilkins*, Smith (N. H.) 1, 14. In such a connection, no distinction being made between public office and other public employment, "civil officers of the state" means persons in the civil service of the state.

Great numbers of persons, male and female, who are not regarded as public officers, are employed by the public, and selected and paid by public authority. In the civil service, the classification is not as distinct as among privates and commissioned and non-commissioned officers, and the location of the official line, at some points, may be a subject of controversy. In some instances a test may be found in that universal understanding which is the sanction and source of much common law. 107 Mass. 604; Sharswood, Law Lectures, 196, 199. While a removal of common law disability by legislation was necessary to enable women to be members of school boards (Gen. Laws, chap. 87, § 10; Laws 1879, chap. 57, § 19), no statute was required to authorize their election as public teachers. "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service, without becoming an officer." *United States v. Maurice*, 2 Brock. 96. Fed. Cas. No. 15,747. "A public office . . . is never conferred by contract. . . . Where, therefore, the authority in question was conferred by a contract, it must be regarded as an employment, and not as a public office" Mechem, Pub. Off. § 5. Ministers elected by towns were considered a class of teachers employed by contract. In this and other cases, the making of contracts by voters in town meeting was an exercise of governmental power. "A government office is different from a government contract." *United States v. Hartwell*, 78 U. S. 6 Wall. 385, 398, 18 L. ed. 830, 881. A contractor for carrying the mail is not an officer of the government, nor is the employment an office. *Whitehouse v. Langdon*, 10 N. H. 331.

Under a constitutional provision that no senator or representative should, during the term for which he was elected, "be appointed to any civil office of profit," under the state, which had been created during such term, the justices were of opinion that "every 'office,' in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws," and that an agent appointed by the governor, under a legislative resolution, for the preservation of timber on the public lands, and for other purposes, would not hold such an office, and need not take the oath required by the constitution of persons elected or appointed to "office under this state." 3 Greenl. 481, 483; *United States v. Hatch*, 1 Pinney, 182. In dispersing a mob or suppressing an insurrection, 24 L. R. A.

sovereign power may be exercised by the rank and file, as well as by the governor, president, or other commander in chief. In making a lawful arrest, the sheriff exercises the same power; and a woman giving him necessary assistance, though not an officer, is not a trespasser. *Rez v. Pinney*, 5 Car. & P. 260, 261, note; *Phillips v. Eyrre*, L. R. 6 Q. B. 15. In executing the laws, the sovereign power employs many officers and many agents and workmen who are not officers. Mechem, Pub. Off. cc. 1, 2; Paine, Elect. §§ 126, 127.

A selectman is a public officer. *State v. Boody*, 58 N. H. 610. A representative in the legislature is a state officer, within the meaning of the Act of June 23, 1813. *Morri v. Haines*, 2 N. H. 246. In *Doyle v. Raleigh*, 89 N. C. 133, 45 Am. Rep. 677, the plaintiff was elected an alderman of a city while acting, under an appointment from the treasury department of the United States, at a salary of \$60 a month, as night watchman of a post-office building. The state constitution provides that "no person who shall hold any office or place of trust or profit under the United States, or any department thereof . . . shall hold or exercise any other office or place of trust or profit under the authority of this state." Art. 14, § 7. It was held that the plaintiff's federal employment was not an office, or place of trust or profit. In such a case there might be doubts, or a difference of opinion. A public service may be an office or place of trust for some purpose, in some sense, within the meaning of one law, though not an office or place of trust for all purposes, in every sense, within the meaning of other laws, and legislative intent may be defeated by an invariable definition. In *Roland v. New York*, 83 N. Y. 372, the question was whether supervisors had authority to increase the plaintiff's compensation as "an attendant upon the supreme court." A statute had prohibited their "creating any new office, . . . or increasing the salaries of those now in office." It was held that the object of the law was to limit expenses; that it was reasonable to suppose "the legislature had in mind . . . all persons who, under any name, were the recipients of salaries from the city treasury; and that in this extended sense the words of the act should be construed."

"The term 'office' has no legal or technical meaning attached to it, distinct from its ordinary acceptations. An office is a public charge or employment; but, as every employment is not an office, it is sometimes difficult to distinguish between employments which are, and those which are not, offices. . . . 'A public officer is one who has some duty to perform concerning the public; and he is not the less a public officer when his duty is confined to narrow limits because it is the duty and the nature of that duty, which makes him a public officer, and not the extent of his authority.' 7 Bacon, Abr. 280; *King v. Burnell*, Carth. 479. . . . Where an employment or duty is a continuing one, which is defined by rules prescribed by law, and not by contract, such a charge or employment is an office, and the person who performs it is an officer. . . . The powers vested in the government of the state of Mississippi are either legislative, judi-

cial or executive; and these respective branches of power have been committed to separate bodies of magistracy. . . . Whether an office has been created by the constitution itself, or by statute, . . . the incumbent, as a component member of one of the bodies of the magistracy, is vested with a portion of the power of the government. . . . The words 'civil office under the state' . . . import an office in which is reposed some portion of the sovereign power of the state; and of necessity having some connection with the legislative, judicial, or executive departments of the government. . . . The local and limited power and duties of the levee commissioner can have no effect in determining the question whether his office is not an office under the state. A member of the board of county police, or a justice of the peace, is as much an officer under the state as the executive, the heads of department, or a member of the judiciary. The powers attached to the office of levee commissioner evidently pertain to the executive branch of the government. Clothed with a portion of the power vested in that department, the commissioner, in the discharge of his proper functions, exercises as clearly sovereign power as the governor or a sheriff." *Shelby v. Alcorn*, 36 Miss. 278, 288-290, 292, 73 Am. Dec. 169. The constitution provided that "no senator or representative" should, during his term, "be appointed to any civil office of profit under this state," which had been created during his legislative term. The object of the clause was manifest, and the office of levee commissioner was held to be within the mischief which the prohibition was intended to prevent.

"By the Constitution of 1846 (art. 6, § 8), the judges of the court of appeals and justices of the supreme court were prohibited from exercising 'any power of appointment to public office.' . . . The term 'office' has a very general signification, and is defined to be that function by virtue whereof a person has some employment in the affairs of another; it may be public or private, or quasi public, as exercised under public authority, but yet affecting only the affairs of particular individuals. The presidency of a bank is spoken of as an office, and a trustee of a private trust is, in ordinary parlance, said to hold the office of trustee; and the term 'office' is applied to an executor or guardian, etc. A referee, for the trial and decision of actions is an officer exercising judicial powers under public authority. So, receivers appointed by the courts, and commissioners for the appraisal of damages for lands taken for public use, are officers, and strictly and technically exercise the functions of an office. But they are not public officers, within the inhibition of the constitution. . . . They are not called upon to take the constitutional oath of office." Opinion of the majority in *Re Ilathaway*, 71 N. Y. 238, 242, 243. "The power of courts of law and equity to appoint referees and receivers. . . was a part of their acknowledged authority and jurisdiction prior to and at the time of the adoption of the constitution. They were said to be officers of the court. . . . The power of the courts to act through official agencies of their own appointment . . . was incident to their jurisdiction,

and passed to the supreme court as a part of the general jurisdiction of law and equity conferred by section 8, article 6, of the Constitution. . . . Assuming, therefore, that receivers and referees are public officers (a point which we do not determine), the power of appointment . . . was continued in the new supreme court by the . . . constitution." Opinion of the minority in the same case, pages 252, 253.

"An attorney-at-law is an officer of the court. The terms of the oaths exacted of him at his admission to the bar prove him to be so: 'You shall behave yourself in your office of attorney within the court, with all due fidelity as well to the court as the client.'" *Austin's Case*, 5 Rawle, 191, 203, 28 Am. Dec. 657. "Attorneys who have been admitted to practice as such are officers of the court, of whom the court will take judicial notice, and generally will not require them to show their authority to appear; and if questioned, the declaration of the attorney that he has such authority will ordinarily be sufficient." *Stevens v. Fuller*, 55 N. H. 443; *Thomas v. Steele*, 22 Wis. 207, 209. "The agreement was signed by the attorneys of record. They were officers of the court, and their signatures were judicially known to the court." *Scrippelmann v. Clark*, 11 Tex. 296, 298. "The office of an attorney is quasi public, and his conduct semi official. *Ex parte Wallis*, 73 Ind. 95, 106.

"For the better understanding in what cases the court may proceed in the manner above mentioned [summarily, by attachment],

. . . I shall endeavor to show where it may so proceed against the ministers of the court, and, where against others. As to the first of these points, I shall consider where it may so proceed against sheriffs, bailiffs of franchises, and sheriffs' bailiffs; where against attorneys, and others acting as such; where against other officers. . . . I shall endeavor to show—First, where the court may so proceed against sheriffs, bailiffs of franchises, and sheriffs' bailiffs, for not executing a writ; secondly, where for doing it oppressively; thirdly, where for not doing it effectually; fourthly, where for making a false return. . . . As to the second point, viz. in what cases the court may proceed, in the manner above mentioned, against attorneys, and others acting as such, I shall endeavor to show—First, where it may so proceed against them for appearing for a person without sufficient authority, secondly, where for injustice to their clients; thirdly, where for . . . dishonest practice. . . . Where the court may proceed, in the manner above mentioned, against other officers of the court. There being scarce anything of this kind to be met with in the books, I shall only observe that it seems clear, from the general reason of the law, which gives all courts of record a kind of discretionary power in the government of their own officers, that any such court may proceed in such manner against any such officer, not only for refusing to execute its commands, or for executing them irregularly, remissly, or oppressively, but also for all kinds of oppression or injustice done by them in the execution of their offices, or by color of them. . . . In what

cases counselors are punishable in the manner above mentioned. It seems clear, that notwithstanding they are neither officers of any court, nor invested with any judicial office, but barely practice as counselor, yet inasmuch as they have a special privilege to practice the law, and their misbehavior tends to bring a disgrace upon the law itself, they are punishable for any foul practice as other ministers of justice are." 2 Hawk. P. O. chap. 22, §§ 1, 5, 12, 30.

"Attorneys and solicitors are to be considered as public officers and ministers of justice. Upon this ground it is that, in courts both of law and equity, they have stated fees allowed them for their service, and are under the government of the several courts in relation to their behavior to their clients. The courts exercise a much larger authority over them, and interfere much more in contracts which they make with their clients, than they do in other cases. . . . Upon this ground it is that if an attorney accepts a retainer from his client, and does not appear for him, the court will compel him to do it. . . . Attorneys and solicitors, when they have accepted retainers from their clients, are bound to serve them for the stated fees which are allowed by the several courts." Hardwicke, *Ld. Ch. in Walmsley v. Booth*, Barnard, Ch. 478, 479. "It is because attorneys and solicitors are regarded as officers of the court that our courts have been in the habit of granting relief against them by summary motion; treating the act as one of official misconduct in an officer of the court, and there to be redressed in the summary manner." *Waters v. Whittemore*, 22 Barb. 598, 595.

Merritt v. Lambert, 10 Paige, 852, 4 L. ed. 1007, "came before the chancellor upon an appeal of J. Wallis, one of the solicitors and counselors of this court, from an order of the vice-chancellor, . . . made upon the application of Loubat, who was a purchaser *pendente lite* of part of the property in litigation in this cause." The suit was brought by Merritt against Lambert for the specific performance of a contract to exchange lands, and the bill was dismissed. Wallis was originally employed by Lambert. During the pendency of the suit a receiver was appointed of the rents of Lambert's land, which rents came into the hands of Wallis when the bill was dismissed. Loubat had employed Wallis to defend the title to a part of that land. After the bill was dismissed, Loubat applied for an order that Wallis pay him his share of the rents. The vice-chancellor directed a reference to a master to ascertain and report the amount of the rents of Loubat's lot, received by Wallis, and also to ascertain and report what reasonable counsel fees should be allowed to Wallis, and that, upon the confirmation of the master's report, Wallis should pay Loubat the balance, if any, remaining in his hands after deducting taxable costs and reasonable counsel fees. Walworth, *Ch.*, affirming this order, said: "The principles upon which the court proceeds in cases of this kind are stated . . . by Lord Hardwicke in *Walmsley v. Booth*, Barnard, Ch. 478. He there says attorneys and solicitors are to be considered as public officers and ministers of justice. . . . If an attor-

ney extorts more money from his client than the courts allow of, or makes a contract with his client to have more money, the courts will give relief. . . . In England the duties of attorney or solicitor and counsel are always performed by different persons; and of course the attorney or solicitor cannot be permitted to stipulate for any greater compensation for his services than such as are allowed by the practice of the court, or by the tariff of fees fixed by law. The same rule prevails here, so far as relates to the mere services of an attorney or solicitor. But as most members of the profession practice in the capacity of counsel, as well as in that of solicitor or attorney, if the client agrees with his solicitor or attorney to perform the duty of counsel also, . . . the latter, in his character of counsel, may stipulate for a reasonable reward for his services as such counsel. . . . But he is not permitted, either as attorney or solicitor, or as counsel, to contract with his client . . . for a part of the demand or subject-matter of the litigation, as a compensation for his services." This statement of the law shows the ground of *Chancellor Walworth's* previous decision in *Bleakley's Case*, 5 Paige, 311, 3 L. ed. 731, and of his opinion, afterwards expressed in *Ray v. Birdseye*, 5 Denio, 619, 627, that "the attorney who issued the execution was a public officer appointed under the authority of this state."

In *Leigh's Case*, 1 Munt. 468 (decided in 1810), the question was whether an attorney-at-law was a person "appointed to any office or place, civil or military, under this commonwealth," within section 3 of an act to suppress dueling, which prescribed a certain oath to be taken by every such person. On his motion to be admitted to the bar of the supreme court of appeals without taking this oath, "Mr. Leigh insisted that the practice of law was not an office or place under the commonwealth, within the meaning of the act; that the act intended public officers only and not private ones of any kind. I agree, said he, 'it is laid down generally that attorneys-at-law, in England, are, in all points, officers of the respective courts in which they are admitted. 3 Bl. Com. 26. But their character of officers of court in England is derived from certain restrictions they are under, and privileges they enjoy, in that country, unknown in this. In England, attorneys cannot be bail in civil cases; nor can attorneys at law practice as solicitor in chancery; nor attorneys in one of the courts of Westminster in any other; nor can they be called to the bar till struck off the roll of attorneys; nor, if once admitted barristers, enrolled as attorneys again till disbarred at their inns of court. . . . On the other hand, attorneys cannot regularly be held to special bail. They must be sued by bill, not by original. They can only be sued in the courts they belong to, and they are exempt from serving in offices they may be elected to against their inclination. . . . Barristers at law (king's counsel excepted) . . . take no oath of office, and are not deemed officers of court. In Virginia, no such restrictions or privileges exist. Here, attorneys are counsel. In England, too, it was formerly held that attorneys were compellable to act. Co. Litt. 295a. But it has been since adjudged, that an attorney is not compellable to appear for any

one unless he takes his fee, or back the warrant. *Oades v. Woodward*, 1 Salk. 87. And even if the law, as stated by Coke, has not been thus exploded, still counsel were never thought compellable to act. Hargraves' note, 252 to Co. Litt. 295a. And as, in Virginia, the characters of attorney and counsel are inseparably blended in the same person, so that one cannot be engaged as attorney without being engaged as counsel, in which latter capacity he is on no principle compellable to act, it results that no part of the profession is so compellable in this country. Attorneys therefore are no more officers of the court here than counsels are in England. A class of men there are, indeed, in this as well as in that country, concerned in the administration of justice, to whose diligence, integrity, ability and honor much is necessarily confided; . . . sworn to do their duty, regulated by rules of policy and practice, and liable to summary punishment and privation for unworthiness or misconduct. But these, their only traits of the officer known to our law, they have in common with jurors. . . . But granting that attorneys are on the same footing here as in England,—that they are officers of court,—still Mr. Leigh contended, they are not public 'officers,' within this act. 'In fixing the legal construction of this our test,' said he, 'I could not . . . forbear looking into the construction put by English legislators and lawyers on their corporation, test, and abjuration acts, which are known to have been enforced and interpreted, in a spirit that the most rigorous expounder of our test cannot except against.' . . . By the Abjuration Act (18 Wm. III. chap. 6) it was enacted 'that every person who shall bear any office, civil or military, . . . and all persons teaching pupils, etc., and all preachers, etc., and every person that shall act as a sergeant at law, counselor, barrister, advocate, attorney, solicitor, clerk, or notary by practising as such in any court, shall, within three months after they enter upon such office, or take upon them such practice,' take the oath of abjuration. . . . The alternative words 'or take upon them such practice' plainly referred to the legal characters before mentioned, and showed that the parliament did not deem their profession, nor was it generally understood to be, an office or place under government. If they had thought so, those words would not have been inserted. And by the corporation act (18 Car. II. Stat. 2, chap. 1) it was enacted 'that no person shall be placed or chosen in any office of mayor, alderman, recorder, bailiff, town clerk, common councilman, or other office of magistracy, place, trust, or employment, concerning the government of any city, borough, or cinque port, and their members, or other port town, that shall not, within one year next before such choice, have taken the oath of supremacy,' etc. . . . If any words would include the attorneys of corporation courts, as officers or placemen, those of this statute would. Yet it had been expressly adjudged that an attorney was not an 'officer,' within that act. *Hurst's Case*, T. Raym. 56, 94, Sid. 94, 152, and 1 Keb. 849, 854, 387, 558, 675. . . . In all the notices of this case, the only question ever raised was 24 L. R. A.

whether an attorneyship was such a place as that a mandamus would lie to restore one to it; . . . but no doubt was ever entertained that the attorney was not within the corporation act. . . . If the profession of the law be an office or place under the commonwealth at all, it is a lucrative one. Now, the constitution of Virginia expressly provides that all persons 'holding lucrative . . . offices shall be incapable of being elected members of either house of assembly or the privy council.' Article 4. If, then, the construction I am controverting be right, lawyers are excluded from the assembly and the council. Yet the framers of the constitution, . . . and their successors ever since, never (as we know) had any such idea. The whole practice of the constitution, from its origin to this day, the contemporaneous, the present, the constant exposition of it, refutes this inference . . . that attorneys are officers under government. . . . By the Constitution of the United States (art. 1, § 6, cl. 2), 'no person holding any office under the United States shall be a member of either house during his continuance in office.' Is it, or has it ever been, thought that hereby the bar of the federal courts are excluded from Congress? . . . By the Act of 1788 . . . 'all persons who shall hold any legislative, executive, or judicial office, or other lucrative office whatsoever, under the authority of the United States, shall be . . . incapable of holding . . . any legislative, executive, or judicial office, or other lucrative office whatsoever under the government of this commonwealth.' And by the Act of 1799, . . . 'no person holding or occupying any office or place, or any commission or appointment whatsoever, civil or military, under the authority of the United States, whether any pay or emolument be attached to such office, place, commission, or appointment, or otherwise, . . . shall be capable of being elected to or holding any office, legislative, executive, or judicial, or any other office, place, or appointment of trust or profit, under the government of this commonwealth.' If lawyers in the state courts are officers or placemen under the commonwealth, lawyers in the federal courts are so under the United States, and are excluded not only from all political and military state offices, but from the state bar also. . . . It never occurred as a possible opinion, that lawyers of the state or federal bar are officers under the state or federal government. . . . Mr. Leigh knew of only two objections to his argument, which had been deduced from our own laws and usages. One was that, under a general provision that all officers of government shall take the oath of allegiance, the members of the bar, state and federal, have been always held bound to take that oath; that is, they have been held to be officers under government. But this objection . . . was founded upon a plain mistake; . . . it was not from any such reasoning or inference, but from positive and express provision that the profession had been required to take the oath of allegiance to the state or to the Union. . . . Another objection was that the Act of 1792 (chap. 71, § 2) directs that counsel and attorneys 'shall take an oath of office,' namely, 'I do solemnly swear that I will

honestly demean myself in the practice of the law as counsel or attorney, and will in all respects execute my office according to the best of my knowledge and abilities.' This objection . . . begged the whole question.

The lawyer swears he will execute his office. What office? The practice of the law. And this brought it back to the first point,—the nature of that office. 'Office' there meant no more than 'duty.' . . . In a large sense, an attorney-at-law is an officer, so is an attorney in fact, an administrator, a physician, and who not? In the largest sense, every duty is an office. . . . The question here is not whether the practice of the law be an office, but whether it be, as the chief justice says (*King v. Burrell*, 5 Mod. 432), a public office or not.

"Judge Tucker. On a former day of this term, Mr. Leigh, a gentleman who has practiced as an attorney and counsel for several years in the district courts, county courts, and court of chancery, made a motion to be permitted to practice in this court. A question was propounded whether he must take the oath prescribed by the act of the last session for the suppression of dueling. I was of opinion that he could not be permitted to practice in this court without taking that oath. My opinion was founded upon these principles: That an attorney-at-law is a public officer; that his license is only an inchoate step to office; that he becomes an officer in that court only in which he qualifies as the law directs; that his admission to practice in one court does not authorize him to practice in any other court; . . . that such an admission was equivalent to an appointment, inasmuch as he thereby becomes an officer of that particular court. . . .

In England an attorney-at-law is considered as a public officer; otherwise a mandamus would not lie to restore him. The whole context of our act concerning counsel and attorneys-at-law, between whom there is no distinction in this country, proves the same thing. . . .

They are subject to penalties to which no private citizen could possibly be subjected. Let a single example suffice: The lawyers practicing in the inferior courts may demand for an opinion or advice, where no suit is brought, or prosecuted or defended, by the attorney giving such advice, but not otherwise, \$1.67; those in the general court, \$3.58, for advice, under the same restrictions. And every lawyer exacting, taking, receiving, or demanding any greater fee or other reward is subjected to a heavy penalty. Under what color or pretext could the legislature impose a penalty on any other than a public officer for demanding and receiving \$100 or \$1,000, or any other sum whatever, for giving his advice to any person willing to pay for it? . . . Whether the legislature, the executive, or the court appoints or admits to an office, the office or place is held or exercised under the authority of the commonwealth. . . .

"Judge Roane. . . . An attorney is defined to be one who is set in the place of another, and he is either public, as an attorney-at-law, or private, as being delegated to act for another in private contracts or agreements. 1 Bacon, Abr. 287; Co. Litt. 52. With respect to these public attorneys or attorneys-at-law, in order to insure a due degree of probity

and knowledge in their profession so indispensable to persons acting in that character, none are permitted to act as such but those who are allowed by the judges to be skilled in the law, and certified by the court of the county of their residence to be persons of honesty, probity, and good demeanor. As a further guard against improper practices in their profession, they are required to take the oath prescribed by the act upon this subject. . . .

Having obtained the sanction of these two tribunals touching these two particulars, an attorney is licensed or allowed to practice; and the courts have also a continuing control over them, with power to revoke their licenses for unworthy practices or behavior. But the licensing judges cannot be said to 'elect' or 'appoint' an attorney. He can, perhaps, only be said to be appointed by the particular clients, who, after he is licensed, may severally employ him. This result is entirely justified by a view of the act 'concerning attorneys at law and counsel,' . . . in which these functionaries are nowhere said to be elected or appointed, either by the government or the licensing judges; nor are their functions anywhere called or designated as 'offices' in the act, except in the form of the oath prescribed to be taken; and even there that term may well be taken in a general and extended sense, as synonymous with 'duty.' The act, it is true, prescribes an oath to be taken as aforesaid, previous to being allowed to practice; but that can only be considered . . .

as an additional security for the good conduct of the attorney. It would be too much to say that this single circumstance of precaution (any more than those of the license and certificate of the county court before mentioned) shall exalt that functionary into an 'officer,' when he is neither said in the law to be appointed to any office, nor to hold any office, and when he receives no salary or emolument except the fees which individual citizens may please to give him. If this single circumstance should be construed to have that effect, it might be equally argued to have a similar effect in relation to jurors. . . . It is not necessary in this case to consider whether, and in what degree, attorneys are considered in this country (as they are in England) officers of their respective courts, though it is easy to see that, an attorney in this country not having as many privileges as the English attorneys, in consideration of which that character is there holden to attach, a difference may probably exist in this country in this particular. . . .

Even admitting . . . that attorneys are, in some sense and in some degree, officers of their several courts, as they are held to be in England, the question still recurs, Are they 'officers,' within the meaning of the act to suppress dueling? . . . The second section declares that a person accepting a challenge, etc., 'shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, under the government of this commonwealth.' It relates as well to persons now in office as to those to be elected thereto. . . .

The former must have been elected. . . . This part of the clause . . . excludes attorneys-at-law, who . . . are neither

elected nor appointed to office, but are merely permitted to practice by those who are constituted by law judges of their character and qualifications. . . . Admitting . . . that attorneys are to be considered as officers, they are only considered, even in England, . . . as officers of their respective courts. 1 Bacon, Abr. 287. They do not therefore come up to the *desideratum* of this act; they are not officers under the government of the commonwealth. There is no just ground on which we can erect, by implication or construction, into governmental officers, those who, in England, are not exalted to that character, and who, in the only books and doctrines handed to us on the subject from that country, are held, at most, to be mere subordinate officers of their respective courts. But if attorneys could be even considered as officers of the government, they do not hold an office of profit or emolument under the government (or in other words, a lucrative office); otherwise they would have been excluded from a seat in the legislature by the provisions of the constitution. . . . The words of the oath . . . 'during my continuance in office' seem to indicate those public offices which are held by commission or appointment, and are wont and proper to be resigned. They do not naturally apply to a function which is never resigned or formally given up, which it is the right of one citizen to exercise at the request and for the benefit of another, and in respect to which the regulating hand of the legislature has only interposed for the salutary purposes before mentioned. . . . It has never been pretended (although attorneys, when they practice in the state courts, thereby become officers of the commonwealth, they equally become officers of the general government when they practice in the federal courts) that the attorneys practicing in the latter courts cannot also practice in the former.

"Judge Fleming. . . . Practitioners of the law are not comprehended in the act, under these words 'every person who shall be appointed to any office or place, civil or military, under the commonwealth, shall, in addition to the oath now prescribed by law, take the following oath,' etc. The practice of the law is a profession which every citizen of the state, having complied with certain requisites, . . . may take up, engage in, and exercise according to his own will and pleasure, and which he may lay down and resume as often as to him may seem convenient, without any responsibility for his conduct in so doing. . . . The officer taking the oath, after swearing 'that he hath not been engaged in a duel,' . . . is further to swear that 'he will not be so concerned, directly or indirectly, in such duel, during his continuance in office,' which . . . has no allusion to practitioners of the law."

Mr. Leigh was therefore admitted without taking the oath.

In *Byrne v. Stewart* (decided in 1812) 8 Desauss. Eq. 466, it was held that the office of a solicitor in a court of chancery is not a public office. "He is not appointed by the legislature," says *Chancellor Waties* (pages 478, 479), "nor is he amenable to it, for he does not possess any portion of the public authority. His admission to practice is indeed regulated

by law, but it is in the power of any man who will comply with the legal requisites to become a solicitor, independently of the will of the legislature. He can be considered in no other light than that of a private agent for the citizens of the country who may employ him to do their legal business in the courts; and although the law requires of him certain qualifications, and he receives a license from the judges, yet his office is no more a public one than would be any other profession or trade which the legislature might choose to subject to similar regulations, and which is the practice in many other countries."

"The 'Act to Suppress Duelling' [passed in 1816] . . . requires 'every member of the senate or of the assembly, and every person who shall be elected or appointed to any office or place, civil or military, except town officers, and every person who shall be admitted a counsellor, attorney, or solicitor, . . . to take an oath that he has not been engaged in a duel.' A new section of the Constitution of 1821 'ordains that members of the legislature, and all officers, executive and judicial, . . . shall take . . . an oath or affirmation to support the Constitution of the United States, and the constitution of this state, and also faithfully to discharge the duties of his office; and that 'no other oath, declaration, or test shall be required as a qualification for any office or public trust.' The question now presented is whether the new constitution has repealed the provision of the act to suppress dueling in regard to the oath required to be taken by attorneys and counselors of this court. The point is simply whether an attorney or counselor holds an office or public trust in the sense of the constitution. Lexicographers generally, define 'office' to mean 'public employment;' and I apprehend its legal meaning to be an employment on behalf of the government, in any station or public trust, not merely transient, occasional, or incidental. In common parlance, the term 'office' has a more general signification. Thus, we say the office of executor or guardian or the office of a friend. In my judgment, an attorney or counselor does not hold an office, but exercises a privilege or franchise. As attorneys or counselors, they perform no duties on behalf of the government; they execute no public trust. They enjoy the exclusive privilege of prosecuting and defending suits for clients who may choose to employ them. Various classes of persons are licensed in the city of New York, with an exclusive privilege in their employment; yet they are not public officers. Physicians are also licensed, pursuant to statutes; yet they hold no office or public trust, in legal construction. Lawyers are licensed to practice in one of the learned professions, and physicians in another, and there are many regulations by law for their government as distinct orders of men in society; but they are not trustees nor agents for the public, any more than persons licensed to carry on the business of banking. The fees of attorneys are fixed by law; and so is the compensation of cartmen and bakers, and ferrymen. . . . The legislature, in framing the act to suppress dueling, have discriminated between public officers and attorneys and counselors. They provide, not only that 'persons elected or ap-

pointed to any office or place, civil or military,' but that 'persons admitted' as counselors and attorneys, shall take the oath: thus, by fair inference, giving an exposition which shows that lawyers, in their contemplation, were not public officers. I am therefore of opinion that the new constitution has not abrogated the provision of the act which required attorneys and counselors to take this oath." Platt, *J.*, in *Re Oaths to be Taken by Attorneys & Counselors*, 20 Johns. 492-494. Woodworth, *J.*, concurred. Spencer, *Ch. J.*, dissented.

In *Seymour v. Ellison*, 2 Cow. 18, 28, 29, Spencer, *Ch. J.*, expressed the opinion that an attorney holds an office within the sense of the constitutional provision that "neither the chancellor, nor justices of the supreme court, nor any circuit judge, shall hold any other office or public trust."

"So far as the legal profession is an occupation open to all, there is no reason to consider a lawyer as a public officer. The exercise of this profession is in part an occupation, in which every person is free to engage; but it is not so in respect to proceedings in the courts of justice. These proceedings are, according to our laws and usages, conducted by a distinct class of men specially appointed for this service. The practice of the law in the courts of justice is permitted only to those who are appointed by the courts. The persons appointed are subject to the control of the courts, and they may be deprived of their right to pursue this occupation. These regulations evidently consider the practice of the law in the courts as a part of the administration of justice,—as a function important, not merely to private parties, but also to the public. They are regulations which are supposed to be necessary or conducive to a good administration of public justice. The admission of an attorney, solicitor, or counselor is a general appointment to conduct causes before the courts. This station, thus conferred by public authority, has its peculiar powers, privileges, and duties; and this station thus becomes an office in the administration of justice. Attorneys, solicitors, and counselors are constantly denominated 'officers' of the courts by which they are appointed. Our laws have required that upon their admission they should take a particular oath for the faithful discharge of their duties, and that oath is termed, by the legislature itself, an 'oath of office.' In this, as in other regulations, the legislature have considered and treated persons appointed to practice the law as holding a species of office. . . . The constitution of the Union requires that all executive and judicial officers of the United States and of the several states shall be bound by oath or affirmation to support that constitution. The Supreme Court of the United States have directed that counselors and attorneys admitted to practice in that court shall take an oath or affirmation to demean themselves uprightly, and also to support the Constitution of the United States. Rule of February term, 1790, and rule of February term, 1791. Attorneys and counselors are thus considered by that court as officers of the United States, under the national constitution. . . . The obvious intention of the existing constitution [of New York] is to establish one oath for all offices and for

every public trust; and I am accordingly of opinion . . . that no other oath can be required." Sanford, *Ch.*, in *Wood's Case*, Hopk. Ch. 7, 8, 2 L. ed. 828.

"The general assembly shall have power to pass such penal laws to suppress the evil practice of dueling, extending to disqualification from office or the tenure thereof, as they may deem expedient. Every person shall be disqualified from holding any office, or place of honor or profit, under the authority of the state, who shall be convicted of having given or offered any bribe to procure his election or appointment. Laws shall be made to exclude from office, from suffrage and from serving as jurors those who shall hereafter be convicted of . . . high crimes or misdemeanors." Alabama Const. 1819, art. 6. §§ 3-5. An act, passed in 1826, requiring "all members of the general assembly, . . . and all officers and public functionaries, . . . and attorneys and counselors at law," to take an oath that they had taken no part in a duel since January 1, 1826, and would take no part therein during their continuance in office or in the discharge of any public function; and provided that "any attorney or counselor at law, failing or refusing to take the said oath, shall not be permitted to practice as such in any court in this state."

In *Dorsey's Case*, 7 Port. (Ala.) 293, it was held by a majority of the court that the requirement of this oath was not a constitutional method of disqualification.

"Goldthwaite, *J.* . . . If a statute excluded from office one convicted of a particular offense, and used no other term of designation, I should not hesitate to decide that the profession of a lawyer was not included within the meaning of the term as generally used, because he can no more be said to hold an office than one who pursues the profession of a physician, the avocation of a teacher, or who discharges the functions of an administrator or guardian. But if I were called on to declare that the constitution, by these express grants, has not invested the general assembly with power to exclude from the exercise of these or similar professions, I confess I should very much doubt the propriety of such a construction. The present inclination of my judgment is that those terms are sufficiently comprehensive to include all avocations, franchises, professions, or functions which are public in their nature, and which therefore may affect the constitution and well-being of society. . . . This act provides a mode of ascertaining and punishing guilt, which is . . . in direct contravention . . . of the declaration of rights. [Pages 365, 367.] . . .

"Ormond, *J.* . . . The first question . . . is whether the privilege or right to practice law is an office, within the meaning of article 6, section 8. The word 'office' has two meanings; the one popular, the other legal and technical. Thus we speak of the office of an executor, guardian, etc. The legal meaning of the term always implies 'a charge, or trust, conferred by public authority, and for a public purpose.' It is most unlikely that in framing a constitution of government its authors should have used a word of the importance of this, technical in its nature, . . . in a loose or pop-

ular sense. . . . 'Extending to disqualification from office, or the tenure thereof,' is quite conclusive of its meaning; for with no propriety of language could the tenure of an office be spoken of, unless it were an office of public trust. . . . Under the head of 'Impeachments,' we find that the governor and all civil officers shall be liable to impeachment for any misdemeanor in office. The term is general,—all civil officers,—and must embrace all persons holding an office within the purview of any constitutional regulation or restriction; yet no one, we apprehend, would contend that for malpractice, or for other good and sufficient cause, an attorney-at-law must be removed by impeachment before the senate. [Pages 371, 372.] . . . Collier, *Ch. J.* [dissenting]. . . . A license to practice law confers a mere franchise or privilege. . . . It is conditional, depending for its efficacy upon taking the oaths prescribed by law. . . . Nor does an attorney and counselor at law, as such, hold an office under the government. . . . Taking the law to have been correctly adjudged in the cases cited from 20 Johns. and 1 Munf., an attorney may be said to hold a privilege or profession. . . . Such only as are charged with the interests of the public are officers within the meaning of the constitution." Pages 392-394, 413.

In *Faulkner's Case*, 1 W. Va. 269, it was held by a majority of the court that an attorney-at-law was not an officer within the meaning of an Act of 1863, requiring "every person elected or appointed to any office" to take an oath that he had voluntarily given no aid or comfort to persons engaged in armed hostility against the United States. "Brown, *J.* . . . Whenever it was the legislative intention to embrace attorneys-at-law, they are named as such; and, when not so intended, they are not so named, and are not included by the general terms 'all officers elected or appointed.' . . . It would seem to be the settled understanding . . . that attorneys-at-law were not officers of the government, either state or national, elected or appointed, within the meaning of any of said acts relative to officers, civil or military; but, on the contrary, that they were a profession or class *sui generis*; and, though called officers of courts, yet never in the sense of these acts, nor intended to be embraced by them." Page 285.

A California statute provided that "no attorney-at-law shall be permitted to practice . . . until he shall have taken and filed" an oath "that I have not, since April 25, 1863 [the date of the passage of the act], knowingly aided, encouraged, countenanced, or assisted, nor will I hereafter in any manner aid, encourage, countenance, or assist, the so called confederate states, or any of them, in their rebellion." "It is insisted that the statute violates section 8 of article 20 of the Constitution of this state," which requires members of the legislature, and all officers, executive and judicial, "to take an oath to support the constitutions, state and federal, and to faithfully discharge the duties of their office, and provides that "no other oath, declaration, or test shall be required as a qualification for any office or public trust." "It is insisted that an attorney-at-law is an 'officer'; that the privilege

he exercises is an 'office,' within the intent and meaning of this section; and that the affidavit required by the statute in question is another and a different oath, in the nature of a test oath, imposed as a qualification for the office; and that the law therefore conflicts with the constitution. . . . To construe this section to mean that a lawyer is an officer, would directly conflict with the well-established meaning of other provisions in which the word 'officer' is used. Thus, if it is an office, it is one of profit; and an impeached officer would be disqualified from practicing the profession, under section 19 of article 4; and senators and assemblymen who should vote to regulate attorneys' fees would be excluded from practicing law by section 20; and a lawyer, admitted to practice under the laws of the United States, would be a 'person holding a lucrative office under the United States,' and would not 'be eligible to any civil office of profit under this state,' and so would be excluded from practicing in our state courts, or holding any office, by section 21, and could not be governor, under section 12, article 5. If it is an office, it is liable to become 'vacant' by death, resignation, removal from the state, or otherwise, and would be governed by section 8 of article 5 [which authorizes the governor to fill vacancies]. If it is an office, a lawyer must be a 'judicial officer,' for his duties relate mainly to courts of justice; and he has always been termed an officer of the court. He would, therefore, be precluded from receiving 'to his own use any fees or perquisites of office.' Article 6, § 15. . . . If he is an officer, he must be elected or appointed, as required by section 6 of article 11, and the duration of the office cannot exceed four years, as prescribed by section 7 of article 11. . . . Attorneys are officers of the court, and as such are subject to the control of the court before which they practice, which has power to summarily investigate the dealings and transactions between them and their clients, . . . as also to disbar them for misconduct and deprive them of the privilege of practicing their profession. The books are full of decisions in which they are termed officers in this sense. And in some cases the courts have said arguendo that they are 'public officers,' on the ground that they receive stated fees, fixed by statute, and are subject to the control of the court. . . . But none of the cases we have been referred to hold directly, as a point actually decided, . . . that they are 'officers,' or 'public officers,' within the legal meaning of those terms when used in statutes and constitutions, except *Wood's Case* in Hopk. Ch. 7, 2 L. ed. 323, which is clearly overruled by the numerous cases to the contrary. We therefore hold that an attorney-at-law is not an officer, within the meaning of that term as used in the constitution." *Cohen v. Wright*, 23 Cal. 293, 307, 314, 315, 329.

A Tennessee statute made it the duty of all courts, "at every term for two years, to call before them all the officers thereof, who shall be sworn, and have this act read or explained to them." Laws 1868, p. 19, § 5. "Although in one sense an attorney is an officer of the court, yet that he does not belong to the class of officers referred to in this section is too clear to admit of discussion. . . . The idea that

the legislature ever intended that the judges should call before them . . . all the attorneys of their respective courts, and have the acts of assembly read or explained to them, and have them sworn to disclose, as common informers, all their knowledge as to persons . . . who have been guilty of the offenses in the act commonly known as the Ku klux law, is so palpably absurd that it cannot be entertained for a moment. The language of the act plainly indicates that it was intended . . . to apply only to those persons who held offices, and who were subject to the orders of the court, but not to attorneys, who hold no office, and who are not subject to the order of the court, except in well defined instances." *Ingersoll v. Howard*, 1 Heisk. 247, 254.

In *Re Thomas*, 16 Colo. 441, 446, 447, 18 L. R. A. 538, the question arose whether a constitutional provision prohibiting the election or appointment to any civil or military office of any person except a qualified elector excluded women from the bar. "Attorneys at law," says the court, "are constantly spoken of as 'officers of the court.' The designation is not inaccurate. Their special researches and general legal knowledge enable them to aid the courts, and thus to contribute towards the due administration of justice. The office is, therefore, an important one, and the attorney incidentally performs a quasi public duty. But admission to the profession is purely a private matter, and is secured solely for the advancement of private interests. By virtue of such admission attorneys are not required to perform specific public acts, nor are specified duties devolved upon them in behalf of the general public. The duties they assume, and the labor they perform, are usually in pursuance of personal contracts with private litigants. . . . Our conclusion is that attorneys at law are not *per se* civil officers within the meaning of the constitutional phrase under consideration. . . . That instrument . . . contains nothing inconsistent with the admission of women to the bar."

A statute requiring locomotive engineers to be licensed, after examination as to competency and fitness, by a board appointed by the governor is a police regulation providing "a proper mode of preserving the safety of the traveling public and other persons whose lives may be imperiled by the negligence of ignorant and incompetent engineers. . . . Laws providing by accustomed modes for the licensing of physicians, lawyers, pilots, butchers, bakers, liquor dealers, and in fact all trades, professions, and callings, interfere with no natural rights of the citizen secured by the constitution." *McDonald v. State*, 81 Ala. 279, 60 Am. Rep. 150. The legislature may be of opinion that the public welfare requires a reasonable degree of skill and trustworthiness in physicians and lawyers, as well as in pilots, and that their business should not be carried on by persons to whom important interests cannot be safely intrusted. Statutes have authorized the selection of persons qualified for various employments, and the grant of licenses as evidence of their qualifications, and excluded all who did not obtain this evidence. Such regulations, adopted as a means of protecting the public against incapacity and

unfitness, do not necessarily transform the licensee's business into a public office in such a sense as to exclude women. A legislative purpose to introduce a sexual test, and extend the legal disabilities of women, cannot be implied from a mere requirement of a license as a certificate that the holder is competent for a specified work. If the work is such as our common law allows a woman to do, the requirement of a license is no more evidence of an intent to disqualify women than of an intent to disqualify men. "It shall not be lawful for any person to practice medicine, surgery, or midwifery, unless such person shall have obtained a license . . . stating that he is qualified in the branches of the medical profession named in said license. Every medical society . . . shall . . . elect a board of censors, . . . which board shall have authority to examine and license persons to practice medicine, surgery, or midwifery." Gen. Laws, chap. 132, §§ 1, 2. "The object of the statute is protection to the public from incompetent and unworthy physicians and surgeons. . . . Authority to examine and license as expressed in the statute, means authority to license, when, upon examination of the candidate as to his medical education, skill, and experience, the censors are satisfied that he possesses the necessary qualifications for the important and responsible occupation of a medical practitioner. . . . The license is, in effect, a certificate that the holder possesses the necessary medical and other qualifications." *Gage v. Censors of New Hampshire Electric Medical Soc.* 63 N. H. 92, 94, 56 Am. Rep. 492. "The purpose of the statute is to protect the public from the imposture and fraud of quacks and charlatans." *State v. Pennoyer*, 65 N. H. 113, 116, 5 L. R. A. 709.

The Liquor Law of 1888 (chap. 869) prohibited the sale of wine and spirits without license from the selectmen. One object of the act was "to place the trade in liquors . . . in the hands of suitable persons to be intrusted with such business." *Pierce v. State*, 13 N. H. 536, 582, 583. The Act of 1791, "regulating licensed houses," provides that no person shall exercise the business of a taverner or retailer of wines or spirits without license; and "that if the selectmen shall unreasonably neglect or refuse to license any suitable person applying therefor, such person, and suitable persons in towns and places where there are no selectmen, may apply to the court of general sessions of the peace, . . . who may, if they think proper, license such persons." One object of the statute was "to prevent improper persons from opening taverns." *Wason v. Serrance*, 2 N. H. 501, 503. The Act of 1715 (Laws 1726, p. 57; Laws 1771, p. 57) presents the distinction between a public office and a business that cannot be carried on without a license. "No person," says the act, "who is or shall be licensed to be an innholder, taverner, common victualler, or retailer, shall suffer any apprentice, servant, or negro to sit drinking in his or her house, or to have any manner of drink there, without special order or allowance of their respective master. . . . Neither shall any licensed person suffer any inhabitant of such towns where he dwells, or coming thither from any other town, to sit

drinking or tippling after ten o'clock at night in his or her house, . . . or to continue there above the space of two hours (other than travelers, persons upon business, or extraordinary occasions). . . . And no person or persons licensed as aforesaid shall suffer any person to drink to drunkenness or excess in his or her house, nor shall suffer any person as his or her guest to be and remain in such house, . . . on the Lord's day other than strangers, travelers, or such as come thither for necessary refreshments. And for the better inspecting of licensed houses, and the discovery of such persons as shall presume to sell without license, . . . the selectmen . . . shall take due care tythingmen be annually chosen at the general meeting for choice of town officers: . . . whose duty it shall be carefully to inspect all licensed houses, and to inform of" various police offenses (with power to call offenders before a justice of the peace, and to command assistance); "every of which tythingmen shall be sworn . . . to the faithful discharge of his office," and shall have "a badge of his office. . . . If any person, being duly chosen to the said office, shall refuse to take his oath, or serve therein, he shall forfeit . . . forty shillings."

The position of a licensed attorney, like that of a licensed physician or a teacher of a public school, has a certain official character directly derived from the law. "An attorney is a public officer. Admission to and expulsion from his office are regulated by law. He takes an official oath. The public is entitled to ample protection against the danger of any abuse of the great powers of the office which the public, by its agents, has conferred upon him. The legislature could not have intended to . . . require another branch of the government to continue to hold him out to the world as worthy of confidence when the holding out becomes false and fraudulent." *Delano's Case*, 58 N. H. 5, 6, 42 Am. Rep. 556; *Kimball's Case*, 64 Me. 140, 146. Women would not be barred from practicing medicine or teaching school by a statute requiring an official oath, and a certificate from a judicial tribunal holding them out as worthy of confidence and employment in those callings. Attorneys "constitute a profession essential to society. Their aid is required, not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidence which they receive, and the responsibilities which they are obliged to assume, demand not only ability of a high order, but the strictest integrity." *Randall v. Brigham*, 74 U. S. 7 Wall. 523, 540, 19 L. ed. 285, 293. "Anything that tends to lower the standard of professional acquirements among those whose duty it is to investigate and defend the rights of others is to be lamented. Every man may be a plaintiff or defendant. Every man may have a right to enforce, or an unjust claim to resist. . . . When he applies to an attorney for advice, he should have security, from the attorney's previous study of his profession, that he is reasonably competent to discharge his trust. There is no class of men whose advice in their particular calling is more generally followed than the class of attorneys. More implicit con-

fidence is reposed in them, for personal honor and devotion to their duties, than in any other persons. Secrets involving all that renders life valuable are confided to them upon the mere security and belief that they will not violate a professional confidence. Evidences of debt and of rights to property are placed in their hands, for whose return other security than their professional trust is rarely required. It is even more important for the interest of the public than of the attorneys that this high character should continue to be deserved as it has been," and that they should be mentally and morally competent to act as legal advisers and draughtsmen, and "to take charge of litigated cases in court, involving, as they do, the life, liberty, reputation, and property of so many of their fellow citizens." *Bryant's Case*, 24 N. H. 149, 153, 158.

Notwithstanding the importance and official character of an attorney's vocation, it is not generally regarded as a public office; and the question whether, in the work of his profession, he takes an official part in the government of the state, for which women are disqualified by the common law, must be determined by the nature of the employment, and not by the verbal test of his being called an officer of the court. A common carrier "is in the exercise of a sort of public office, and has public duties to perform. . . . He is bound to receive and carry all the goods offered for transportation." *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 382, 13 L. ed. 465, 482; *Sandford v. Ontawissa, W. & E. R. Co.* 24 Pa. 378, 381, 64 Am. Dec. 667. "Like an innkeeper, he holds a sort of official relation to the public. He is bound to carry at reasonable rates. . . . He cannot refuse to carry a proper article, . . . on the offer of the usual reasonable compensation. . . . When he undertakes the business of a common carrier, he assumes this relation to the public, and he is not at liberty to decline the duties and responsibilities of his place, as they are defined and fixed by law." *Moses v. Boston & M. Railroad*, 24 N. H. 71, 88, 55 Am. Dec. 222; *McDuffie v. Portland & R. Railroad*, 52 N. H. 430, 448, 18 Am. Rep. 72. "Railroads, . . . like other highways, are public." Gen. Laws, chap. 160, § 1. "Yet the officers who manage them . . . are not public officers," within the meaning of a constitutional requirement that the legislature "shall fix the term of office, and the compensation of all officers." *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24. Women are not excluded from a carrier's business by a public and official character. "Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments; whether public, as those of magistrates, or private, as of bailiffs, receivers, and the like." 2 Bl. Com. 86. "Offices . . . consist in a right, and corresponding duty, to execute a public or private trust, and to take the emoluments belonging to it." 8 Kent, Com. 454. "If a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park." Litt. Ten.

lib. 3, § 378. "In this section Littleton putteth an example of a condition in law annexed to the office of the keeper of a park, but this example must be understood with a distinction; for, if the parker doth not attend on the park one or two, etc., days, this is no forfeiture of the office of parkership; but if, in his default, any deer be killed, and so a damage to the lord, that is a forfeiture, for . . . nonuser of itself, without some special damage, is no forfeiture of private offices, but nonuser of public offices, which concern the administration of justice or the commonwealth, is of itself a cause of forfeiture." Co. Litt. 233a; *Shrewsbury's Case*, 9 Coke, 42, 50; *People v. Kingston & M. Turnp. Road Co.* 23 Wend. 193, 207, 208, 85 Am. Dec. 551. "Public offices are held upon the implied condition that the officer will . . . execute the duties belonging to them, and . . . if the officer refuses or neglects to exercise the functions of the office for so long a period as to reasonably warrant the presumption that he does not desire or intend to perform the duties of the office at all, he will be held to have abandoned it." Mechem, Pub. Off. § 485; 18 Cruise, Dig. 182. "As a city physician . . . is, by virtue of his office, a member of the board of health, which is invested with important powers to be exercised for the safety and health of the people, he is a public officer, and the title to his office can be tried by . . . a quo warranto." *Com. v. Swasey*, 183 Mass. 538, 541. "Quo warranto will lie for usurping any office, whether created by charter alone, or by the crown, with the consent of parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant, held at the will and pleasure of others." *Darley v. Queen*, 12 Clark & F. 520. "An office, such as to properly come within the legitimate scope of a quo warranto information, may be defined as a public position, to which a portion of the sovereignty of the country . . . attaches for the time being, and which is exercised for the benefit of the public." The jurisdiction covers "a great variety of offices of a public nature, both elective and appointive, whose functions partake of an executive, ministerial, legislative, or judicial character." High, Extr. Legal Rem. §§ 620, 625, 626. The professional business of an attorney has not been understood to be an office within the law of abandonment and quo warranto. "One Edward Hurst, an attorney of the town court of Canterbury, being turned out by the commissioners within the late act for corporations, moved now for a mandamus. . . . It was suggested that it is a place concerning the administration of justice. . . . The court being divided in opinion, no writ could be had." *Hurst's Case*, T. Raym. 57. "A mandamus was granted in the case of Hurst, . . . and upon the return of the writ, restitution was granted, because an attorney is not such an office of which the commissioners for corporations have a power to intermeddle." Id. 94. An attorney admitted to practice in a federal court is an officer of that court. In that sense, his position is an "office under the United States;" but it is not an "office" within the meaning of the Federal Constitution (art. 1, § 6), or the State Constitution, art. 94. He

"is not a civil, governmental, or public officer. He is not a holder of an office of public trust, within the meaning of the constitutions. . . . He is simply an officer of the court." Weeks, Attorneys at Law, 81. "Public office" is sometimes used in a broad sense, synonymous with public duty." *Henly v. Lyme*, 5 Bing. 91, was case against a municipal corporation for not repairing sea walls according to the condition of a grant to it from the king. "If a man," says Best, *Oh. J.*, "takes a reward—whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from any individual—for the discharge of a public duty, that instant he becomes a public officer; and if, by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action. If that be so, then it is quite clear that the plaintiff in this case is entitled to maintain this action." See *Folts v. Kerlin*, 105 Ind. 221, 223, 55 Am. Rep. 197. This definition does not include attorneys at-law. The obligation to render public service, which the law imposes upon common carriers, and which is one of the ordinary characteristics of public office, is not an element in the business of the legal profession. "An attorney is neither a public officer nor an officer of the court in the sense in which a prosecuting attorney, a clerk, a sheriff, or coroner is an officer. . . . In the mere practice of his profession he is not in the receipt either of a salary or fees allowed by law, but is simply engaged in a private pursuit. Consequently his particular services cannot be required without compensation." *Ex parte Harrison*, 112 Ind. 329, 333. On this point the authorities are conflicting. Cooley, Const. Lim. 406, 446. In this state an attorney is not compellable to engage in general or special practice, or to render any professional service, upon tender of compensation. "It seems like a solecism to regard that to be an office, in this country, to which there are no duties assigned" (*Com. v. Gamble*, 62 Pa. 343, 1 Am. Rep. 422), and in which an unlimited number of incumbents may remain during life, legally qualified, and amply competent in fact, but refusing every request to perform official service, without incurring censure or liability, or being guilty of official neglect. If public office is erroneously defined as including duty, the inquiry may be merely whether a license to practice law is an appointment to a place of governmental power. Whether that power is or is not necessarily accompanied by duty, a right to exercise it, in its electoral or official form, is not conferred upon women by the common law of this state.

In Rome and England and elsewhere, women have not been lawyers. The usage may have been regarded as universal law, but it is not conclusive on the question of legality. The callings followed by women have multiplied without legislation, and there are others in which they are not found, but in which they can lawfully engage. Without a statutory or common-law rule closing any branch of any profession against them, public sentiment, based on prevailing views of natural law and public policy, might be practically

equivalent to a legislative prohibition. "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things." Bradley, Swayne, and Field, *J.J.*, in *Bradwell v. Illinois*, 82 U. S. 16 Wall. 180, 141, 21 L. ed. 442, 446. Men authorized to admit women to the bar, or to practice as attorneys, might deem it inexpedient to try the experiment. In certain social conditions the legal question would not be likely to arise. Its first appearance would be expected in this age, and in this country. With a universal opinion that the practice of law is not an employment fit for women, and with such a view of consequences as was expressed in *Goodell's Case*, 39 Wis. 232, 20 Am. Rep. 42, the question in the minds of benchers and courts would be, not whether women could lawfully be admitted, but whether they could lawfully be kept out. When it was held that it could not be necessary that Mrs. Cobbett "should come into court [in behalf of her husband, who was absent and in custody] to wrangle at *nisi prius* and engage in scenes inconsistent with the character of her sex," it would not have been considered necessary or advisable that women should engage, professionally and habitually, in scenes thus described.

The principle by which the question of judicial power to grant the petition in this case is to be determined seems plain and simple, however difficult may be its application to other cases nearer the line that separates official from nonofficial employments. By our common law, women do not vote in town meeting. The reason is that voting is an exercise of governmental power. For the same reason, and by the same law, they do not hold public office. The reason of the rule does not exclude them from an occupation in which they would take no official part in the government of the country. The question is whether an attorney-at-law is an officer of government within the reason and purpose of the rule. If a licensed attorney, being a public officer in a special and limited sense, is not a public officer in the ordinary sense, and by virtue of his office takes no official part in the government, the admission of women to the bar would not be a violation of our common law. If an attorney's occupation is a public office in the governmental sense, the admission of women will be illegal until the disability is removed by the legislature. The test cannot be found in anything so indeterminate as whatever concerns the administration of justice. Nothing concerns the administration of justice more than the part taken by men and women as witnesses in the trial of civil and criminal cases. Governmental power is not exercised by their testifying truly or falsely. Neither is it exercised by an attorney in advising a client, drawing a will, deed, declaration, or plea, questioning witnesses, or arguing upon their testimony. Before appearance by attorney was allowed by acts of parliament, a person appearing as attorney for a party under a royal mandate may have been regarded as invested with a degree of official authority.

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After the passage of the Act of 1403 (4 Hen. IV. chap. 18), entitled "For Regulation of Attorneys," which required them "to be sworn well and truly to serve in their offices," there may have been little occasion to distinguish between their position as officers of the court and the position of other officials who exercised powers of government. Serjeants at law, appointed by the king, may have been considered officers in a peculiar sense. All barristers might be accounted officers by those who denied that they were agents of their clients. To what extent attorneys and counsel were understood to be government officers, and to what extent they were mere occupants of places assigned them in the social and legal ranks into which the whole community was divided, may be a question. 1 Bl. Com. 271, 272, 376, 396-408. Giving due weight to history, tradition, and usage, it does not appear that members of the New Hampshire bar are public officers in any other sense than that in which they are officers of the court. That sense is well understood, and is fully set forth and clearly defined in authorities before cited.

In determining whether an indictment shall be *not prossed* or tried, the attorney general acts for the state in business in which he is the state's agent, exercises a portion of the power of the state, and performs an official duty. The prisoner's counsel is not employed by and does not act for the same principal, exercises no governmental power, and performs no official duty due from him to the state. As adviser, draughtsman, and counsel for other parties than the state, he is the private agent of his employers. His admission to practice was not an admission to the state's service in an official or unofficial capacity. When retained by the state to bring a civil suit or prosecute an indictment, he does not become a state officer. When not retained by the state, he is not in the state's employment; and his vocation as an attorney and an officer of the court (a public officer, in the special and limited sense explained by the authorities), with no power or duty of a governmental nature, is not a public office, within the meaning and reason of the common-law rule which excludes women from government by withholding electoral and official power. Their exclusion from the exercise of legislative, executive, and judicial authority does not prevent their being licensed to practice as physicians or attorneys.

When the attorney-general employs counsel in a state case (Gen. Laws, chap. 263, § 2), there is a distinction between the position of the public prosecutor, who acts in his official capacity, and the position of the attorney, who renders service in pursuance of a contract. In every branch of the government illegal attempts may be made, by contract or license, to delegate official power to disqualified persons, minors, women, and aliens, and to adult male citizens. *State v. Hayes*, 61 N. H. 323-329. The inconvenience that may arise from this practice, and the difficulty (in some cases) of finding the line between official and non-official employment, are not a ground on which the existence or the necessity of the line can be denied, or on which it can be held that a

woman cannot legally act as an amanuensis in drawing an indictment, or as an attorney in a civil or criminal case.

When the petitioner furnishes the evidence required by the rules, the question of her admis-

sion to examination (or admission to practice without examination, as a person who has been admitted and has practiced in another state) will be considered.

All concurred.

DISTRICT OF COLUMBIA SUPREME COURT, GENERAL TERM.

James L. BARBOUR, *Appt.*,

v.

Laurence HICKEY *et al.*

(.....D. C.....)

1. An unexplained delay of two years before filing a bill for specific performance of a contract to convey improved city property, upon which the price has not been paid, will defeat the relief sought.

3. The tender of the whole amount of purchase money before it was due, under a contract by which part was to be paid in

interest bearing notes, is not a proper tender of performance of the contract.

3. A certified check is not properly tendered instead of money.

4. Specific performance cannot be ordered of a contract for the sale of land made by a man whose wife did not join in it, and who refused to execute the conveyance; nor can the husband alone be compelled to execute it, with a deduction from the purchase price of the value of her dower interest, as this changes the contract.

(January 11, 1894.)

NOTE.—Specific performance of contracts for conveyance where wife refuses to unite in the conveyance.

Specific performance against wife on contract of husband.

Specific performance of a contract by a husband in regard to the homestead will not be enforced as against the wife. *Leonard v. Crane*, 147 Ill. 52; *Yost v. De Vault*, 9 Iowa, 60; *Conboy v. Kansas City & S. R. Co.* 42 Kan. 658; *Bird v. Logan*, 35 Kan. 223.

So she will not be compelled to release dower in land where the husband has made a contract of sale. *Hall v. Hall*, 125 Ill. 96; *Wiswall v. Hall*, 3 Paige, 313, 3 L. ed. 168; *Richmond v. Robinson*, 12 Mich. 183; *Kelsey v. Crowther*, 7 Utah, 519; *Buchoz v. Walker*, 19 Mich. 224; *Hanna v. Phillips*, 1 Grant, Cas. 253; *Schoonmaker v. Bonnie*, 119 N. Y. 665, modifying 43 Hun, 634.

And the same was stated in *Kiddlesberger v. Menzer*, 7 Watts, 142, but was not the question involved.

These cases fully sustain the position in the main case of *BARBOUR v. HICKEY*.

And the wife will not be required to specifically perform a contract made by the husband in regard to executing a conveyance of her lands. *Graybill v. Brugh*, 21 L. R. A. 133, 89 Va. 895; *Welsh v. Bayard*, 21 N. J. Eq. 146; *Wooden v. Morris*, 3 N. J. Eq. 65; *Hennessey v. Woolworth*, 128 U. S. 435, 32 L. ed. 500; *Williams v. Christie*, 4 Duer, 29; *Bryan v. Woolley*, 1 Bro. P. C. 184; *Daniel v. Adams*, Amb. 495; *Squire v. Harder*, 1 Paige, 494, 2 L. ed. 728, 19 Am. Dec. 446; *Rogers v. Brooks*, 30 Ark. 612; *Beaver v. Trittip*, 24 Ind. 41.

And compromise of contested will made by her husband and attorney affecting her estate will not bind her. *Nichols v. Jones*, L. R. 3 Eq. 696, 36 L. J. Ch. 564, 15 L. T. N. S. 833.

So where a husband made an exchange of lands, but contracted that she should assume payments on that conveyed to her it would not be specifically enforced. *Musgrove v. Hodges*, 46 Kan. 764.

So where the husband made mutual partition, it would not be enforced as against the wife, but as she came into court and then consented a decree was ordered. *Ireland v. Rittie*, 1 Atk. 542.

See "Enforceable contracts," *infra*.

Specific performance against wife on contract of husband and wife.

And specific performance by wife will not be 24 L. R. A.

decreed on a contract by husband and wife to convey her property. *Mitchell*, 2 Jac. & W. 425; *Hogan v. Hogan*, 89 Ill. 427; *Spurck v. Crook*, 19 Ill. 415; *Butler v. Buckingham*, 5 Day, 432, 5 Am. Dec. 174; *Knowles v. McCamy*, 10 Paige, 342, 4 L. ed. 1008; *Starbuck v. Hynod*, 1 Ohio L. Bull. 140.

So where the contract is to convey lands. *Long v. Brown*, 66 Ind. 160.

And in *Gardner v. Moore*, 75 Ala. 394, 51 Am. Rep. 454, it was stated that specific performance of a contract by a married woman's husband, to convey, would not be enforced where her power to convey is derived from the statute.

And a court of equity refused to enforce a contract by a husband and wife to levy a fine to the use of the purchaser, but decreed that the husband must refund the money. *Otread v. Round*, 4 Vin. Abr. 203.

So a deed incomplete from defective acknowledgment or want of delivery will not be enforced as a contract to convey. *Jenkins v. Harrison*, 66 Ala. 345; *Martin v. Dwelly*, 6 Wend. 9, 21 Am. Rep. 245; *Carr v. Williams*, 10 Ohio, 805, 36 Am. Dec. 87; *Miller v. Hine*, 13 Ohio St. 665; *Carney v. Hopple*, 17 Ohio St. 38; *Leland's App.* 13 Pa. 84.

And in *Moseby v. Parree*, 5 Helsk. 26, it was stated that a married woman could not join with her husband in executing a penal bond that would be binding on her on her failure to execute a deed in fee simple with covenants of warranty.

See also "Enforceable contracts," *infra*.

Specific performance against wife on contract of wife.

A contract by a married woman for the conveyance of her real estate will not be specifically enforced against her, where it is not executed with all the requirements of a conveyance under the statute. *Watrous v. Chalker*, 7 Conn. 224; *Jackson v. Torrence*, 88 Cal. 321; *Blythe v. Darkin*, 68 Ala. 370; *Pilcher v. Smith*, 2 Head, 204; *Avery v. Griffin*, L. R. 6 Eq. 606; *Steffey v. Steffey*, 19 Md. 5; *Ogleby Coal Co. v. Pasco*, 79 Ill. 164; *Jones v. Goff*, 63 Tex. 245.

So a deed not executed according to the statute will not be specifically enforced as a contract to convey. *Townslay v. Chapin*, 12 Allen, 476; *Moulton v. Hurd*, 20 Ill. 137, 71 Am. Dec. 257.

So a contract by a wife to make a lease will not be specifically enforced. *Aylett v. Ashton*, 1 Myl. & C. 105, 5 L. J. Ch. N. S. 71.

And where a married woman made a mistake as

APPEAL by complainant from a decree of the Special Term sustaining a demurrer to and dismissing the bill in a suit brought to compel specific performance of a contract for the sale of real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Carusi & Miller, for appellants:

The title being in equity vested by the agreement in complainant as assigns of Holmes, he has a right to have a decree compelling Laurence Hickey to convey the property to him, and if his wife will not join in the deed, the value of her inchoate dower right should be ascertained and deducted from the amount of purchase money.

Complainant shows his willingness to take the property and his ability to comply with the terms of sale, and asks that defendant Laurence Hickey convey the property to him, deducting from the purchase money the value of the inchoate dower of Mrs. Hickey.

Martin v. Merritt, 57 Ind. 84, 26 Am. Rep. 45; *Wright v. Young*, 6 Wis. 125, 60 Am. Dec. 458.

to the effect in law of title in a piece of property and on finding that it was affected by a bond of tutorship resulting in a mortgage which she could not cancel, the court refused to compel her to convey the same, as under Civil Code, article 1822 and article 1819, she was entitled to relief from mistake. *Wilberding v. Maher*, 35 La. Ann. 1182.

See next subhead.

Contracts that are enforceable against her and her husband.

Contracts made by wife and husband where possession has been delivered will be specifically enforced. *Clayton v. Frazier*, 38 Tex. 91; *Perrine v. Mayberry*, 37 Kan. 258; *Edwards v. Fry*, 9 Kan. 417.

In Kansas the contracts of a married woman are the same as those of a single woman, but it requires joint consent of husband and wife to convey the homestead, and possession was considered joint consent in *Edwards v. Fry*, *supra*.

So where possession was delivered to a purchaser and improvements were made and money paid, and the wife refused to convey, the purchaser was allowed a lien on the land for the money paid and improvements less the value of the use. *Frarey v. Wheeler*, 4 Or. 190.

So where the complaint against husband and wife to compel specific performance of a contract to convey does not show whether it was acknowledged according to the statute so as to be binding, it will be presumed that it was so acknowledged and support a decree for specific performance. *Banbury v. Arnold*, 91 Cal. 608.

And where a married woman executes a contract in regard to real estate according to the statutory mode of contracting for a conveyance it will be specifically enforced against her, or her vendee with notice. *Kingsley v. Gilman*, 15 Minn. 50; *Union Brick & Tile Mfg. Co. v. Lorillard*, 44 N. J. Eq. 1; *Baker v. Hathaway*, 5 Allen, 108; *Dankel v. Hunter*, 61 Pa. 332, 100 Am. Dec. 651; *Gilbert v. Sleeper*, 71 Cal. 290.

And a married woman will be required to convey land for which she makes an ante-nuptial contract, or which she contracts to convey and then marries. *Carpenter v. Carpenter*, 40 Hun. 263; *Newby v. Hinshaw*, 22 Ind. 334; *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624.

So where a wife obtained a decree of specific performance of an ante-nuptial settlement and her husband died, his children might enforce such de-

The rule for calculating the value of an inchoate right of dower is laid down in *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 308.

Where the defendant Hickey repudiates the sale, or it is apparent from the facts and circumstances that the money would be refused, it is not necessary to make a tender according to the terms of the contract; besides, in this case, the defendant waived the tender by declining to execute the deed.

Hinckley v. Pittsburgh Bessemer Steel Co. 121 U. S. 264, 80 L. ed. 967; *Martin v. Merritt*, 57 Ind. 85, 26 Am. Rep. 45; *Brown v. Euton*, 21 Minn. 409; *Mattocks v. Young*, 66 Me. 459; *Crary v. Smith*, 2 N. Y. 60; *Wright v. Young*, 6 Wis. 127, 60 Am. Dec. 458; *Selon v. Blade*, 3 White & Tudor, Eq. Cas. 76; *Gibbs v. Champion*, 8 Ohio, 387.

Even if complainant did not offer to comply with contracts as to the purchase money, yet the benefit of the objection may be waived by the conduct of the parties, as was done in this case by defendant putting his refusal solely on the ground that his wife would not consent to the sale.

oree against her, as she is bound by such election. *Barrow v. Barrow*, 4 Kay & J. 408, 4 Jur. N. S. 1028.

So where a trustee refused to convey for an association and died specific performance was decreed against his heirs. *Vaughan v. Barclay*, 6 Whart. 322.

But after this decree it was found that the trust had descended to all the children equally, and one of the heirs, a *feme covert*, refusing to acknowledge her signature to the deed as being voluntary specific performance was decreed. *Dundas v. Bidle*, 2 Pa. 160.

And where a purchaser of land caused the same to be conveyed to a married woman, under an agreement with her husband that on repayment of the purchase money he would cause the land to be conveyed to the purchaser, who took possession and made improvements, it may be enforced against the wife who is held to be only a naked trustee. *Bush v. Cella*, 63 Ark. 378.

And where a married woman bought land at judicial sale and agreed to convey the same to a party who paid the purchase money, he was allowed a lien for the same. *Moore v. Ligon*, 30 W. Va. 144.

So where a woman has the right of a *feme sole* and agrees to make a mortgage receiving a valuable consideration, equity will enforce specific performance. *Stead v. Nelson*, 2 Beav. 245, 9 L. J. Ch. N. S. 18, 3 Jur. 1046.

And where she ratifies her husband's agreement to execute a mortgage, to take up another, by paying the fees for obtaining discharge and record of same, she will be required to specifically perform the same. *Dort v. Nicken* (N. Y.), Oct. 27, 1891.

And in *Dreutzer v. Lawrence*, 56 Wis. 594, a contract by husband and wife for the sale of land owned jointly by them was specifically enforced against both, on the ground that under the statute which gives her full control of real estate which she owns in her own right, her contract in regard to such lands will be enforced as though she were unmarried.

Specific performance against husband where wife refuses to unite in conveyance.

As to how far courts will enforce contracts for conveyance against husbands where the wife refuses to join there is some conflict of decisions, some courts holding that a contract by a husband to convey the homestead will be specifically enforced.

Webb v. Hughes, L. R. 10 Eq. 281; *Wells v. Maxwell*, 82 Beav. 408.

The property has not enhanced in value,—and the circumstances of the parties to the contract are the same,—hence we claim specific performance will be decreed.

Tiernan v. Roland, 15 Pa. 429; *McKay v. Carrington*, 1 McLean, 50.

Where the contract is unobjectionable (as to sale of real estate) it is as much a matter of course for a court of equity to decree specific performance, as it is for a court of law to give damages for a breach of it.

Smoot v. Ren, 19 Md. 898.

Messrs. Riddle & Davis, for appellees:

The enforcement of a specific performance is not a matter *ex debito iustitia*; "the party seeking its execution must show that he has fully, not partially, performed everything to be done on his part.

O'Brien v. Fentz, 48 Md. 562.

The vendee must make a tender and pay the money into court.

Doyle v. Teas, 5 Ill. 202; *Bradford v. Foster*, 87 Tenn. 4.

In many of the states a wife must execute a

contract with the formality of her deed to warrant such a decree against her. Her signature without this is not sufficient.

Knowles v. McCamly, 10 Paige, 342, 4 L. ed. 1008.

Equity will not require a husband to procure his wife to convey.

2 Story, Eq. §§ 731-735; *Emery v. Wase*, 8 Vea. Jr. 514.

Equity will not decree indemnity against a husband for nonconveyance of his wife.

Clark v. Scirer, 7 Watts, 107, 32 Am. Dec. 745; *Hepburn v. Auld*, 9 U. S. 5 Cranch, 242, 8 L. ed. 96; *Maughlin v. Perry*, 35 Md. 352.

There was a decree, for performance by husband, without indemnity in,—

Fraharty v. Blake (N. J. Eq.) July 2, 1887; *Blake v. Flatley*, 44 N. J. Eq. 228. See also *Reilly v. Smith*, 25 N. J. Eq. 153; *Lawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Lucas v. Scott*, 41 Ohio St. 686; *Weed v. Terry*, 2 Dougl. (Mich.) 844, 45 Am. Dec. 257; *Richmond v. Robinson*, 12 Mich. 193; *Cairncross v. McGrann*, 87 Minn. 120; *Musgrove v. Hodges*, 46 Kan. 764.

A vendee desiring a conveyance from a wife

oed after the death of the wife or the removal of the family from that land. *Allison v. Shilling*, 27 Tex. 450, 88 Am. Dec. 622; *Brewer v. Wall*, 23 Tex. 585, 78 Am. Dec. 76.

And will be enforced as against all land over and above the homestead amount. *Hotchkiss v. Brooks*, 36 Ill. 386; *Watson v. Doyle*, 130 Ill. 415.

And equity will decree husband to convey his own interest in land, where he contracts to convey. *Edrington v. Harper*, 2 J. J. Marsh. 363, 20 Am. Dec. 145.

But will not compel the husband to coerce his wife to surrender dower. *Ibid.*

And where a father agreed to convey to his son but conveyed to his wife through a third party, and then died, the widow was compelled to convey her husband's title subject to her dower. *Jefferson v. Jefferson*, 96 Ill. 551.

And where a husband holds land as trustee for his wife and at her request sells the same to a stranger, specific performance was decreed as it was unnecessary for her to join in the deed and the husband will be compelled to convey. *Rostetter v. Grant*, 18 Ohio St. 123.

But specific performance of contract by husband to convey the homestead will not be specifically enforced where the wife refuses to unite in the conveyance. *Barnett v. Mendenhall*, 42 Iowa, 296; *Phillips v. Stauch*, 20 Mich. 389; *Moses v. McClain*, 68 Ala. 370.

These cases hold that under the statutes contracts for conveyance of the homestead are invalid if not executed by husband and wife according to the statute.

And specific performance by husband alone on a contract for conveyance of lands was denied where complainant was guilty of delay and laches. *Ford v. Euker*, 36 Va. 75; *Peters v. Delaplaine*, 49 N. Y. 362.

And where the parties did not contemplate a sale subject to wife's dower, specific performance by the husband will be refused. *Dunsmore v. Lyle*, 67 Va. 391.

In *Stevens v. Parish*, 29 Ind. 200, 95 Am. Dec. 636, it was stated that neither the husband nor wife would be compelled to join in a conveyance on a contract where both did not join.

But where husband had the reversion in fee with life estate in wife, and the husband received the purchase money and died, the purchaser was entitled to a L. R. A.

tled to specific performance as to the reversion in fee. *Barker v. Cox*, L. R. 4 Ch. Div. 444, 46 L. J. Ch. 62, 35 L. T. N. S. 632, 25 Week. Rep. 133.

Specific performance by husband with abatement for deficiency in title.

Many courts hold that a husband will be compelled to convey such title as he can give, allowing the purchaser an abatement of the price for damages in not obtaining the wife's joinder in the deed. *Woodbury v. Luddy*, 14 Allen, 1, 32 Am. Dec. 731; *Wingate v. Hamilton*, 7 Ind. 73; *Hazlerig v. Hutson*, 18 Ind. 481; *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45; *Troutman v. Gowing*, 16 Iowa, 415; *Leach v. Forney*, 21 Iowa, 271, 39 Am. Dec. 574; *Presser v. Hildenbrand*, 23 Iowa, 433; *Zebley v. Sears*, 38 Iowa, 507; *Park v. Johnson*, 4 Allen, 259; *Davis v. Parker*, 14 Allen, 94; *Walker v. Kelly*, 91 Mich. 212; *Sanborn v. Nookin*, 20 Minn. 178; *Wright v. Young*, 6 Wis. 137, 70 Am. Dec. 453; *Springlie v. Shields*, 17 Ala. 295; *Young v. Paul*, 10 N. J. Eq. 401, 64 Am. Dec. 456; *Barnes v. Wood*, L. R. 8 Eq. 424, 38 L. J. Ch. 683, 17 Week. Rep. 1080, 21 L. T. N. S. 227.

And the same was stated in *Shaw v. Vincent*, 64 N. C. 690, but held that such an equity could not be applied in a court of law.

Other courts hold that a decree will not be granted compelling the husband to convey subject to the right of his wife and deducting damages for her refusal to join in the deed, holding with the main case that this would be making a new contract. *McCann v. Jones*, 1 Rob. (Va.) 256; *Clarke v. Reins*, 12 Gratt. 98; *Burk's App.* 75 Pa. 141, 15 Am. Rep. 587; *Rieser's App.* 73 Pa. 485; *Clark v. Seirer*, 7 Watts, 107, 32 Am. Dec. 745; *Ross v. Lockwood*, 59 Hun, 181; *Martin v. Colby*, 42 Hun, 1.

So where an exchange of lands was agreed upon and no cash value was placed on either tract, specific performance with deduction for wife's right of dower was refused. *Sternberger v. McGovern*, 56 N. Y. 12.

So where the complainant was not willing to accept the title without the wife joining, the court would not compel the defendant to indemnify the complainant. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613.

And where the husband would have refused to agree to convey with release of dower by his wife and this was known to the purchaser, specific performance with an abatement for her interest was refused. *Lucas v. Scott*, 41 Ohio St. 686.

must contract with her with forms that bind her and her heirs at-law. A court will not enforce a husband's covenant that his wife shall convey, nor indemnify the vendee for her refusal. He may take the husband's deed, or an action against him at law—his only remedies.

Rice's App. 78 Pa. 485; *Burk's App.* 75 Pa. 141, 15 Am. Rep. 587; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485; *Peeler v. Levy*, 26 N. J. Eq. 820; *Jackson v. Torrence*, 88 Cal. 521.

Alvey, Ch. J., delivered the opinion of the court:

The plaintiff in this case, as assignee of a contract for the sale of certain real estate, situated in the city of Washington, has filed this bill against the defendants to procure a decree for specific performance of the contract. The contract is in writing, and bears date the 15th of September, 1888. By this contract the defendant, Laurence Hickey, agreed to sell the property to the defendant, James O. Holmes, and the latter, on the 17th of September, 1888, assigned the contract to the

plaintiff. In fact, Holmes acted as the agent of the plaintiff in making the purchase, though the fact was not disclosed to the defendant Hickey until some time after the contract was made. The bill was filed on the 6th of December, 1890, against Hickey and his wife, though the wife was not a party to the contract. A decree is prayed against both husband and wife, that they be required to join in the execution of a deed for the property to the plaintiff. Holmes is also made a defendant to the bill. Hickey and wife severally demurred to the bill, and the demurrers were sustained and the bill dismissed. And in thus disposing of the case we think the court below has committed no error.

By the terms of the contract, the two lots, Nos. 16 and 17, in Square No. 536, were agreed to be sold by the defendant Laurence Hickey to Holmes for the sum of \$5500, and the sum of \$100 was paid at the time as part of the purchase money. The title to the property was to be perfect, or otherwise the \$100 deposit was to be returned. It was also

And the same was held where the purchaser never believed that he could have purchased the fee. *Castle v. Wilkinson*, L. R. 5 Ch. 584, 59 L. J. Ch. 843, 18 Week. Rep. 586.

And so it is held that the purchaser can only require the vendor to convey without deducting damages for refusal of wife to unite. *Dixon v. Rice*, 16 Hun, 422; *Flaharty v. Blake* (N. J.) July 2, 1887; *Bonnet v. Babbage*, 19 N. Y. Supp. 984; *Reilly v. Smith*, 25 N. J. Eq. 158.

Requiring husband to obtain his wife's signature.

A husband will not be compelled to obtain his wife's signature to his conveyance. *Weed v. Terry*, 2 Doug. (Mich.) 344, 45 Am. Dec. 237; *Martin v. Mitchell*, 2 Jac. & W. 425; *Howell v. George*, 1 Madd. 18; *Peeler v. Levy*, 26 N. J. Eq. 330; *Daniel v. Adams*, Ambl. 495.

And in *Frederick v. Coxwell*, 3 Younge & J. 514; *Fisher v. Worrall*, 5 Watts & S. 478; and *Weller v. Weyand*, 2 Grant, Cas. 105,—it was stated that a vendor would not be required to procure his wife to join in his deed.

And in *Davis v. Jones*, 4 Bos. & P. 267, *Lord Mansfield* said: "Nothing can be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued and thrown into goal, when the general principle of law is that a married woman shall not be compelled to levy a fine."

Formerly it was held that the husband must procure his wife's joinder. *Hall v. Hardy*, 3 P. Wms. 186; *Withers v. Pinchard*, cited in 7 Ves. Jr. 475; *Barrington v. Horn*, 2 Eq. Cas. Abr. 17.

So in *Berry v. Wade*, Finch, 180, although counsel for plaintiff agreed that a plea that the wife was a joint owner and not a party to an award on a contract to exchange land, but the court ordered defendant to convey according to his agreement.

And in *Stephenson v. Morris*, 7 Ves. Jr. 474, the defendant was decreed to obtain his wife's joinder in a surrender of copyhold, but he did not allege inability to procure her joinder.

And while in *Sedgwick v. Hargrave*, 2 Ves. Sr. 57, it was said that the court will not make a personal decree on the wife where the husband and wife contract, yet the husband was decreed to convey and procure his wife's joinder or refund the money.

And in *Hulmes v. Thorpe*, 5 N. J. Eq. 415, it was stated that a wife would not be decreed to convey, but as she had twice acknowledged a deed she 24 L. R. A.

had shown such consent that she might be ordered to give a deed, but the safer way would be to order the delivery of the deed that had been already executed.

Mutuality; enforcing contracts against vendee.

It is generally held that where contracts are not enforceable by the vendee, on account of the wife of the vendor not being compelled to convey, the vendor cannot enforce specific performance of such contract. *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 206; *Williams v. Graves* (Tex.) May 2, 1894; *Shenandoah Valley R. Co. v. Dunlap*, 88 Va. 346; *Luse v. Deitz*, 46 Iowa, 205; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Ten Eyck v. Manning* (N. J.) Nov. 10, 1893; *Harris v. Mott*, 10 Beav. 169, 15 Jur. 978.

So where the married woman had refused for years to perform the contract for conveyance she and her husband cannot thereafter obtain a decree for specific performance. *Holgate v. Eaton*, 116 U. S. 33, 29 L. ed. 538.

And in *Richards v. Doyle*, 36 Ohio St. 41, 38 Am. Rep. 550, it was stated that such a contract as is not mutually enforceable will not be decreed to be specifically performed.

But where the contract is binding on the husband and wife it will be specifically enforced against the purchaser. *Newberry v. Slaffer*, 96 Mich. 468; *Van Allen v. Humphrey*, 15 Barb. 556.

And where the wife has fully performed her part and the purchaser is in possession, he cannot object to want of mutuality in a suit by the vendors for specific performance. *Seager v. Burns*, 4 Minn. 141.

And in *Fennelly v. Anderson*, 1 Ir. Ch. Rep. 706, it was held that a husband and wife may maintain a suit for specific performance of an agreement by them with a third party for the sale to him of lands of which the husband is seized in right of his wife.

This case admits that the law has changed in regard to the purchaser obtaining specific performance and that he could not, but bases the decision on statements made by counsel in arguments in other cases, and that pending this negotiation the married woman might have validated the contract by acknowledging it under Statute 4 & 5 Wm. IV. chap. 92, and refuses to dismiss the petition on the ground of want of mutuality.

Cases in regard to reformation of deeds have been omitted from this note. I. T.

agreed that the terms of sale should be complied with within twenty days from the date of the contract, and thereupon the property was to be deeded to Holmes or his assigns. Twenty-five hundred dollars of the purchase money were to be paid in cash, and the balance to be paid in three notes of \$1000 each, bearing six per cent interest, payable in one, two, and three years from date respectively.

The plaintiff alleges in his bill that on the 5th day of October, 1888, after the contract had been assigned to him, and within the twenty days for the performance of the contract, he called on the defendant, Laurence Hickey, and tendered him in cash, in the form of a certified check by one of the banks of the City of Washington, \$5,400, which, with the \$100 paid at the date of the contract made the sum of \$5,500, the full amount of the purchase money; and, at the same time, tendered the draft of a deed for the property in fee-simple, to be executed by said Hickey and his wife. But, as it is alleged, the defendant, Laurence Hickey, refused to accept the amount so tendered him, or to examine and execute the deed, on the ground, as stated by him, that his wife was not willing to sell and convey the property to the plaintiff, and, therefore she declined to become a party to the deed.

The plaintiff then alleges that he has always been ready and willing, and is still ready and willing, and tenders himself ready to perform the agreement on his part, upon having a conveyance made to him for the property in fee simple by Hickey and wife, discharged of any incumbrance thereon, and the dower right in the same, held by the wife; but that the defendant Laurence Hickey has refused, and does still refuse, to perform the agreement on his part, under pretence that he is unable to convey the property free of dower, for the reason alleged by him that his wife will not join him in the deed.

The bill then alleges that although the wife will not join her husband in the deed, yet the plaintiff is ready and willing to take a deed of conveyance in fee simple of the property from the husband alone, subject to the contingent right of dower in the wife, at the price stated in the agreement, less whatever may be the reasonable value of said contingent right of dower in the property. The plaintiff also claims to be reimbursed for expenditures made by him, in having the title to the property examined and the deed prepared.

The prayer of the bill is that the defendants Hickey and wife be compelled by a decree to execute, acknowledge, and deliver to the plaintiff a deed in due form of law, conveying the property free of all incumbrances, upon the plaintiff paying the purchase money mentioned in the contract. Or that a decree be passed requiring the defendant Hickey to convey to the plaintiff, subject to the contingent right of dower of the wife in the property, a good fee simple title, by a proper deed therefor, first deducting the value of such contingent right of dower of the wife in the property from the amount of purchase money stipulated to be paid. There is also a prayer for general relief.

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There are several grounds upon which the court below was well justified in sustaining the demurrers and dismissing the bill.

A party coming to a court of equity for specific performance must show that there is equity and good conscience in support of his claim to relief, and that his application is made within reasonable time, in view of all the circumstances of the case. In this case the bill was not filed until after the lapse of more than two years from the time the defendant Hickey refused to receive the money and execute the deed. This was undue delay under the circumstances of the case, and there is nothing shown in the bill to justify the delay. The lots of ground were improved by buildings thereon, and they require the expenditure of money to keep them in repairs, and to keep up insurance; and the salable value of the property was liable to constant change and fluctuation; and where the purchase money has not been paid, the motive for enforcing the contract or not enforcing it specifically may largely depend upon such change in value.

Apart, however, from the objection of delay in making the application, there was no proper tender of performance of the contract on the part of the plaintiff, such as was required by the terms of the contract itself. The tender of the whole amount of the purchase money within the twenty days was not what was contemplated by the contract. By the terms of the contract, the defendant Hickey was entitled to receive in cash \$2,500 of the purchase money, and the balance in three notes, at one, two and three years, to bear interest at the rate of six per cent. This investment of a portion of the purchase money may have been a very material consideration with the defendant Hickey, inducing him to enter into the contract of sale. Clearly, the plaintiff had no right to require the defendant to forego his right to receive the notes, according to the terms of the agreement. Nor had the plaintiff a right to require the defendant to receive a certified check instead of money. Before the plaintiff could rightfully demand performance on the part of the defendant, he should have tendered strict performance on his own part.

But there is more substantial ground shown for sustaining the demurrers than those to which we have referred; and that is the want of right in the plaintiff to require the defendant Hickey to procure the joinder of his wife in the conveyance of the property, or to submit to a modification of the contract, and to have the contract specifically executed as modified. The question here presented is one that has been variously decided, both in England and in this country. Indeed, it has been a perplexing question to the court; but the great weight of authority of the present day would seem clearly to be against the attempt of a court of equity to compel a husband to procure the joinder of his wife in a conveyance with him, against her will, at the peril of his being imprisoned for contempt of court for nonexecution of the decree. For such a decree would seem clearly to contravene both the letter and the policy of the statute, which requires that, in order to give

effect to a conveyance of the estate of the wife, or to bar her right of dower in the estate of her husband, she shall, apart from her husband, declare that she executes and acknowledges the deed willingly and freely. U. S. Rev. Stat. relating to District of Columbia, secs. 450, 451. But how is this to be accomplished if the wife is unwilling to execute the deed, or to make the acknowledgment required by the statute? The husband ought not to be put in a position by a court of equity to tempt him to coerce his wife to join him in a deed, nor ought the wife, especially where she is not a party to the contract, to be put to the alternative of either executing and acknowledging the deed, or of allowing her husband to be committed to prison for contempt of court because of the noncompliance with the decree for specific performance.

In the view of and according to the opinion of some of the ablest and most distinguished chancellors and writers on equity jurisprudence, a decree for specific performance against the husband in such case ought not to be made.

This was the opinion of *Lord Chancellor Cowper*, *Lord Chancellor B. Gilbert*, *Lord Eldon* and *Sir Thomas Plumer*, as shown by *Chancellor Kent*, in the second volume of his *Commentaries*, p. 169; and the learned American chancellor and commentator leaves no doubt of his own opinion upon the subject as being strongly opposed to decreeing specific performance in such cases.

In 2 Story on Equity Jurisprudence, §§ 781, 782, the subject is treated by the author with great clearness and force. After stating that there have been many cases in which agreements and covenants of this sort have been decreed to be specifically performed, the author proceeds to say that the reason for such decrees is said to be because, in such cases, it is to be presumed that the husband, when he enters into such a covenant, has first gained the wife's consent for that purpose. "But," continues the learned jurist, "this reason is a very insufficient one for so strong a doctrine; for it may be a presumption entirely against the fact; and, if correct at the time, the wife may have subsequently withdrawn her consent, and refused, upon very proper grounds, to comply with the covenant. Let us suppose a case in which, either there has been no consent, or it has been thus

withdrawn; it may then be asked, and indeed, it has been asked, with the earnestness of great doubt, whether, if it is impossible for the husband to procure the concurrence of his wife in such a proceeding, a court of equity, acting according to conscience, will decree the husband to perform what it is morally impossible for him to perform? It seems difficult to maintain the affirmative especially as a full compensation may generally be obtained by returning the money with interest and damages. But there is a stronger ground, upon which the propriety of the doctrine may well be contested. It is the impolicy of endeavoring to compel the husband to use undue influence, and unjustifiable means, inconsistent with the harmony, peace, and confidence of conjugal life, to obtain such a surrender of the rights of the wife. It is offering to him a premium to be ungenerous, as well as unjust, and separating his interest, as well his good faith from hers."

It is insisted, however, that if the wife cannot be required to join with her husband in the making of the deed, a decree should be made against the husband, requiring him to convey, and that he should suffer an abatement of the purchase money to an amount equivalent to the value of the contingent right of dower of the wife in the property. But to do this would be simply modifying the contract, and decreeing its specific performance as modified. To ascertain the value of such contingent right of dower would necessarily involve a controverted question of fact—a question that would likely elicit a variety of opinion and judgment; and when determined it would not be the agreement of the parties but would be a distinct term introduced into the contract by the court. Such method of dealing with the contract is not consistent with the equitable doctrine of specific performance. The court should either execute the contract as made by the parties, or decline the exercise of the jurisdiction altogether. Upon this subject we refer to the opinion of *Chief Justice Gibson*, in the case of *Clark v. Seirens*, 7 Watts, 107, 83 Am. Dec. 745. The remedy at law is adequate, and the plaintiff must be remitted to that remedy if he desires redress.

It follows that the decree of the court below dismissing the bill must be affirmed, with costs to the appellees.

Decree affirmed.

INDIANA SUPREME COURT.

James E. CHAMPER, *Appt.*,

v.

City of GREENCASTLE.

(....Ind.....)

1. The reasonableness of an ordinance is open to judicial inquiry, when it is

passed in the exercise of general authority to legislate on the subject without prescribing the mode of its exercise.

2. General power to license and regulate places for the sale of liquor does not prevent judicial inquiry as to the reasonableness of an ordinance prohibiting the use of blinds, screens, etc., in such places.

NOTE.—Municipal power to prohibit screens in bar-rooms.

CHAMPER v. GREENCASTLE appears to be the leading case upon this question.

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In *Shultz v. Cambridge*, 88 Ohio St. 659, blinds, screens, curtains, shades, etc., were prohibited under power to regulate ale, beer, and porter houses or shops, and the question arose whether or not a

3. An ordinance prohibiting the use of screens, blinds, stained glass, etc., or anything that will obstruct the view of the interior of saloons is not authorized by a mere general authority to license and regulate saloons and is therefore invalid.

(October 31, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Putnam County in favor of plaintiff in an action brought to recover the penalty for the alleged violation of a city ordinance requiring the removal of screens from the front part of saloons. *Reversed.*

The facts are stated in the opinion.

Messrs. P. O. Colliver and C. C. Matson for appellant.

Mr. Thomas T. Moore, for appellee:

Many things are universally regarded and recognized as the proper subjects of police regulations; chief among which is the liquor business.

Tiedeman, Pol. Powers, p. 275; *Schwuchow v. Chicago*, 68 Ill. 444; *Black, Intoxicating Liquors*, p. 114, § 82; *Re Wilson*, 82 Minn. 145.

Laws in relation thereto are upheld by the courts as not infringing the constitutional rights of the individual, as the same are construed by the courts.

Tiedeman, Pol. Powers, p. 810; *Schwuchow v. Chicago, supra*; *Black, Intoxicating Liquors*, p. 114.

Even the total prohibition of the traffic in intoxicants is within the police power.

Tiedeman, Pol. Powers, p. 804, and *note 1*, and 807 *note 1*, 810, 811; *Black, Intoxicating Liquors*, pp. 48, 49, and *notes*, p. 113; *Barlemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 919.

It being then conceded that the state has the general constitutional power to regulate the traffic and can delegate the power to the municipality, it would seem that the only question that need seriously be argued in this case is the proposition "that such ordinance is unreasonable, and subversive of fundamental rights."

The power to regulate all places where intoxicating liquors are sold to be used in and upon the premises, has been conferred by the state upon municipal corporations.

Acts 1881, sec. 8106.

This power to regulate is given in the broadest manner.

Moore v. Indianapolis, 120 Ind. 487.

Concerning all matters of detail in the manner of regulation cities are left untrammelled.

Duckwall v. New Albany, 25 Ind. 285; *Cronin*

v. People, 82 N. Y. 818, 37 Am. Rep. 564; *State v. Clark*, 54 Mo. 20, 14 Am. Rep. 471; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 648; *State v. Holcomb*, 64 Iowa, 107, 56 Am. Rep. 858; *Com. v. Pitch*, 97 Mass. 221; *Dill. Mun. Corp.* § 328, p. 405.

Appellant urges that the ordinance is invalid, because it is an unreasonable interference with the property rights of the citizen, and places a burden on the saloon keeper from which other property holders are exempt.

In *State v. Lewis*, 20 L. R. A. 52, 134 Ind. 250, it was held "that in matters over which the legislature may properly exercise police power, it has a right to do so, although in so doing it affects the property rights of the citizen."

No one possesses a natural inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors.

Sherlock v. Stewart, 96 Mich. 193.

The council's discretion is not to be questioned, unless grossly and manifestly abused.

Horr & Bemis, Mun. Pol. Ord. § 138, p. 166, and cases noted; also pp. 167, 168.

When a municipal corporation is invested with the authority to license and regulate the sale of intoxicating liquors, it has the implied power to make all such ordinances as may be necessary to make the grant of power effective and accomplish the ends of municipal good order and public security intruded to its care.

Black, Intoxicating Liquors, § 234, p. 281.

Under a power to regulate all beer and porter houses, it has been held proper to ordain that no girls or women shall be employed in saloons or restaurants where ale, beer, porter, wine, or liquors are sold.

Bergman v. Cleveland, 39 Ohio St. 651; *Horr & Bemis, Mun. Pol. Ord.* § 277, p. 269.

They may confine the sale to a particular room in the house, "as the front room on the ground floor."

Sanders v. Elberton, 50 Ga. 178.

They may provide that no liquor shall be kept or used in any refreshment saloon for any purpose.

State v. Clark, 28 N. H. 176, 61 Am. Dec. 611.

And may prohibit druggists from selling except for medical purposes.

Provo City v. Shurtliff, 4 Utah, 15.

Municipal corporations have power to ordain that no direct avenue of communication shall be had between a place where intoxicating liquors are sold and a billiard room.

Re Neilly & Owen Sound, 87 U. C. Q. B. 289; *Horr & Bemis, Mun. Pol. Ord.* pp. 96, 102.

board partition was within the meaning of the ordinance. It was held that it was not, and the court expressly refused to consider the question whether or not the ordinance was reasonable and consistent with the policy of the state.

CHAMPER V. GREENCASTLE was followed in a later Indiana case, *Steffy v. Monroe City* (Ind.) Nov. 3, 1893, in which the ordinance was passed by a town under the general grant of power to license, regulate, or restrain . . . the sale of spirituous, vinous, malt, or other intoxicating liquors. The court held that power was not given by such statute to prohibit the use of screens in windows and the general language of CHAMPER V. GREENCASTLE, as to the reasonableness of the ordinance was somewhat modified in that the court refused to place its ruling on

the ground of the unreasonableness of the ordinance, but did place it on the fact that the ordinance was not authorized by the grant of power, and there is a strong intimation that that is the ground upon which CHAMPER V. GREENCASTLE was decided.

In *Steffy v. Monroe City, supra*, the court says that "the distinction between this case and those cases holding valid screen ordinances relating to times when it is not lawful to make sales is patent." There are statutes in several of the states which prohibit screens in saloons the whole or a portion of the time, which have been construed in several cases, but a careful search has failed to disclose any cases in which ordinances of that character have been construed, except those mentioned above.

H. F. F.

Ordinances will not be declared invalid or unreasonable or in restraint of trade, except in plain cases.

Horr & Bemis, Mun. Pol. Ord. § 127, p. 92; Ex parte Frank and Re Wilson, supra.

Mr. Tiedeman says on page 810 of his work on Limitations of Police Powers that it has been declared to be a reasonable exercise of the police power to prohibit the erection of screens and shutters where liquors are sold, and cites *Com. v. Costello*, 183 Mass. 192; *Com. v. Casey*, 184 Mass. 194; *Shulte v. Cambridge*, 88 Ohio St. 659; *Com. v. Gibbons*, 184 Mass. 197.

In *Decker v. Sargeant*, 125 Ind. 404, this court upheld an ordinance providing for the removal of screens and blinds at such times as the party was not permitted by law to sell intoxicants.

See also *Davis v. Fasig*, 128 Ind. 272.

States have the constitutional power to enact laws prohibiting the use of screens by drinking saloons.

Black, Intoxicating Liquors, § 153, p. 193; Robinson v. Haug, 71 Mich. 38; *State v. Doyle*, 15 R. I. 825; *Com. v. Kelley*, 140 Mass. 441; *Com. v. Auberton*, 183 Mass. 404; *Com. v. Costello, supra*; *Com. v. Barnes*, 188 Mass. 511, 140 Mass. 447; *Com. v. Worcester*, 141 Mass. 58; *Com. v. Rourke*, Id. 321; *Com. v. Kane*, 148 Mass. 92; *Com. v. Moore*, 145 Mass. 244; *Com. v. Sarrille*, 150 Mass. 820; *Com. v. McDonnough*, Id. 504.

The municipality under a power to regulate may make discriminations as to classes, and regulations and restrictions may lawfully be placed upon a single kind of business; and trades and occupations may be classified, and each class required to pay a different amount.

Ex parte Burl, 49 Cal. 557; *Athens v. Long*, 54 Ga. 830; *Horr & Bemis, Mun. Pol. Ord. § 268, p. 261.*

McCabe, Ch. J., delivered the opinion of the court:

This was a suit by the appellee against the appellant, begun in the mayor's court of said city to recover the penalty provided for the violation of an ordinance of said city. Appellee recovered judgment, from which appellant appealed to the circuit court, where appellant's demurrer to the complaint for want of sufficient facts and his motion to dismiss the cause were both overruled, after which appellee again recovered judgment. Appellant assigns for error these rulings of the trial court, and that the complaint does not state facts sufficient. The whole question thus raised turns upon the validity of an ordinance of said city which reads as follows:

"An ordinance to provide for the removal of all saloon screens and window blinds, and providing penalty for the violation of such ordinance. Whereas it is claimed that there have been frequent violations of the liquor law in the city of Greencastle, Indiana, by the saloon keepers of said city in selling intoxicating liquors to minors and intoxicated persons, and also in allowing minors to congregate in such saloons around the pool table and billiard tables kept therein; and whereas it has been found difficult, if not impossible to obtain the evidence necessary to secure a conviction for

such violations of law owing to the blinds and screens, erected and maintained by such saloon keepers to the doors and windows of such saloons so as to obscure and prevent a view of the interior thereof. Therefore, for the better policing of said city, and the more perfect enforcement of law, be it ordained by the common council of the city of Greencastle, Indiana, that it shall be and is hereby made unlawful for any person or persons who own, operate, or run any saloon, shop, or other place where intoxicating liquors are sold to be used in and upon the premises within said city of Greencastle, Indiana, or within two miles beyond the corporate limits of said city to put up, erect, or maintain any door, screens, window blinds, stained, ground, colored, or darkened glass of any kind to any of the doors, windows, or openings of such saloon, shop, or other place where intoxicating liquors are sold to be used in and upon the premises, or to put up, erect, or maintain any obstruction of any kind whatever to any of such doors, windows, or openings, that will in any way obscure or prevent a full view of the interior of such saloon, shop, or place aforesaid, but all such screens, blinds, and stained, ground, darkened, or colored glass, and all other obstructions aforesaid to the doors, windows, and openings of such saloons, shops, and places where intoxicating liquors are sold as aforesaid, shall be taken down and removed, so as to give a full and unobstructed view of the interior of such places at all times. Provided that nothing herein contained shall be so construed as to prevent said saloon keepers and persons aforesaid from having the usual and ordinary shutters to said doors. Any persons violating any of the provisions of this ordinance shall, upon conviction before the mayor of said city, be fined in any sum not less than ten dollars, nor more than one hundred dollars for each offense, and each day that such obstruction shall be put up, erected, maintained, or remain in place shall constitute a separate and distinct offense. This ordinance shall be in force and take effect from and after its passage and publication."

It is contended on behalf of the appellant that this ordinance is void because it is unreasonable, oppressive, and in violation of the constitution, because it invades the rights of private property.

The validity of the ordinance depends upon the answer to the question, Had the municipal corporation of Greencastle the power to pass the ordinance? Municipal corporations have such powers only as are conferred upon them by the act of the legislature creating them, and such incidental powers as are implied by their creation, and as are essential for the accomplishment of the purposes of their creation and for their continued existence. *Lafayette v. Cox*, 5 Ind. 88; *Kyle v. Malin*, 8 Ind. 84.

All acts of such corporations not strictly within these limits are void. Their acts cannot be declared void by the courts because of any supposed conflict between them and the constitution, so long as their acts are authorized by the legislature and the act of the legislature is not in conflict with the constitution. It is well settled that the creation of a muni-

cipal corporation carries with it the implication that such corporation is empowered to pass such ordinances and by-laws as may be needful for its well being. 1 Dill. Mun. Corp. 4th ed. §§ 815, 816, and authorities there cited.

It is also well settled law that where an ordinance is passed by such municipality under no other authority than such implied power, the ordinance to be valid must be reasonable, and if it is unreasonable it will be void. 1 Dill. Mun. Corp. 4th ed. § 819, and authorities cited.

The first question therefore that confronts us is whether the passage of the ordinance was a reasonable exercise of the power conferred upon the corporation, and therefore whether the corporation had the power to pass it or not. It is to be regretted that counsel on neither side have furnished us with such a discussion of the question as its great importance seems to demand, as it is one of first impression in this court therefore we have gone far beyond the briefs in our investigation in order to reach a correct solution of the question. At the threshold of this discussion we are met with the suggestion that this court has held in two cases that no inquiry can be made into the reasonableness of the ordinance when the legislature has enacted anything upon the subject, and hence, it is suggested in such a case has delegated to cities the power to exercise a discretion in such matters, and therefore, in such case, the courts cannot review that discretion. The first of the cases referred to is *Coal-Float v. Jeffersonville*, 112 Ind. 15, where it was said: "The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely," and refers to sections 819 and 828 of 1 Dill. Mun. Corp. 4th ed., as authority for that statement. If the quotation is to be construed as meaning that no inquiry in such a case can be made into the question whether the ordinance was a reasonable exercise of the power conferred, then the language is too broad; if, however, it is to be construed to mean that no inquiry can be made as to whether the ordinance is reasonable or not, where the power to pass it has been conferred, then it is correct. We think the latter is the proper construction to be placed on the language employed.

Section 828 of Dillon, *supra*, is the one that relates more directly to the point involved in the above quotation. It reads as follows: "Where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power

to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." This is undoubtedly a correct statement of the law, and is amply supported by the adjudicated cases wherever the point has come in question. It affords support to the statement of the rule by the learned judge who wrote the opinion from which we have quoted above, only when construed as we have indicated. That was a case in which a recovery in attachment was sought against the boat for wharfage due the city of Jeffersonville. The question arose on the sufficiency of the complaint which set out the ordinance, which provided that "all steamboats, barges, keel boats, flat boats, or boats or rafts, coming to or landing at the wharves of said city shall pay to said city, to wit: . . . 'Forevery coal float used, etc., \$200 per year, payable, etc.'" The statute authorizing the enactment of the ordinance is the 84th subdivision of section 8106, Rev. Stat. 1881, which confers on cities the power "to establish and construct wharves, docks, piers and basins, and to regulate landing places, and to fix the rates of landing, wharfage, and dockage on all public grounds belonging to such city," etc. This court held in that case, and we think correctly under the statute above quoted, that "cities are expressly authorized . . . to fix rates of wharfage and dockage," and therefore expressly authorized to pass the ordinance above set out. And hence no question of the reasonableness of the ordinance could arise in that case, because the legislature had conferred the authority on the city to pass an ordinance of that specified and defined character, and the section of Dillon cited as above set out, and authorities there cited, as well as the facts, fully warranted the conclusion reached in that case, but neither the case then before the court, nor the authority cited warranted the statement of the abstract proposition quoted, unless construed as we have indicated above. The same question incidentally arose on an appeal to this court from a judgment for a personal injury through negligence of appellant in *Cleveland, C. C. & I. R. Co. v. Harrington*, 181 Ind. 426, where the language above quoted from the *Coal-Float Case* is again quoted. The question there incidentally arose as to the validity of an ordinance limiting the speed of engines and trains within the corporate limits of the city of Indianapolis. This court held that the legislature had expressly conferred the power on the city to pass such an ordinance. Therefore, when this court reached the conclusion which it correctly did in that case, that because the legislature had conferred the power to pass the ordinance of the specified and defined character mentioned, it had decided all there was touching that point in the case, and the quotation from the *Coal-Float Case* was unnecessary to the decision, though the enunciation was correct in both of the cases, with the construction we have placed upon it. *Bills v. Goshen*, 117 Ind. 221, 8 L. R. A. 261, involved the validity of an ordinance requiring, among other things, a license for a roller skating rink, which provided that the same should be granted upon the payment of such sum as the mayor

and common council should determine in each particular case. The 14th subdivision of section 8108, Rev. Stat. 1881, empowered cities "to regulate and restrain all tables, alleys, machines, devices or places of any kind for sports or games kept for hire or pay, if deemed expedient, without a license, . . . to be provided for by ordinance." This court held the ordinance invalid, because it placed the power to determine the amount of the license fee in each particular case in the mayor and common council, instead of fixing the same in the ordinance. This was tantamount to holding that the ordinance was not a reasonable exercise of the power conferred by the statute. *First Nat. Bank of Mt. Vernon v. Sarile*, 129 Ind. 201, 18 L. R. A. 481, involved the validity of an ordinance making it "unlawful for any person to alter, repair, or rebuild any frame or wooden building within the limits described, when the cost shall equal or exceed three hundred dollars."

After recognizing the principle that cities in this state have ample power to enact and enforce reasonable ordinances in the absence of express statutory authority to secure protection against fire, the statute was referred to as conferring additional power, which authorizes cities, "to organize a board of public improvements, and empower such board to grant permits to build houses or additions thereto; to prevent the erection of wooden buildings in such parts of the city as the common council may determine." As applied to repairs, it was held that the ordinance was invalid because the statute did not empower cities to prevent the repair of wooden buildings in all cases. This is not at variance with the broad language used in the *Coal-Float Case*, *supra*, construed as we have indicated. We briefly quote from some of the cases cited in support of the text of section 819 of Dillon, cited as authority in the *Coal-Float Case*, *supra*. In *Haynes v. Cape May*, 50 N. J. L. 55, it is said: "There are circumstances under which the court will inquire into the reasonableness of ordinances passed by a municipal body under legislative powers granted to it. Those circumstances exist when the powers granted by the legislature are expressed in terms general and indefinite. But where the legislature has defined the delegated powers and prescribed with precision the penalties that may be imposed, an ordinance within the powers granted, prescribing a penalty within the designated limit, cannot be set aside as unreasonable."

And in another one of those cases it was said: "But the legislature has granted ample power of legislation upon the subject of the erection and use of steam engines within the city limits to the mayor and city council of Baltimore, independent of the power 'to prevent and remove nuisances.' They are clothed with power to pass ordinances 'for the prevention and extinguishment of fires,' for 'securing persons and property from danger or destruction,' etc., . . . It has been well said in reference to such general grants of power that as to the degree of necessity for municipal legislation on the subjects thus committed to their charge, the mayor and the city council are the exclusive judges, while the selection of the means and manner (contributory to the end) of exercising

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the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their sound discretion. . . . This discretion is very broad, but is not absolute and in all cases beyond judicial control. . . . And while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority." *Baltimore v. Radecke*, 49 Md. 217, 38 Am. Rep. 229.

In another of those cases it is said: "It is contended by the appellees that the town did not have the power to pass the ordinance. It is provided by statute that cities and towns have the power 'to establish and regulate markets, to provide for the measuring or weighing of hay, coal, or any other article for sale.' . . . This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation, subject, however, to the general rule that the ordinance must be reasonable." *Davis v. Anita*, 78 Iowa, 325.

To the same effect is *Meyers v. Chicago*, 9 I. & P. R. Co. 57 Iowa, 555, 43 Am. Rep. 50, also cited in Dillon. And in another of those cases, the supreme court of California said: "On this subject the rule is this: where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power, general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid." *Ex parte Chin Yan*, 60 Cal. 78.

To the same effect is *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642, and many other cases cited in support of the text of Dillon, *supra*, and elsewhere too numerous even to cite, and we have been unable to find any case to the contrary, unless the two cases first above referred to in this court are to be so regarded. But as we have already intimated, we do not think they are to be regarded as against the current of authority, when the language employed in them is construed as we have done, and the cases were both correctly decided on the facts.

But before we can consider the question whether the ordinance here involved is a rea-

reasonable exercise of the powers vested in the corporation, we must inquire what the nature and extent of the powers are that have been conferred by the legislature of this state upon municipal corporations. Because, if the legislature has conferred the power to pass ordinances of the specified and defined character of the one here in question, according to the principles we have laid down above, then no inquiry can be made as to the reasonableness of the ordinance. In that event, we would be limited in our investigation to the single question whether the act of the legislature conferring the power was valid and constitutional, or not. The adjudicated cases cited by the appellee's counsel in support of the validity of the ordinance here in question, were cases where the municipalities had been empowered by the legislature of the state of Massachusetts to pass the particular and specified ordinances prohibiting the use of screens in saloons. No power has been conferred by the legislature of this state on municipal corporations to pass ordinances of that particular character, that is, no statute has specified ordinances to prevent the use of screens by saloons as among those that cities are empowered to pass. Hence, the cases cited by appellee's counsel are not only not in point here, but their influence is against appellee's contention, if they are entitled to any weight at all, because the enactment of such a statute in Massachusetts is a tacit recognition by the lawmaking power of that state that municipal corporations there had no power to pass ordinances of that kind without a statute specifically authorizing the same. The statute upon which the claim is based in this case that the corporation had the power to pass the ordinance here in question, empowered cities "to regulate and license all inns, taverns, or other places used or kept for public entertainment; also, all shops or other places kept for the sale of liquors to be used in and upon the premises. (Rev. Stat. 1881, § 8106, subdiv. 13) . . . "And to regulate all places where intoxicating liquors are sold to be used on the premises." Rev. Stat. 1881, § 8154, and the general welfare clause.

It would be difficult to perceive of a more general grant of power, the two subdivisions of the sections referred to are almost as general and indefinite as the general welfare clause. The power to legislate upon a given subject is conferred upon municipal corporations, but the mode of its exercise is not prescribed, and the kind of ordinances that they are empowered to pass are not specified or defined. The legislature has not said here what distinct or particular acts may be done by the corporation. It has not said that municipal corporations may pass ordinances of the kind here involved. If it had, that would end the inquiry. As it has not, by the uniform current of authority, ordinances passed under such a general grant of power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state, otherwise it is the duty of the courts to declare them void. We therefore hold that the ordinance here involved is open to the inquiry whether its passage is a reasonable exercise of the power conferred by the legislature. It is strenuously insisted that the

corporation by the police power, is authorized to pass the ordinance in question, whether it is reasonable or unreasonable. The police power of the state, so far, has not received a full and complete definition. It may be said, however, to be the right of the state or state functionary to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which do not encroach on a like power vested in congress by the Federal Constitution, or which do not violate any of the provisions of the organic law. Of this power it may be said that it is known when and where it begins, but not when and where it terminates. But this power, whatever may be its limits, resides in the state in its sovereign capacity, and can only be possessed and exercised by a municipal corporation by a delegation thereof to the municipality by the law making power of the state. *Craefordville v. Braden*, 180 Ind. 149; 15 Am. & Eng. Encyclop. Law, pp. 1166, 1167, and authorities there cited.

So that at last the validity of the ordinance depends upon whether it is a reasonable exercise of the power conferred or not. It forbids the erection or maintenance of door screens, window blinds, stained, ground, colored or darkened glass to the doors, windows, or openings of any saloon, shop, or other place where intoxicating liquors are sold to be used on the premises, or the erection and maintenance of any obstruction of any kind whatever of such doors, windows, or openings that will obscure or prevent a full view of the interior of such saloon, etc., provided that it is not to be so constructed as to prevent such saloon keepers and other persons mentioned from having the usual and ordinary shutters to their doors. Under this ordinance if valid, it would make the use of the ordinary door screen or window shutters, window screens and window curtains to the doors or windows of a saloon unlawful, and it would likewise make it unlawful to maintain stained, ground, colored or darkened glass of any kind to any of such doors or windows. We know of our own knowledge, common alike to all, that the use of door screens, window screens, window shutters, window curtains and blinds, ground, darkened and colored glass used in and to doors and windows are among the comforts and conveniences of civilized life. They are used in other business houses than saloons, in private residences, in public buildings and offices, in hotels and dining halls, in depots, in court houses and in churches. Indeed, it may be said that they are necessary comforts and conveniences of civilized life, almost as much so as houses are to live in, and to do business in. The protection of the occupants of such houses against the fierce rays of the sun in the proper use of such houses and places may be almost, if not quite, as necessary as protection against the storm and the rain and the inclemency of the weather generally. It may be admitted that the evils arising from the sale of intoxicants have been so great that it has become the settled policy of the state from the earliest times to place and keep the traffic under stringent restrictions, by the statutes of the state, and that these evils are often increased by violations of these statutory re-

strictions by licensed dealers. But we cannot concur in the contention of the appellee's counsel that the saloon "business is an illegitimate one and that in order to make large profits therein it is necessary to constantly violate the law." The business is one that any one could lawfully engage in, in the absence of any statute on the subject, and the statutes of the state which from time to time have imposed restrictions and burdens upon the traffic do not proceed upon the idea that the business is illegitimate, and seek to legalize an illegitimate business, but proceed upon the idea that the business is legitimate, and owing to the evils arising from it seek to place it under restrictions and burdens so as to lessen those evils. Be this as it may, there is no reason in saying that because some saloon keepers violate the law, all shall be deprived of the use of the necessary comforts and conveniences of civilized life in their business. If the corporation can make it unlawful for them to use screens to exclude flies and insects, they may make it unlawful for them to use shutters to their doors to exclude the cold, the storm and the rain, if it can make it unlawful for them to use window shutters and window blinds and curtains, colored, stained and ground glass in doors and windows of their saloons under the pretense of permitting an unobstructed view into the interior of their saloons the better to detect violations of the liquor law, then there is no reason why they cannot be compelled to make the whole front of their saloons of solid glass without any wood or any other material. Indeed, if the corporation has the power to make the ordinance here in question, for

the reasons given in the preamble thereto, then it necessarily has the power by ordinance to compel them to open the whole front of their saloons from one side to the other, without even the poor privilege of putting solid glass in as a protection against storm, rain, and the inclemency of the weather, and against theft and robbery. This court in *Dicker v. Sargeant*, 125 Ind. 404, in holding an ordinance valid forbidding the use of screens by saloon keepers between eleven o'clock in the evening and five o'clock in the morning, recognized the principle that such an ordinance might not be valid when applied to that portion of the day when the saloon keeper was authorized to sell under his license. There can be no doubt that such an ordinance would be within the power granted, and reasonable, if it is confined in its operation to such time as the saloon keeper is not allowed to do business, as between eleven o'clock at night and five o'clock in the morning, on Sundays and legal holidays, and other days on which they are prohibited from doing business.

We are of opinion that the ordinance here involved goes beyond any power conferred upon the common council either by express statute or by necessary implication, and is therefore void. The circuit court erred in overruling the demurrer in the complaint.

The judgment is reversed, the cause remanded, with instructions to sustain the demurrer to the complaint.

Petition for rehearing overruled June 8, 1894.

ALABAMA SUPREME COURT

Ex parte J. D. SIKES.

(.....Ala.....)

1. Municipal authority "to license and regulate" the sale of intoxicating liquors does not include the authority to prohibit it absolutely.
2. The only qualification of power contained in a grant to a municipality of the power "to fix the price of licenses" is that it shall not be prohibitory.
3. A license fee of \$2,000 is not invalid as prohibitory, or as a license for revenue as distinguished from a license tax for police purposes, where the agreed facts show that there is a population of 4,000 inhabitants and the retail sales of the business for four years aggregate \$351,000, while two thirds of the entire expense required to police the city are traceable solely to the sale of liquor within its corporate limits.

(May 3, 1894.)

APPPLICATION for a writ of habeas corpus prosecuted to the Supreme Court after it

NOTE.—As to the extent of discretion in the granting of liquor licenses, see note to *Sherlock v. Stuart* (Mich.) 21 L. R. A. 580.

See also the preceding case of *Champer v. Green-castle*, ante, 768.

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had been refused by the probate judge for Pike County to obtain the release of petitioner from custody to which he had been committed for refusal to pay a fine for violation of a municipal ordinance prohibiting the sale of intoxicating liquor without a license. *Denied.*

The facts are stated in the opinion.

Messrs. Hubbard, Wilkerson & Hubbard and Worthy & Foster for petitioner.
Mr. William L. Parks for respondent.

Coleman, J., delivered the opinion of the court:

By an ordinance of the city of Troy, dealers in spirituous liquors were required to pay \$2,000 for a license. For a violation of this ordinance, the defendant was arrested and fined, and, refusing to pay the fine, imprisoned. He sued out a writ of habeas corpus before the probate judge, who, upon the hearing of the case, refused to discharge the petitioner, and remanded him to the custody of the marshal. From this judgment the petitioner prosecutes his application to this court. All the facts are agreed upon, and the only question is as to the legality of the ordinance. The prisoner contends that it is prohibitory in its character and effect, and that such an ordinance is not authorized by the municipal charter of the city of Troy. The Act of the Legislature of

1890-91 (page 724) declares that "the mayor and councilmen shall have power and authority . . . to license and regulate the retailing and the wholesale of liquors within the corporate limits, and to provide for the annulling and revoking such license for good cause being shown; . . . to license and regulate commission merchants, dry goods and grocery merchants, keepers of hotels and eating houses; . . . to prohibit the sale of liquors on any election day; . . . to restrain and prohibit gambling; to prohibit all unlawful assemblies; to prohibit violations of the Sabbath; to prevent stock from running at large; . . . to prohibit all breaches of the peace; . . . and to fix the price or tax on all licenses." We think it very clear that the authority "to license and regulate" a business does not include the authority to prohibit it absolutely. We have so held many times. *Ex parte Burnett*, 80 Ala. 461; *Miller v. Jones*, 80 Ala. 89; *Ex parte Covert*, 92 Ala. 94; *Ex parte Anniston*, 90 Ala. 516. Independent of the judicial construction given to a statute which merely confers the power to license and regulate a business, a reading of the act in question clearly demonstrates that the intention of the legislature to authorize the mayor and councilmen to "license and regulate," and not to "restrain and prohibit," the sale of spirituous liquors. Whenever it was intended to confer such power, the words used are "restrain," "prohibit," but these and similar words are not used when the power in regard to the sale of liquors was conferred. We are of opinion the legislature has the constitutional right to prohibit or to authorize any community or municipality absolutely to prohibit the sale of spirituous liquors. *Marion v. Chandler*, 6 Ala. 899; *Ex parte Burnett*, and *Ex parte Covert*, *supra*; *Harris v. Livingston*, 28 Ala. 579.

Having the power to prohibit, the legislature undoubtedly could fix the price of a license to sell liquor at any sum, and, had it seen proper to exercise the right, could have conferred on the mayor and councilmen of Troy, by express provision, the power either to prohibit entirely, or fix the price of the license at \$2,000. It has, however, declared that the "mayor and councilmen shall have the power to license and regulate the retailing and the wholesale of liquors within the corporate limits," and "to fix the price or tax on all licenses." The only limitation on the power and discretion of the mayor and councilmen in fixing the "price of the license" is contained in the words "license and regulate the sale," and that this limitation is that the price fixed shall not be prohibitory. What is the test by which it shall be determined whether a "price for a license" is or is not prohibitory? Upon what principle is it to be held that a price of \$200 is not prohibitory, and \$2,000 is prohibitory? What rules and facts must guide the mayor and councilmen in fixing the price of a license, so that the ordinance will be an exercise of power within their granted authority "to fix the price," and not transgress the boundary fixed by the term "to license and regulate," so that it shall not be prohibitory? No one unvarying price will suit for all places and all circumstances. It seems to us the populousness of the municipality, the profitability of the business, the character of the busi-

ness proposed to be licensed, and its effects upon the community, the additional expense necessarily entailed by a police supervision of the business, and perhaps other matters might be mentioned, are all proper subjects of inquiry in arriving at a legal and just conclusion in fixing a price which will not be prohibitory. In the case of *Ex parte Burnett* the town council of Cahaba required, by ordinance, a license of \$1,000, and it was pronounced prohibitory in its character. There were no facts in evidence in the case except the ordinance, and the act of the legislature granting charter rights, and the conviction of the petitioner for a violation of the ordinance; and in that case it was said: "Neither is it our purpose to limit the price of a corporation license to the sum fixed by the general law on a license to retail. As one of the incidental powers of a corporation, the council may certainly transcend that limit, provided their ordinance is not in its nature prohibitory." (We italicize.) The authority granted to the mayor and councilmen of Troy is more specific and enlarged than that under which the town council of Cahaba acted. In the case of *Ex parte Marshall*, 64 Ala. 266, the rule was recognized that the "license may be graduated by the populousness of the community in which the privilege was to be exercised, and the profitability of the employment;" and in *Van Hook's Case*, 70 Ala. 361, the additional expense for a faithful enforcement of police superintendence should be considered.

Under these rules and principles of law, we cannot say the ordinance is void upon its face. What are the agreed facts? The city of Troy has a population of about 4,000 inhabitants. That in the years 1890, 1891, 1892, and 1893, there were three separate retail liquor dealers in Troy, who paid a license of \$2,000; and each did a business of about \$38,000 in the year 1890, and the business of each in 1891 amounted to \$35,000, and in the year 1892 to about \$24,000, and in the year 1893 each did a business of \$20,000—an aggregate for the four years of \$351,000. The capital invested upon which this business was transacted is not stated, but it is stated "that the profits on the amount of business were about one fourth of these amounts, out of which were paid all licenses, besides house rent, clerk hire, and other current expenses." It is also stated that the expenses of petitioner Sikes for the year 1893 approximated \$8,000. What these expenses were for, whether confined solely to the business of selling liquor, or whether family expenses were included, is not stated, and the expenses of the two other dealers are not given. It is also stated that "the other dealers, for the year 1893, did an unprofitable business after paying their licenses and other expenses." It also appears that the other two dealers have paid the license for the year 1894, and are continuing in the business. The profits at 25 per cent on total sales of spirituous liquors in Troy for four years, not exclusive of current expenses, were about \$88,000. We do not think there is anything in this showing which reasonably satisfies the mind that the license required is prohibitory in a business view. Again, it is agreed in the statement of facts that there is an average of "seven hundred and fifty

violations of the city ordinances during each year, and that two thirds of them are the results of whiskey sold in Troy." It is further agreed that the present necessary expenses of the city for a marshal and police force exceed \$3,100, "and, if there were no saloons and no sale of whiskey in Troy, this expense could be reduced to \$1,000." Confessedly, then, two thirds of all the violations of the ordinances of the city, and two thirds of the entire expense required to police the city, are traceable solely to the sale of liquor within its corporate limits. Certainly, municipal officers charged with the "protection of the lives, health, and property of the citizens, the maintenance of good order and quiet of the community, and the preservation of the public morals," and to this end intrusted with the police power, are justified in the exercise of all the authority granted when they undertake to regulate business productive of such results. It is contended that, as the sale of liquor increases the violation of the city ordinances, the revenues of the city are proportionately increased; and this, it is said, must be considered in estimating the evil results of the traffic, and the extra expenses of policing the city. The peace of a community, the quiet and happiness of the family, the influence of example upon the young and old, the public morals, have no money value. The argument leads to the conclusion that, however much a business may increase violations of the law, if the revenue therefrom is proportionately increased, the less it is to be condemned as an evil. We need say no more on this point.

It is further argued that the amount required

for a license shows that the purpose was to raise a revenue for the city, and not for police purposes. It is manifest that, if the purpose of the ordinance was to raise revenue, then it was not intended to be prohibitory. A business which is prohibited cannot yield a revenue from licenses. We do not think there is any foundation for the argument, and the facts of the case, without repeating them, justify this conclusion. Doubtless, in providing for the necessary expenses of the city, and in fixing the assessments of taxes upon the property, the income anticipated from licenses, as well as fines, entered into the computations; but this alone would not determine that the licenses were for revenue, as distinguished from a license tax for police purposes. There are some dicta in our own court, and declarations of principle by high authority, not altogether in harmony with all that we may have said; but our construction of the act of the legislature conferring municipal power upon the mayor and councilmen of the city of Troy is that there is a full grant of power "to fix the price of licenses," limited only, by the grant to "license and regulate the sale of liquor;" and the only qualification of power contained in this grant, construed in connection with the unqualified power "to fix the price of licenses," is that it shall not be prohibitory. In our opinion, the facts of the case show that the ordinance is within the power granted. This was the conclusion reached by the trial judge, and, in our opinion, it was correct. Petition denied.

Affirmed

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

REPUBLICAN MOUNTAIN SILVER MINES, Limited, et al., Appts.,

v.

J. Warren BROWN et al.

(58 Fed. Rep. 645.)

1. A court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business.
2. A stockholder in a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or ultra vires acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance.
3. Equity had at common law no power to decree a surrender or forfeiture of

corporate franchises at the suit of an individual.

4. Courts have no visitatorial power over foreign corporations doing business within the state, unless it is expressly conferred by statute.
5. The invalidity of a resolution passed at its domicile by a foreign corporation to wind up its affairs will not entitle the courts of a foreign state, in which it is doing business, to decree its dissolution and appoint a receiver, if its directors have submitted to the jurisdiction so that relief may be afforded by simply enjoining the execution of the resolution.
6. Statutory provisions as to the notice to be given of a meeting to consider the question of liquidating a corporation must prevail over provisions in the by-laws.
7. Provisions in the by-laws as to notice of a meeting to consolidate with another corporation can have no application to a proceeding to liquidate the corporation and sell the assets.
8. The motives of the stockholders of a

NOTE.—The status of corporations away from their domicile is quite fully discussed in a series of notes beginning with the one appended to *Cone Export & Commission Co. v. Poole*, ante, 289, and some cases will there be found which include L. R. A.

dentally discuss the power to dissolve a foreign corporation. Even those cases are, however, rare and this case is likely to become the leading one upon that subject.

corporation, resident at its domicile, in calling a meeting to wind it up on such short notice that the majority stockholders resident at its place of business cannot attend the meeting will not cause equity to interfere, if the proceeding is strictly according to law, and the foreign stockholders might have appointed an agent to represent their interests.

(October 30, 1898.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the District of Colorado in favor of plaintiffs in a proceeding brought to procure the dissolution of the defendant corporation and the appointment of a receiver for an alleged illegal attempt at dissolution. *Reversed.*

Statement by Thayer, District Judge:

This was a bill filed by the appellees against the Republican Mountain Silver Mines, Limited, and its directors, and also against Edward F. Tremayne, its secretary, who had been appointed liquidator to wind up the affairs of the corporation. The bill averred, in substance, that the defendant company was a corporation organized and existing under the laws of Great Britain, with its principal office in the city of London, England, but that its mining property, consisting of numerous mining lodes or claims, was all situated in the state of Colorado; that the capital stock of the company consisted of 100,000 deferred shares and 50,000 ordinary shares of the nominal value of one pound each, and that the great majority of said shares were owned by the appellees, and by other American shareholders, not named as complainants, but in whose behalf the bill purported to have been filed; that within the eight years preceding the filing of the bill the defendant company had remitted from England less than \$18,000 for the working of its mines; that prior to December, 1889, it had become indebted to a bank in the state of Colorado for money borrowed to conduct certain mining operations, and that on the 11th of December, 1889, the bank had recovered a judgment therefor in the sum of \$4,358 and costs, which judgment was subsequently assigned to A. P. Welch, who was chairman of the company's board of directors, he having advanced the money wherewith to pay said judgment; that in the year 1890 the defendant company, in pursuance of a resolution of its board of directors, had executed two deeds of trust on all of its mining property in Colorado for the purpose of securing two notes which had been drawn in favor of said A. P. Welch; and that under the terms of said deeds of trust the property covered thereby might be sold on thirty days' notice if the sum due on said notes was not paid at maturity. The bill averred that said deeds of trust in favor of said Welch were executed without authority, for the purpose of acquiring title to the property of the company, in fraud of the rights of the majority of the shareholders; but it did not appear from any other allegations of the bill, or from the testimony produced at the trial, in what respect the deeds of trust were unauthorized, or that the in-

debtedness thereby secured was not justly due and owing to the party in whose favor they were ordered to be executed. The bill further averred, in substance, that on the 16th day of June, 1891, an extraordinary meeting of the shareholders was held in London, England, in pursuance of a notice theretofore given, for the purpose of appointing a liquidator under English laws to wind up the affairs of the corporation, but that the notice of such meeting was not sent to or received by the appellees and other American shareholders in time to attend the same. That at such meeting a resolution was passed that the company be wound up. That Edward F. Tremayne, who is named as defendant, be appointed liquidator of the company; and that he be vested with authority to sell the property and business thereof to any other corporation, and to receive in payment therefor shares in such other corporation, for the purpose of making a distribution of the same among the shareholders of the defendant company. That after the passage of such resolution a subsequent extraordinary general meeting of the shareholders was appointed to be held on July 1, 1891, at London, England, for the purpose of confirming, according to English laws, the resolution that had been adopted at the prior meeting of June 16, 1891. That only 16 days' notice was given of such confirmatory meeting of July 1, 1891, which was insufficient to enable the appellees, or any of the American stockholders, to be present, whereas a by-law of the defendant company expressly required that no such confirmatory meeting should be held to approve a resolution for the winding up of the company, within less than thirty days after the first meeting at which such resolution should be proposed and adopted. That at such second meeting, held on July 1, 1891, as well as at the prior meeting, none of the American shareholders were in fact present or were represented, but that the resolution of June 16, 1891, was nevertheless re-enacted and confirmed. The bill further charged that the adoption of said resolution under the circumstances aforesaid was in violation of the by-laws of the company, and was also a violation of English laws, but that, whether or not such action was within the letter of any English statute it was nevertheless fraudulent, because the several meetings had been held with knowledge that the American shareholders, who held a large majority of the stock, could not attend or be represented. The bill also charged that the liquidator appointed by the company to wind up its affairs was financially irresponsible, and that one of the appellees (J. Warren Brown) claimed to be a creditor as well as a stockholder of the defendant company, and that his claim was then in litigation. The testimony showed that the litigation had resulted in a final judgment in favor of the company. In view of the premises, the complainants below prayed that the members of the board of directors who had been made parties, and said Edward F. Tremayne, might be severally enjoined from selling or disposing of any of the defendant company's

property; that said Tremayne might be restrained from taking any proceedings whatever as liquidator to wind up the affairs of the company; that a receiver might be appointed to take charge of all of the company's property in Colorado, and that he be authorized to sell and dispose of the same to the end that the defendant company might be dissolved and wound up for the benefit of all of its stockholders and creditors. On final hearing the circuit court sustained the bill, and granted substantially all of the relief that was prayed for therein. From such decree granting an injunction and appointing a receiver with a view of dissolving and winding up the company the defendants below have prosecuted an appeal to this court.

Argued before Caldwell and Sanborn, *Circuit Judges*, and Thayer, *District Judge*.

Mr. Charles E. Gast, for appellants:

In the absence of fraud, the court will not inquire whether the property has been well or ill managed.

Hedges v. Paquett, 8 Or. 77.

The case presented by this record relates wholly to the internal affairs of a British corporation, and as the complainants sue only as stockholders, upon a charge that their rights as stockholders have been ignored, this court has not, or rather will not entertain, a jurisdiction to settle the dispute.

North State Copper & Gold Min. Co. v. Field, 64 Md. 151; *Barclay v. Talman*, 4 Edw. Ch. 123, 6 L. ed. 320; *Slee v. Bloom*, 19 Johns. 456, 10 Am. Dec. 273; *Briggs v. Penniman*, 8 Cow. 367, 18 Am. Dec. 454.

Independent of statutes, courts of equity will not exercise a jurisdiction for the purpose of winding up the affairs of any corporation, domestic or foreign, and distributing its assets.

French v. Gifford, 30 Iowa, 148; *Strong v. McCagg*, 55 Wis. 624.

Messrs. R. S. Morrison and Willard Teller, for appellees.

Thayer, *District Judge*, delivered the opinion of the court:

It is made apparent by an inspection of the bill of complaint that it states no case entitling the complainants to any form of equitable relief, unless the right thereto can be maintained on the strength of the allegation that the shareholders' extraordinary general meeting of July 1, 1891, was an unauthorized meeting, because it was convened and held on insufficient notice under the charter and by-laws of the company. Unless that averment is sustained, we are unable to see that the complainants had any fair pretense for invoking the aid of a court of chancery to restrain the proceedings that were about to be taken by the English liquidator, in conformity with English laws, for the purpose of disposing of the property of the company, and winding up its affairs.

The corporation owed its existence to the laws of Great Britain. It held all of its property and franchises under and subject to the laws of that kingdom relative to the "incorporation, regulation, and winding up of trading companies and other associations," 24 L. R. A.

to which class of corporations it evidently belonged. Those laws entered into and formed a part of the defendant company's charter; and every shareholder not only had notice thereof and assented thereto when he became a member of the company, but he impliedly agreed that the company might be wound up in accordance with the provisions of such statutes, if it was thought proper to go into liquidation, and if a resolution to that effect was duly enacted. These principles must be regarded as sufficiently established by the decision in *Relfe v. Rundie*, 103 U. S. 222, 226, 26 L. ed. 337, 339. See also *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020.

The jurisdiction that a court of equity may lawfully exercise over the affairs of an ordinary business corporation, in the absence of any statute conferring extraordinary powers, is likewise well defined. A court of chancery may, at the instance of a stockholder, and if the company itself refuses to move, lawfully entertain a bill to depose or to restrain the officers or directors of a corporation, when it appears that in their capacity as agents or trustees of the stockholders they have committed, or are about to commit, acts that are tantamount to a breach of trust, whether such acts consist of fraudulent dealings with the corporate property or funds, or whether they consist in engaging the corporation in enterprises that are beyond the scope of its chartered powers. In more general phrase, it is sometimes said that a court of chancery may grant equitable relief against a corporation, at the suit of an individual, "whenever a sufficient case for relief is shown upon ordinary principles of equity jurisprudence." Morawetz, *Priv. Corp.* § 1042, and citations; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 341, 15 L. ed. 401, 404; *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 381, 385, 386, 16 L. ed. 488; *Peabody v. Flint*, 6 Allen, 52; *March v. Eastern R. Co.* 40 N. H. 548, 77 Am. Dec. 732; *Robinson v. Smith*, 3 Paige, 222, 8 L. ed. 126, 24 Am. Dec. 212.

But a court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of a similar controversy arising between the members of an ordinary partnership. Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy, and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder in a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do not threaten to do any fraudulent or *ultra vires* acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance. If in either

of the cases last specified a stockholder is nevertheless dissatisfied with the business policy that is being pursued, or the methods of corporate management, he must seek redress within the corporation, in the mode prescribed by its charter and by-laws, rather than by an appeal to the courts. *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 837; *Oglesby v. Attrill*, 105 U. S. 605, 610, 26 L. ed. 1186, 1188; *French v. Gifford*, 80 Iowa, 148; *Foss v. Harbottle*, 2 Hare, 461. Moreover, the doctrine is very well established that a court of equity has no power at the suit of an individual to decree the dissolution of a domestic corporation, and a winding up of its affairs, unless such extraordinary power has been conferred upon it by the terms of some statute. The better view undoubtedly is that at common law no such power to decree a surrender or forfeiture of corporate franchises was vested in courts of equity, to be exercised at the suit of an individual, although some courts have upheld the right of a court of chancery to exercise that power when invoked by the state through its attorney-general. *Folger v. Columbian Ins. Co.* 99 Mass. 267, 274, 96 Am. Dec. 747; *Stas v. Bloom*, 5 Johns. Ch. 866, 877, 1 L. ed. 1111, 1115; *French v. Gifford*, *supra*; *Atty-Gen. v. Chicago & N. W. R. Co.* 85 Wis. 425, 511; *Morawetz*, Priv. Corp. § 1040.

It is hardly necessary to remark that if courts of equity, at the suit of a shareholder, and in the absence of a statute, have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can they exercise such powers with respect to a foreign corporation. It has, indeed, been held on much consideration that the courts of a state have no visitatorial powers over foreign corporations doing business within the state, unless such power is expressly conferred by local statutes; and for that reason it was ruled by the supreme court of Maryland that it would not entertain a proceeding by a citizen of Maryland, who was a shareholder in a foreign company, to compel it to annul an alleged wrongful forfeiture of his stock, and to reinstate him as a stockholder. *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151. See also *Wilkins v. Thorne*, 60 Md. 258.

In view of the foregoing principles, it is evident, we think, that the decree of the circuit court was erroneous in so far as it contained provisions which contemplated a sale of all of the defendant company's property in the state of Colorado, and a general liquidation of its affairs. As we have already shown, the circuit court had no inherent power, as a court of equity, to dissolve the company, and to wind up its business operations. It had no authority to enter a decree of that nature under any existing statute of the state of Colorado to which our attention has been directed, and it can hardly be pretended that it derived or could derive any such power or jurisdiction from the act of parliament under which the corporation was organized. The trial court appears to have been of the opinion that the resolution to wind up the company which was adopted at the meeting of June 16, 1891, and was con-

firmed at the meeting of July 1, 1891, was void, for the reason that the latter meeting was held on insufficient notice; but, if we accept that view as sound, it is nevertheless apparent that there was no occasion for the appointment of a receiver to hold and dispose of the company's property, or for the order directing him to inquire and to report in what manner the property in question could be most advantageously sold. As all of the defendants, including the foreign liquidator, had joined in an answer to the bill, and had thereby submitted themselves to the jurisdiction of the court, we think that adequate relief would have been afforded for the injury complained of,—if the trial court had simply declared the invalidity of the resolution to wind up the company, and had thereupon enjoined the defendants from taking any action to carry the same into effect. An injunction in the form last suggested would have been all-sufficient to prevent the threatened wrong, even if the resolution to wind up the company was in fact void; and we are unable to see that the record discloses any fact or circumstance which rendered an order for the appointment of a receiver and for the sale of the company's property either a necessary or a proper order.

It is insisted, however, that the resolution to wind up the company was neither void nor irregular, but was passed in strict conformity with English laws; and this contention on the part of the appellants compels us to make a brief reference to the company's articles of association, and to some provisions of the act of parliament under which the defendant company was organized. It is not denied that the act of parliament last referred to permitted the defendant company to go into voluntary liquidation in the manner contemplated by the resolution adopted at the shareholders' meeting of June 16, 1891, which was subsequently confirmed. The act of parliament provides that a company organized under the act may be wound up "whensoever the company has passed a special resolution requiring the company to be wound up voluntarily;" it further provides, in substance, that the liquidator appointed by the shareholders to wind up the company may be authorized to transfer the business and property of the company to another company, and in payment therefor receive shares in such other company for distribution among the shareholders of the company whose affairs are being liquidated. *Vide Companies Act 1862*, §§ 129, 161. The act defines a special resolution to wind up a company to be, in substance, one which has first been passed at a general meeting of shareholders, and has been confirmed at a subsequent general meeting, "of which notice has been duly given and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed." *Vide Id.* § 51. The resolution over which the controversy arises in the present case appears to have been passed and to have been subsequently confirmed in strict conformity with the provisions of the companies act above cited, both as respects the method of calling the meetings at which

the resolution was proposed and adopted and as respects the notice given to shareholders of said meetings and the time within which they were to be held. It is contended, however, that although the second meeting was held within the period prescribed by section 51 of the Companies Act, to which we have alluded,—that is to say, not less than fourteen days nor more than one month from the date of the first meeting,—yet that it was not held within the period prescribed by section 186 of the defendant company's articles of association. An obvious answer to this contention is, that if the articles of association are in conflict with the act of parliament under which the company was organized, the act of parliament must prevail. Section 186 of the articles of association provides, in substance, that the company "may amalgamate its business with, or transfer its business and property to, any similar undertaking or company, or purchase or acquire the business or property of any company . . . carrying on a business similar to that of the defendant company, upon such terms as may be agreed upon, . . . and may pay for any business so acquired either in cash or in shares," etc., provided a resolution to that effect is passed by a three-fourths vote at an extraordinary general meeting, and is confirmed at a second meeting, held "not less than one month nor more than three months thereafter." It is obvious that if section 51 of the Companies Act and section 186 of the Articles of Association relate to the same kind of a proceeding or transaction, they are in conflict, because they prescribe a different period within which the confirmatory meeting must be held, and the companies act in that event must prevail. We think, however, that they relate to entirely different transactions. The companies act has reference to a proceeding to wind up a corporation whereby the corporation disposes of all of its property, surrenders its franchises to the crown, and thereby ceases to exist as a legal entity. On the other hand, the articles of association have reference to a proceeding whereby a corporation merely becomes consolidated with some other company doing a similar business, or purchases the property or business of some other company, in which case it neither surrenders its franchise nor ceases to exist. Under the provision contained in the company's articles of association it was intended no doubt that it might unite its business with that of any other company or firm that was engaged in similar enterprises by a simple agreement with such other company that had first been confirmed by the defendant company's members; but in a proceeding taken under the companies act to wind up a corporation it is necessary to appoint a liquidator to dispose of its prop-

24 L. R. A.

erty, and to effect a valid surrender of its corporate franchises. In view of what has already been said on this branch of the case, the necessary conclusion is that the meeting of July 1, 1891, was properly convened and held under the terms of the statute under which the defendant company was organized, and the resolution passed at such meeting was neither void nor irregular by reason of any provision found in the defendant company's articles of association.

We have not overlooked the charge contained in the bill that the two meetings held in London were intentionally called by the English shareholders on short notice for the express purpose of preventing the American shareholders from taking part in such meetings. With reference to that charge, and without deciding whether it is true or false, it is sufficient to say that the company's articles of association gave all foreign shareholders the right to name an address at any place in the United Kingdom, to which notices of all meetings were required to be sent, and the right to appoint an agent at such place to represent their interest at any meeting or meetings that might be held. Furthermore, the foreign shareholders were bound to take notice of the law under which the company was organized, and of the various provisions to which we have already referred that enabled the company to be wound up on short notice by a resolution passed at a shareholders' meeting and confirmed at a subsequent meeting. It is furthermore disclosed by the record that the English and American shareholders had been pulling at cross purposes for some years prior to June, 1891, and that the controversy between them was largely due to the fact that the English shareholders had contributed practically all of the funds to prosecute the business of the company while the American shareholders possessed the superior voting power. But, aside from these considerations, we think that a court of equity should not interfere merely on account of the motives that may have inspired the conduct of the English shareholders, so long as the action taken by them was strictly in accordance with English laws, and was not in violation of any provision of the company's charter or by-laws. *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186.

The result is that we have been constrained to disapprove of all of the provisions of the decree from which the present appeal was taken.

The decree of the Circuit Court is accordingly reversed, and the case is remanded to that court with directions to discharge the receiver, and to vacate its former decree, and to enter an order dismissing the bill of complaint at the complainants' costs.

PENNSYLVANIA SUPREME COURT.

Francis M. BROOKE *et al.*
v.
City of PHILADELPHIA *et al.*

(162 Pa. 123.)

1. A continuation of indebtedness not exceeding 7 per cent of the assessed valuation of a city by creating new indebtedness as fast as the old debts are paid is authorized by the Pennsylvania Constitution, art. 9, § 8, declaring that the debt of any city shall never exceed 7 per cent of the assessed value of the property therein.
2. Certificates of indebtedness of a city purchased and placed uncanceled in a sinking fund of a city, even if the city continues to pay interest on them, do not constitute a part of the indebtedness of the city within the meaning of a constitutional restriction of the amount of its indebtedness.
3. A loan of the city's credit to a corporation is not made by a contract between a city and a railroad company by which one half of the expense of abolishing grade crossings in the city is to be reimbursed to the city by the railroad company.

(May 31, 1894.)

BILL by certain taxpayers of the City of Philadelphia to enjoin defendants from borrowing money and issuing certificates of indebtedness therefor for the purpose of assisting in elevating the tracks of a certain railroad company through a portion of the city. *Dismissed.*

The facts are stated in the opinion.

Mr. Mayer Sulzberger, for plaintiffs:

The policy of the constitution of the state of New York differs from the policy of the constitution of Pennsylvania in this, that the object of the New York constitution is to limit the amount of municipal debt merely. The object of the constitution of Pennsylvania is to limit the amount of municipal debt pending its final extinction by sinking fund. The New York constitution provides for no sinking fund except for temporary loans; whereas the Pennsylvania constitution does not allow the temporary loans permitted by the New York constitution, and insists on the sinking fund, which it invests with inviolable sanctity.

For this reason the word "indebtedness" in the New York constitution received an interpretation in *Bank for Savings in New York v. Grace*, 102 N. Y. 318, which is inapplicable to the word "debt" in ours.

Messrs. James Alcorn and Charles F. Warwick, for defendant:

The city loan in the sinking fund does not form a part of the city debt, and was not intended by the constitutional provision to be counted in estimating the debt of the city.

The principle contended for was determined by *Judge Pearson* in *Com. v. Reading*, 15 W. N. C. 529.

NOTE—As to what constitutes an "indebtedness" within restrictive provisions upon the power of municipalities to contract indebtedness, see *Beard v. Hopkinsville (Ky.)* 23 L. R. A. 402, and *note*. 24 L. R. A.

See also 31 L. R. A. 794.

A case exactly similar to the present one was decided in the New York court of appeals on April 30, 1886, in the case of the *Bank for Savings in New York v. Grace*, 102 N. Y. 318.

The court of appeals, reversing the court of common pleas of the county of New York, held that the city stock of the city of New York held by the commissioners of the sinking fund was not an indebtedness of the city within the meaning of the constitution, but that the indebtedness referred to was one to be met in the future by taxation, and only such indebtedness as the municipality could be called upon to pay.

It cannot be successfully argued that if the defendants' view prevails there is any impairment of the obligation of the contract made by the city with the bondholders. They are not interested in the city debt purchased by the sinking fund; they are only interested in the appropriations being made to the sinking fund as provided by law and ordinances. The contract with them is that a sinking fund will be established and certain appropriations made to it annually. That contract is complete when the sinking fund uses the money appropriated to it in the purchase of the bonds.

All the complaints made by bondholders have been against the diversion of the sinking fund, and not against its use in the redemption of the debt.

Terry v. Wisconsin Marine & P. Ins. Co. Bank, 18 Wis. 87; *Board of Liquidators of City Debt v. Municipality No. 1*, 6 La. Ann. 31.

Pa. Const., art. 9, § 7, was intended to prevent the union of public or private capital or credit in any enterprise whatever, and to prevent a business partnership between a municipality and individuals or private corporations or associations. It did not prevent, as in *Speer v. Blairsville School Directors*, 50 Pa. 150, the legislature from authorizing the appropriation of money for the payment of bounties. The same view was taken by this court in *Hilbish v. Catherman*, 64 Pa. 154.

In *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. 189, an ordinance authorizing the retention of a part of the dividends due to the city on stock of the Pennsylvania Railroad Company for the purpose of aiding in the establishment of an ocean steamship company, was held to be in violation of the Constitutional Amendment of 1857. So in *Wilkesbarre City Hospital v. Luzerne County*, 84 Pa. 55, the Act of May 21, 1874, enabling a private incorporated hospital to make requisitions upon the county for the payment of its charges for the support of patients under its treatment, was held to be an appropriation of money by the county to a corporation, and prohibited by section 7, article 9, of the Constitution.

In *Wheeler v. Philadelphia*, 77 Pa. 388, a loan for the benefit of the gas works of the city of Philadelphia was not considered a violation of this provision of the Constitution.

Dean, J., delivered the opinion of the court:

As the contention here affects large public interests, an early final determination of it

ought to be had; therefore, at the request of both parties, we have taken original jurisdiction of plaintiffs' bill. The plaintiffs are citizens and taxpayers of Philadelphia. They aver that the city councils, by ordinance approved March 15, 1894, authorized the creation of a city loan of \$6,000,000, for the purpose of ridding the city of steam railroad grade crossings on twenty-four public streets from Broad to Thirtieth, all crossings of the Philadelphia & Reading Railroad. The power of the city to make such a municipal improvement is not questioned, nor is its power, within certain constitutional limits, to create a debt, by loan or otherwise, to accomplish the purpose, denied. It is averred, however, that the debt of \$6,000,000 authorized by this ordinance, when added to the existing debt of the city, will largely exceed the constitutional limits of municipal indebtedness, and is therefore illegal. It is further averred that the ordinance authorizing said loan discloses the fact that the money in part is to be expended in an improvement for the advantage of the railroad company, which company is by contract to reimburse the city in an amount equal to one half the expenditure, or \$3,000,000; that, to this extent, it is a loan of the city's credit to a corporation; and the creation of the additional debt for that reason is, under the constitution, unlawful. The city denies that, if \$6,000,000 be added to its existing actual debt, that debt will exceed the amount authorized by the constitution. It further denies that its contract with the railroad company is, in any correct ascertainment of the meaning of the constitution, a loan of its credit to the corporation. Section 8, article 9, of the Constitution declares that "the debt of any city shall never exceed seven per cent of the assessed value of the property therein, nor shall any such municipality incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof at a public election, in such manner as shall be provided by law; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum, in the aggregate, at any one time upon such valuation." This follows immediately after section 7 of the same article, which section prohibits the legislature from authorizing any municipality becoming a stockholder in any corporation, or loaning its credit or money to any corporation, association, or individual.

There were no such restrictions on legislative authority or on municipal power in the Constitution of 1838; and while not a few profound lawyers, because of the sparseness of restrictions in that constitution, and the multiplicity of them in our present one, think the old superior to the new, we doubt if any one condemns the policy disclosed in sections 7 and 8 of article 9, regulating and limiting municipal debts. The twenty years preceding the adoption of the Constitution of 1874 was an era of great growth and expansion in easy and rapid modes of communication and transportation; highways, such as railroads,

plank roads, and turnpikes, were multiplied. Almost every municipal organization sought to promote the construction of them to, from, and through the municipal limits. They subscribed for the securities of these corporations, sometimes beyond their ability, and generally beyond their subsequent willingness to pay. Not seldom the courts were impelled, at the suit of importunate creditors to enforce the assessment and collection of taxes for payment of such debts by the imprisonment of municipal officers. Litigation, too, in more than one case demonstrated that increased ability to pay was not followed by increased willingness to pay such debts. The debt of one county in this commonwealth, for the larger part made up of subscriptions to the stock and bonds of railroad corporations, reached nearly 40 per cent of its assessed valuation. The basis of such debts was almost wholly speculative, for, when contracted, there was no traffic and no experience in the new enterprise which demonstrated any value to its securities. Prompted often by the wildest hopes of future municipal wealth and prosperity on the completion of the new highway, the county, city, or borough rushed into indebtedness to promote it. This propensity was characterized by an eminent writer on municipal law (*Judge Dillon*) as "an epidemic insanity, inducing extravagant corporate subscriptions to public works." The result of this insanity is shown by the fact that in 1860 the fourteen principal cities of the United States had an aggregate indebtedness of only \$109,808,409 fifteen years afterwards, the aggregate debt of the same cities was \$407,218,351. The debt had increased 271 per cent, the population, only 70 per cent. To this sort of debt there was added, during the war, large loans for bounty purposes, so that in 1878, when the constitutional convention was in session, if there was one evil more prominent and exasperating than another to the taxpayer, it was the big debt of his particular locality,—a debt often out of all proportion to its ability to pay. The convention struck at this evil when they framed sections 7 and 8 of article 9 of the Constitution. The people of the commonwealth struck at it when, by a large majority, they adopted the constitution. They fixed what they deemed the reasonable limit of municipal debt at 7 per cent of the assessed valuation. But we do not concur with the learned counsel for plaintiffs, in his most able argument, that the real intent and policy of the Constitution of 1874 was to establish or promote, except debt for temporary purposes, absolute nonindebtedness for cities, counties, and boroughs,—to inaugurate a new and "pay as you go" system. If his assumption be correct, there would seem to be no escape from his conclusion, viz., that no new debt ought to be incurred while any part of the old remains unpaid. But, it seems to us, the obvious intention of sections 7 and 8 of article 9, and section 8 of article 15, is to authorize a continuous debt, not exceeding 7 per cent of the assessed valuation. In these sections the constitution plainly says to all the municipalities of the commonwealth: "You may owe seven per cent of what you

are worth; if you want to spend more than this, then you must pay as you go, for you shall not at any one time, in the aggregate, be in debt beyond this amount." As to the commonwealth itself, the intention was to wipe out the existing debt and thereafter permit the incurring of only a limited amount of debt on grave exigencies, and that only temporarily. But as to the municipal subdivisions of the state, the necessity of a reasonable debt for municipal improvements was recognized; the constitution sought only to limit the aggregate amount of it at any one time, and to provide for the gradual payment of any such debt incurred for any particular purpose within a period of thirty years. On this theory, the borrowing power within the 7 per cent limit would practically never be wholly exhausted, for, whenever the debt to this amount was created, the process of extinction would commence, leaving in a short time a margin for further loans. The constitution did fix, somewhat arbitrarily, perhaps, but nevertheless fixed, the limit of indebtedness at a sum which the people thought a reasonable indebtedness. They determined that no municipality thereafter should create a debt which practically bankrupted it, or a debt which imposed on the taxpayer a burden too grievous to be borne.

The contention here, then, turns on what is the present actual debt of the city. The amount of uncanceled, undestroyed evidences of debt, it is not disputed, is \$52,758,845.22; the assessed valuation of the taxable property of the city is \$769,930,542. Seven per cent of this amount would leave only a margin of about \$1,000,000 more than the amount of uncanceled evidences of debt. If this evidence of debt which once existed still constitutes part of the real debt of the city, the \$6,000,000 loan is in violation of section 8, article 9, of the Constitution. It is averred by defendants that these uncanceled certificates are not conclusive of the real debt of the city; that it is actually much less; that, of the \$52,758,845.22 apparent debt, \$23,130,100, made up of 6, 4, and 8 per cent loans of the city, is in the sinking fund, purchased by the city's money. Deducting this amount from the apparent debt leaves only \$29,628,745 as the real debt, but little more than 4 per cent of the assessed valuation, and, adding the proposed loan to this, the whole real debt would not exceed 5 per cent of the assessed valuation. A debt is defined by lexicographers to be "that which one person is bound to pay to or perform for another." Are the city securities in the sinking fund still a debt owing by the city, and which she is still bound to pay? Bouvier defines a sinking fund as "a fund arising from particular taxes, imposts, or duties, which is appropriated towards the payment of the interest due on a public loan, and for the gradual payment of the principal." The mere definition of the term, however, helps but little in the determination of the meaning of the word "debt" in the constitution; for, whatever technical definition be given the name applied to the fund, the status of the obligations in it must be determined by the legislation, state and municipal, which put them there.

24 L. R. A.

The first appearance of city legislation on the subject is an ordinance of March 12, 1807, Allison & Penrose's Philadelphia, p. 121. It is entitled "An ordinance for the reduction and payment of the debt of the city." It provides that \$5,000 shall be set aside annually as a sinking fund, to be applied to the purchase and redemption of the funded debt of the city at its market price, not exceeding par, until the debt should be redeemed. If the securities could not be purchased at par, then the city treasurer was authorized to purchase for the fund 6 per cent bonds of the United States. Many ordinances were adopted in subsequent years having reference to the same subject, and disclosing the same purpose in substantially the same language. Then, in 1854, came the consolidation act, which provided "that the net debt of the county of Philadelphia, after deducting and canceling that portion in the sinking fund" (Laws 1854, § 88, p. 41), and the net debts of the several districts and municipalities incorporated with the city, after deducting and canceling the portions held by their respective sinking funds, should be consolidated into one debt, to be called the "debt of the city of Philadelphia;" further, that there should be annually raised by tax, in addition to the income from corporate property, a sum sufficient to pay the interest on the consolidated debt. It was further enacted: "No debt shall be incurred or loans made by the said city, without a contemporaneous appropriation of a sufficient annual income or tax, exclusive of loans, to pay the interest and sink the principal of such debt in thirty years." The consolidation act, in declaring what shall be called the "debt of the city of Philadelphia," says that that portion of the debt in the sinking fund shall first be deducted in an ascertainment of the amount of the debt. It recognized the certificates in the fund as still existing, but not existing as part of the consolidated debt. This was supplemented by a number of ordinances in the years following consolidation, all in harmony with the act, and intended to raise annually a sum sufficient to pay the interest and sink the principal of the funded debt in thirty years. The Act of 1857 prohibited the use of the investments in the sinking fund for any other purpose than sale for money or exchange for city loans, and directed that, when sold or exchanged, "the proceeds should be applied exclusively to the sinking fund or to the extinguishment of the funded debt." Then came section 3, article 15, of the Constitution of 1874, which directs that "every city shall create a sinking fund which shall be inviolably pledged for the payment of the public debt." "Every city shall create a sinking fund;" that is, there shall be set apart from all other city money for a specific purpose—the redemption or payment of the funded debt—a portion of the annual revenues of the city. Then, when this portion of the revenue reaches the fund, it is inviolably pledged for the payment of the funded debt. No temptation, however great, no necessity, however imperious, shall move the city to divert one dollar of the fund to a purpose other than the redemption or payment of the debt. The

word "pledged" is to have in its connection here, not a technical legal definition, but its obvious meaning, that of a solemn promise, which, under no possible circumstances, shall be violated. The Acts of 1874 and 1879 regulating the incurring of municipal debts, and the funding of the same, direct the annual levy and collection of a tax sufficient to pay, in addition to the interest, the principal of the debt in thirty years. So far, then, as relates to the general public, among whom are these plaintiffs, what is called the sinking fund is the mere conduit through and by which the money raised by annual taxation reaches its destination. It goes into the fund for a specific purpose, to which it is inviolably pledged. When there, the commissioners must see to it that it accomplishes its purpose,—the payment of the funded debt of the city. When, with that end in view, they from time to time purchase any portion of the funded debt of the city, then the inviolable pledge of the fund, to the extent of the purchase, is kept; that much of the sinking fund has been, in fact, applied in payment of the funded debt.

As set out in appendix to plaintiffs' paper book, there are now in the sinking fund: 6 per cents, city loan, \$14,233,350; 4 per cents, \$1,940,750; 3 per cents, \$6,947,000—altogether, \$23,120,100 of city certificates purchased by the commissioners. There are, besides these, other securities, not those of the city in the fund. As to these last, obviously they remain in the fund, bound by the inviolable pledge which attached to them when they first became part of it. So far as concerns them, they have not yet been applied in payment or redemption of any part of the funded debt. An asset of the city, easily convertible into cash, they undoubtedly are, but as yet they have not operated to the reduction of the funded debt, to which purpose they were pledged. In effect, they only represent the savings of the city, set aside in anticipation of payment of the debt. As to any actual reduction of the debt by them, there has been none. The debt is still an outstanding liability, unaffected by the savings, with only an increased ability on part of the city to pay, an increase in ability measured by the cash value of the savings. When used in purchase of the debt, there is a release of the pledge and a discharge of the obligation to the amount of the purchase. It is not important, in determining the actual debt, that the commissioners have not authority, immediately on purchase, to cancel or destroy the city certificate; it is paid for by the money of the obligor, put into the fund for that very purpose. As an outstanding unpaid obligation, it can, as to the obligor, have no real effective existence after it is purchased and paid for with the city's money; and although the city, in this issue, only claims to deduct from the apparent debt the amount of 6 per cent certificates in the sinking fund, every city certificate in that fund representing a part of the funded debt, and purchased by the commissioners in the redemption or payment of that debt, ceases to be longer a part of the actual debt of the city. That much of the debt the city is no longer

bound to pay, because practically it is paid. We are speaking now of the actual obligation of the city as affected by these certificates in the fund, but not yet canceled. If payments be not made into the fund for the redemption or purchase of the funded debt, as required by law, the commissioners must see to it that such payments are made, even to the institution of legal proceedings to compel annual payment by the city. The commissioners, in our view of their duty, are not, as has been suggested in the argument, mere city clerks or bookkeepers; they are invested with high powers involving very weighty responsibilities. All the legislation, both state and municipal, to which we have referred, is saturated with the one idea that the sinking fund is a plan or scheme by and through which the funded debt of the city shall annually be reduced by redemption or payment of the evidences of the debt outstanding,—that is, the certificates. If, then, the commissioners purchase for the fund any portion of the city loans, and they are no longer, as affects the city, a liability, are the certificates so purchased, even though not canceled, to be treated as an actual existing debt of the city? As between the city and its creditor, who has parted with his money on the apparent promise of an ordinance that these purchased certificates should not be canceled, but should remain in the fund until the maturity of the loan, he has the right to insist on the letter of his contract, whether there be any substantial benefit to him therefrom or not. He is entitled to his right under his contract, without impairment in a particular which he deems important. If he relied on a form, without substance, when he loaned his money, it is not for the city, which promised him not to cancel before maturity, to question his right or violate its promise by canceling as soon as paid. But the contention between the creditor and the city as to when the certificates may be lawfully canceled or destroyed is a wholly different one from that before us. Suppose, as is argued, another creditor loaned his money on the express stipulation of the ordinance that this purchased certificate should not be canceled until the maturity of the loan of which it was a part. Very well; let this be so. At most, this second creditor has two securities instead of one for his debt,—the one in his pocket, the other, uncanceled, in the sinking fund. But that adds nothing to the real debt. If a creditor have twenty securities of his debtor for \$1,000 loan, the debtor's liability is determined, not by the aggregate of securities, but by the amount he actually owes, which is \$1,000, not \$20,000.

The city owes now just what it is bound to pay; not one cent more. If it has, through the sinking fund, purchased its own certificates, placed them uncanceled in the fund, and even pays interest on them annually, it cannot pay them again. The payment of annual interest is only a method or device for the annual appropriation to the fund. To illustrate further: Suppose the city were to resolve to lay a tax sufficient to pay its whole funded debt this year: what sum should it raise? If it assumed, as averred by plaintiffs is the

fact, that its real debt is \$52,758,845.22, which includes the city certificates in the sinking fund, it would then collect from the people \$23,180,100 more than it would pay out. Uncanceled certificates to this amount, it is true, are in the sinking fund, but they have been already bought by the city's money under the sinking fund plan for the payment of the funded debt, and belong to the city. Manifestly, she would have raised \$23,180,100 more than her debt,—more than she was "bound to pay or perform," under the definition of "debt" already quoted; but if a tax of 5 per cent would raise enough money to pay every debt she is bound to pay, as is not disputed, then her debt is 2 per cent within the constitutional limit. While this question is here raised for the first time in this state under the Constitution of 1874, a case almost the same was decided by the New York court of appeals. *Bank for Savings in New York v. Grace*, 102 N. Y. 818. Section 11, article 8, of the Constitution of that state has this provision: "No county containing a city of over one hundred thousand inhabitants, or any such city, shall be allowed to become indebted for any purpose, or in any manner, to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate of such city or county subject to taxation." In 1886, the date of the suit, the authorized funded debt of the city and county of New York was \$126,000,000; the assessed value of real estate was \$1,168,448,137. The debt was therefore apparently in excess of the constitutional limit. But more than \$34,000,000 of the city certificates had been purchased for, and were in, the sinking fund. Deducting these from the whole funded debt left the debt \$19,000,000 less than 10 per centum of the assessed valuation of real estate. The plaintiffs complained that the city was about to issue a loan of \$2,000,000 for the improvement of docks, and, counting the certificates in the sinking fund as part of the debt, this was a violation of the constitution. They therefore prayed for an injunction restraining such issue. The case was most ably and elaborately argued, both in the lower courts and in the court of appeals, which last-named court held that the intent of the constitutional prohibition was aimed "at an actual, not a theoretical, indebtedness,—at a substantial liability which can only be discharged by the enforcement of a tax or an assessment, which, when levied, will be a charge upon the taxpayer, and a burden for him to remove, not a formal obligation which may remain as evidence of a once existing debt, but which can, in no way, be regarded as a present debt to be enforced, and which if not before canceled by the commissioners, becomes waste paper by the mere efflux of time." Therefore the court held that the certificates purchased for the sinking fund were not a debt against the city, to be computed in ascertainment of the amount within the constitutional limit, and dismissed the bill. While we are not bound by the judicial construction put upon the New York constitution, yet the prohibition there is so nearly like unto ours, and the case

was so exhaustively discussed in all its aspects by prominent counsel, then carefully considered by a court eminent for its learning and ability, that we cannot but give persuasive weight to the judgment, vindicated as it is, it seems to us, by the soundest reasoning.

As to the second averment of the bill,—that the debt to be created, to the extent of one half, is practically a loan of the city's credit to the Philadelphia & Reading Railroad Company, a private corporation,—we are of the opinion it cannot be sustained. The avoidance of grade crossings is not only desirable, but, with the growth of the city in business and population, may be considered absolutely necessary. The maimings and deaths incident to grade crossings, the records of this court show, are increasing every year. A densely populated city, dissected by a steam railroad at grade, suffers a serious interruption to travel on its streets, and permits within its limits a constant menace to life and limb. Under such circumstances, it is the city's duty to rid itself of such an obstacle to its growth, and of a danger always imminent. It has the unquestioned power to do so, if there be no legal right on the part of the railroad company interfered with. If there be such right, then it has power to make terms with the corporation, by which the corporation waives its right. And the city has the power to assume the entire expense of the municipal improvement. If the corporation, in view of advantages to it, agrees to reimburse the city to the amount of one half the expenditure, the transaction is, in no sense of the words, a loan of the city's credit to the corporation. The city makes an improvement which is a great public necessity, which largely enhances the valuation of the taxable property; it makes it at its own expense, which it has the undoubted power to do. The corporation, which is also benefited, but which is not impelled thereto by any legal obligation to the public, makes a contribution to the city of one half the cost of the improvement. It thereby obtains no loan of the city credit; simply reimburses the city for an expenditure from which the corporation was greatly advantaged.

We hold: (1) That the \$23,180,100 of city certificates in the sinking fund is not a debt within the meaning of the word "debt" in section 8, article 2, of the Constitution; that the real debt of the city is the authorized debt, less the amount of the city certificates purchased and uncanceled in that fund. (2) The agreement of the city with the Philadelphia & Reading Railroad Company is not a loan of the city's credit to a corporation.

The bill is dismissed at the costs of plaintiffs.

Sterrett, Ch. J., dissenting:

This taxpayers' bill, brought against the city of Philadelphia, and the mayor and comptroller thereof, charges, in substance: (1) That the creation of the \$6,000,000 loan, authorized by the ordinance of March 15, 1894, will increase the debt of the city nearly \$5,000,000 above the constitutional limit of "seven per centum upon the assessed value of

the taxable property therein," in violation of section 8, article 9, of the Constitution. (2) That about \$3,000,000 of the proceeds of said loan is to be expended for the use and benefit of the Philadelphia & Reading Railroad Company in such way as to be in fact an appropriation of money for or a loan of its credit to said railroad corporation in violation of section 7, article 9, of the Constitution; and prays that said defendants be enjoined from placing said loan, etc. In my opinion these charges are abundantly sustained, and the injunction, as prayed for, should issue on both grounds. Section 8, article 9, above referred to, declares: "The debt of any city . . . shall never exceed seven per centum upon the assessed value of the taxable property therein," etc. The history of the constitutional limitation and kindred provisions—among which is section 8, article 15, ordaining that "every city shall create a sinking fund which shall be inviolably pledged for the payment of its funded debt"—is too familiar to require extended comment. They were intended to remedy the then great and growing evil of excessive municipal indebtedness, and consequent oppressive taxation. The latter was the inevitable result of the former, and the obvious, if not the only, remedy was a reasonable limitation on municipal indebtedness. That was finally fixed at "seven per centum upon the assessed value of the taxable property therein," and became a part of the fundamental law. This limitation was of course intended for the protection of taxpayers, because the direct effect of the evil to be remedied was upon them. It was considered by the framers of the constitution that, in addition to taxation for the ordinary current expenses of municipal government, property owners should not be further taxed to any greater extent than is necessary to pay interest on a municipal debt, not exceeding the 7 per cent limit, and to maintain a sinking fund pledged for the payment of said debt at maturity. For example, if the debt of a given city, upon which it is annually paying interest, and also maintaining a sinking fund for the purpose of paying the principal at maturity, amounts to "seven per centum of the assessed value of the taxable property therein," it has reached the ultimate limit of its borrowing power, and must remain in that condition until a borrowing margin is created by reduction of its funded debt or increase of its assessed valuation. It is conceded that the present outstanding indebtedness of the city defendant is \$52,578,845.22, or nearly up to the 7 per cent limit. On every dollar of that sum it is not only paying interest, but, for the purpose of paying the principal of the several loans at maturity, it is also making quarterly payments to the commissioners of the sinking fund, which fund the city, by contract with its loan holders, created and inviolably pledged to them for the payment of said loans at maturity. The fund thus created, and to the gradual increase of which the city bound itself to its loan holders, was committed to the custody and management of three persons, called "commissioners of the sinking fund," whose duty it is to invest and reinvest the same,

etc., until the maturity of the corresponding loan, and then apply the same to the payment thereof in full, if the fund be sufficient; if not, then *pro rata*. Said commissioners are in fact and in law trustees of the said fund and the sureties which represent it,—trustees for both the city and its loan holders, but primarily for the latter, until their claims are paid. Each and every loan holder has a substantial equitable interest in each and every dollar of the fund, and securities which represent it. The legal title to the fund, including the securities belonging thereto, is in said commissioners. Within the lines of their authority as trustees, they have absolute control of it. The city has no more right to the custody and control of the securities than the loan holders have, and not as much. The sinking fund is now represented by securities amounting in round numbers to \$25,000,000, about \$14,000,000 of which are in certificates of the city (6 per cent loans), in which the commissioners are authorized to invest; but those city 6's are no more the property of the city than are the United States bonds or other securities in which the sinking fund is invested. In view of the authority of the commissioners to sell and reinvest, *non constat* that the same securities will represent the fund when the corresponding loan matured. As we have seen, the funded debt of the city, including the securities held by the commissioners of the sinking fund, on all of which it is paying and must continue to pay, interest until the corresponding loans respectively mature, is \$52,578,845.22,—nearly up to the 7 per cent limit. If the proposed \$6,000,000 loan is placed, the funded interest-bearing debt of the city will be \$58,578,845.22, or about \$5,000,000 in excess of the 7 per cent limit. That excess will, of course, necessitate an additional requisition on the taxpayers of the city for an amount sufficient to pay the interest on said excess, and provide for the payment of the principal at maturity. This would be a clear violation of the constitutional limitation, both in letter and in spirit. If it is not, there is no good reason why the excess may not be increased to the extent of \$25,000,000,—the amount of securities in the sinking fund. The only justification or excuse that is suggested for this manifest violation of one of the most valuable safeguards of the constitution is that the city, in ascertaining the amount of its debt, has a right to deduct from its funded debt, on which it is now paying, and must continue to pay, interest, the amount of the city 6's now owned and held by the commissioners of the sinking fund, thus reducing its so-called "real debt" to about \$88,572,845.22. This proposition is as unsound as it is novel. What are we to understand by the word "debt," as employed in the section above quoted? As everybody would naturally understand it, the debt of a city is the aggregate amount of its outstanding obligations or promises to pay. A debt is defined to be "that which is due from one person to another, whether money, goods, or services, and whether payable at present or at a future time." As defined by the Century Dictionary, indebtedness is: "(1) The state of being indebted,

without regard to the ability or inability to pay the debt. (2) The amount owed,—debts collectively; as the indebtedness of an individual or a corporation." Surely the word "debt" ought to embrace, and does embrace, at least all obligations or promises to pay upon which interest is payable, and is actually paid, at stated times. As employed by the framers of the constitution and the people by whom it was adopted, the phrase "debt of any city," etc., was undoubtedly intended to mean at least all interest-bearing obligations or promises to pay.

As to the second ground. Conceding to the fullest extent the meritorious character of the purpose for which the proceeds of the \$6,000-

000 loan is to be used (the reconstruction by the city of part of the Philadelphia & Reading Railroad, in which that company is confessedly interested to the extent of at least \$3,000,000, which it promises to pay or secure to the city), the undisputed facts sufficiently show that at least the sum last named is to be expended for the use and benefit of said company in such way as to be in truth and in fact neither more nor less than an appropriation of money for, or a loan of the city's credit to, said railroad corporation, in violation of section 7, article 9, of the fundamental law. Time will not permit the discussion of this point. For reasons above suggested, I would award the injunction.

OREGON SUPREME COURT.

John SAVAGE, *Recept.*,

v.

City of SALEM, *Appt.*

(23 Or. 881.)

1. Tanks erected in a street by permission of the municipality at points designated by it to assist the owner in performing his contract of sprinkling the streets cannot be treated as public nuisances *per se*.
2. Tanks to hold water for sprinkling streets erected in a street under license from the municipality cannot be removed by it without making compensation to the owner, unless they have become actual nuisances.

(January 9, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of plaintiff in an action brought to recover damages for the alleged wrongful removal by defendant of certain water tanks erected in a public street by a plaintiff with defendant's permission. *Affirmed.*

The facts are stated in the opinion.

Messrs. Darcy & Bingham, for appellant:

The erection of any structure in a street rendering it less commodious is a nuisance, and a city has no authority without the sanction of the legislature to license such a structure.

2 Dill. Mun. Corp. 3d ed. § 660; Elliott, Roads & Streets, 485, 486.

The authority of a city to prevent and abate nuisances should be liberally construed.

Elliott, Roads & Streets, 486.

"Public highways belong, from side to side and from end to end, to the public," and a city has no authority, unless granted by the legislature, to authorize any erection within their limits. Such erections would be unauthorized and an unauthorized obstruction is *per se* a nuisance.

Elliott, Roads & Streets, 478; *Bybes v. State*, 94 Ind. 443, 48 Am. Rep. 175; *Yates v. War-*

renton, 84 Va. 337; *Callanan v. Gilman*, 107 N. Y. 360; *People v. Kerr*, 37 N. Y. 183; *State v. Edens*, 85 N. C. 522; *People v. Vanderbilt*, 38 Barb. 283; *Emerson v. Babcock*, 66 Iowa, 257, 55 Am. Rep. 273; *Farrell v. New York*, 20 N. Y. S. R. 12; *State v. Berdella*, 73 Ind. 185, 38 Am. Rep. 117; *Haynes v. Thomas*, 7 Ind. 38; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286.

The municipality is itself guilty of maintaining a public nuisance, if it places a permanent obstruction in a public street.

Wartman v. Philadelphia, 33 Pa. 202; *State v. Laverack*, 84 N. J. L. 201.

The existence of permanent obstructions in the highway is, therefore, clearly such an unlawful act as injures the citizens who are lot owners on the street, and who have a right, as an essential incident to the enjoyment of their property, to have the street maintain its full width, free from all obstructions of a permanent character.

Smith v. State, 23 N. J. L. 712; *Moyamensing Comrs. v. Long*, 1 Para. Sel. Eq. Cas. 148; *Wood, Nuisance*, § 252; *Langedale v. Bonton*, 12 Ind. 467; *Pettis v. Johnson*, 56 Ind. 139; *Com. v. Blaisdell*, 107 Mass. 284.

Atty-Gen. v. Ewart Boom. Co., 34 Mich. 462, defines a public nuisance as "something which subjects the people to some degree of inconvenience or annoyance."

A public nuisance is that which injures whatever portion of the public may come in contact with it.

Lansing v. Smith, 8 Cow. 146.

Between individuals, even when money has been expended by the licensee, on the faith of the license, the licensor may exercise his power of revocation.

18 Am. & Eng. Encyclop. Law, p. 550, and note 1, p. 551; 2 Dill. Mun. Corp. 3d ed. § 658; Elliott, Roads & Streets, 327, 328; Salem Charter, Laws 1891, p. 1092.

A municipality has no more right to license or maintain a nuisance than an individual would have.

NOTE.—The above case is clearly based on the public nature of the use where tanks for sprinkling are permitted in a street. That street sprinkling is a local improvement within the rule as to 24 L. R. A.

assessments is clearly a different although a kindred question. As to this, see note to *Chicago v. Blair*, ante, 412.

15 Am. & Eng. Encyclop. Law, p. 1185, note 4; *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 851; *Columbus v. Jaques*, 80 Ga. 508; *Com. v. Rush*, 14 Pa. 186; *Herbert v. Benson*, 2 La. Ann. 770.

Messrs. Bonham & Holmes for respondent.

Bean, J., delivered the opinion of the court:

This is an action to recover damages for the removal by defendant of two water tanks which had been erected by plaintiff on State and Court streets, in the city of Salem, by permission of defendant, for the purpose of supplying his sprinkling wagons with water for street sprinkling, and comes here on appeal from a judgment in favor of the plaintiff. On the 16th of February, 1887, the city of Salem, through its common council, authorized and empowered the plaintiff, under the supervision of its street supervisor, to erect and maintain water tanks, for the purpose of supplying his street-sprinkling wagons with water with which to sprinkle and allay the dust on certain of the principal streets of the city, for a compensation by him received from the adjoining property owners. Under this authority the two tanks in question were erected by plaintiff, at the places designated, and under the supervision of the street supervisor, and were maintained and used by him for the purposes for which they were authorized until July 7, 1891, when the council ordered and directed the street commissioner to remove the tanks, which was accordingly done, after a refusal by plaintiff to remove them himself, when this action was commenced to recover damages for such removal.

The contention for appellant is—*First*, that the city had no power or authority to authorize the erection of these water tanks in the streets, because they were to be used for private purposes, and were therefore nuisances *per se*, which could be abated at any time; and, *second*, if this is not so, the permission to so erect them was but a mere license, revocable at the pleasure of the city. At the outset it is well to note that this case is unembarrassed by any question as to the right or remedy of an abutting property owner, or of a private individual, who has suffered some injury special to himself, and not in common with the public, from the erection or obstruction in question, but is solely a question between the municipality, which authorized the alleged obstruction, and the licensee; and hence many of the authorities cited and relied on by the defendant are not applicable to the facts of this case, or in point, and the language of the opinions in these, as in all cases, must be interpreted in the light of the particular facts as presented to the court.

As a general rule, it has been said that "public highways belong, from side to side, and end to end, to the public." *State v. Berdette*, 78 Ind. 185, 38 Am. Rep. 117; *Elliott, Roads & Streets*, 478; and hence any unauthorized, permanent erection or structure which materially encroaches upon a public street or highway, and impedes or interferes with travel, is a nuisance *per se*, and may be abated as such, notwithstanding ample space is left for passage by the public. But it now seems settled

that municipal authorities, which possess, under their charters, general control over the streets, have the power and may authorize and render lawful obstructions and erections therein for a public purpose, which otherwise would be deemed nuisances, on the ground that such erections or structures are merely putting the street to a new and improved use, as demanded and required by the necessities of the times and the modern conveniences and appliances. It is upon this principle that the right to grant franchises authorizing the use of the streets for water and gas pipes, for the construction and operation of street railways, the erection of water hydrants and lamp-posts, of telegraph, telephone, electric-light, and railway poles, and similar structures, is maintained and now generally recognized and upheld by the courts. 2 Dill. Mun. Corp. §§ 657-697; *Keasbey, Electric Wires*, 86, 89; *Thomp. Electricity*, §§ 26, 28.

Since a municipal corporation holds its control and power over the streets in trust for the public, it has no authority to authorize or permit private persons or corporations to erect or maintain permanent obstructions therein for purely private purposes (*Pettis v. Johnson*, 56 Ind. 139; *Emerson v. Babcock*, 66 Iowa, 257; *Farrell v. New York*, 20 N. Y. S. R. 13), but it may authorize such erections or structures by private persons or corporations, for the purpose of serving the public, for private gain; and in such case, although such structures may in fact be or become a public nuisance, and liable to abatement as such, they cannot be held to be a nuisance *per se*. "It is a legal solecism to call that a 'public nuisance' which is maintained by public authority." *Harris v. Thompson*, 9 Barb. 350. Hence, in *Com. v. Boston*, 97 Mass. 555, it was held that the specifications and decisions by the mayor and aldermen of a city through which the lines of an electric telegraph company pass, made and recorded, determining the kind and location of the posts of the company in a highway, are conclusive upon the rightfulness of their erection; so that they cannot lawfully be removed by the city or its officers, or treated in any manner as a public nuisance. So, where a railroad company, under an act, granting it power to construct its road on a public highway, occupied a portion of its road, not exceeding the extent allowed by law, and obstructed travel on such portion, it was held not to be guilty of a nuisance. *Danville, H. & W. R. Co. v. Com.* 73 Pa. 29. To the same effect is *Randle v. Pacific Railroad*, 65 Mo. 325.

It follows, then, that the water tanks in question, having been erected by plaintiff, by the authority and permission of the defendant, at the places designated and selected by its agent, and under his supervision, they cannot be held to be public nuisances *per se*, if they were erected and maintained for public, and not private, purposes; and this depends upon whether sprinkling the streets of a municipality is a public purpose, or, in other words, a business in which the corporation itself may lawfully engage. There seems scarcely room for two opinions upon this point, so unquestionable is it that street sprinkling is a public purpose. As was said by *Pierpoint, J.*, in *West v. Bancroft*, 83 Vt. 871, in sustaining the

right of the city to construct a reservoir in a street for the purpose of retaining water to be used in sprinkling streets and extinguishing fires: "All those acts which tend to facilitate travel, and add to the ease, comfort, and convenience of the traveler or his beasts, whether it be by cutting down hills, filling ravines, paving roads, erecting water troughs, or sprinkling the streets, are acts which it is proper, and often necessary, for the public to do; and no other one of these acts, perhaps, would add so much to the comfort of the passers on the highway, as well as all the inhabitants of the village, as that of sprinkling the streets." And in *State v. Reis*, 38 Minn. 371, it was held that street sprinkling is a "local improvement," for which an assessment may be levied upon the property fronting or abutting on the street sprinkled, in proportion to its lineal feet frontage, and, in the course of the opinion, Mitchell, J., said: "That street sprinkling is a public purpose, is unquestioned." So, too, a public pump in a street has been held not to be a nuisance to an abutting lot owner, when maintained by the city authorities. *Lostutter v. Aurora*, 126 Ind. 486, 12 L. R. A. 259. We conclude, therefore, that the water tanks erected by the plaintiff were not nuisances per

se, and could not be abated as such, and whether they were or had become in fact nuisances was a question for the jury, and its verdict is conclusive upon that matter.

Passing, now, to a consideration of the question as to the right of the city to revoke the license under which the plaintiff erected the water tanks, the rule seems to be that after a municipality has granted a license or franchise to a private person or corporation to occupy a portion of a street for public purposes, and the licensee has acted upon such grant, and expended money on the faith thereof, the city cannot revoke the license without compensation to the owner, unless the erection or structure so authorized is, or has in fact, by subsequent use, become an actual nuisance. 1 Dill. Mun. Corp. 814; *State v. Jersey City*, 49 N. J. L. 303; *Com. v. Boston*, 97 Mass. 555.

In this case the question as to whether these water tanks were, or by plaintiff's negligence had become, nuisances, was submitted to the jury, and, their verdict being against the city, it was not justified in revoking the license and removing the tanks, and must respond in damages to plaintiff for so doing.

Judgment of the court below is therefore affirmed.

MICHIGAN SUPREME COURT.

Henry MERTZ

v.

Thomas A. BERRY, *Appt.*

(.....Mich.....)

A "judgment for a tort as well as a judgment for a contract is included in

the constitutional provision exempting homesteads from liability "for any debts contracted."

(June 16, 1894.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Clair County in favor of plaintiff in an action brought to set

NOTE.—Exemption of homestead from liability for torts.

Generally.

There are some decisions holding that a homestead is exempt from sale under judgments for torts, each case being, however, a construction of the statute or constitution of that state, as where the constitution exempts the same from sale for a "debt," a judgment for tort is held to be a debt. *Dellinger v. Tweed*, 66 N. C. 206; *Gill v. Edwards*, 87 N. C. 77.

So where the homestead is exempt from sale for any "debt" or "liability" contracted, this was held to cover a debt in tort, and "contracted" was held to mean "incurred." *Smith v. Omana*, 17 Wis. 395.

This Wisconsin case which is the only one which construes the words "debts contracted" in agreement with the Michigan case *Mertz v. Berry*, did not in fact base the decision on those words alone. But the court said "the word 'liability' used in conjunction with the word 'debt' is broad enough to include all claims whether founded upon tort or contract."

And an exemption "from levy and forced sale under any process or order from any court of law or equity" includes judgments *ex delicto*. *Conroy v. Sullivan*, 44 Ill. 451.

And this will exempt from sale for fine and costs. *Loomis v. Gerson*, 68 Ill. 11.

See *infra* as to "Fine or costs."

And in *Massie v. Eynart*, 38 Ark. 663, it was stated that the homestead could not be sold on a 24 L. R. A.

judgment for tort or costs thereon, under a statute providing that the same was not liable to sale under execution on any judgment except for purchase money taxes or trusts.

So the homestead of an attorney is not liable for his debt caused by converting to his own use a deposit as indemnity for suretyship—although the Arkansas constitution provided that attorneys and trustees of express trusts shall have no exemption against money collected by them. *Sanders v. Sanders*, 56 Ark. 585.

So an exemption of a homestead from sale under legal process will prevent a sale on an execution issued on a judgment in an action for a tort. *Parker v. Savage*, 6 Lea, 408.

But it is held by many courts that the exemption given for "debts contracted" does not apply to torts. *Burton v. Mill*, 78 Va. 468; *Schouton v. Kilmer*, 8 How. Pr. 527; *Lathrop v. Singer*, 39 Barb. 396; *Meredith v. Holmes*, 68 Ala. 190. In *Burton v. Mills*, *supra*, the action was for breach of promise. See *Cook v. Newman*, *infra*.

And an exemption given for "debts contracted" does not apply to a fine. *Whiteacre v. Bector*, 29 Gratt. 714, 23 Am. Rep. 420.

Nor to a penalty. *Williams v. Bowden*, 69 Ala. 433.

But 't was stated in *Molaren v. Anderson*, 31 Ala. 105, that the sheriff could not look behind the face of the judgment to determine whether the cause of action was for tort or on contract.

These cases construe the same phrase "debt contracted" as appears in the Michigan statute in the

aside an execution sale of plaintiff's homestead. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edwin F. Conely and Orla B. Taylor, for appellant:

There is no homestead exemption as against a judgment in an action of tort, under our Constitution and statutes.

Kruger v. LeBlanc, 75 Mich. 424; *Lane v. Baker*, 2 Grant, Cas. 424.

At common law there is no homestead exemption against judgments of any kind.

The exemption is no broader than its terms, being in derogation of the common law.

Hill v. Bowman, 35 Mich. 191; *Detroit Post & Tribune Co. v. Reilly*, 46 Mich. 469.

The legal acceptance of "debt" is a sum of money due by certain and express agreement.

8 Bl. Com. 154.

Such is also the popular acceptance of the term.

McElfresh v. Kirkendall, 36 Iowa, 226.

A tort does not come within the scope of the word.

Ibid.

Statutes of other states either identical or similar in their terms, have been construed in accordance with our views.

Robinson v. Wiley, 15 N. Y. 499; *Lathrop v. Singer*, 39 Barb. 396; *Schouton v. Kilmer*, 8 How. Pr. 527; *Ries v. McClatchey*, 128 Ind. 125; *Dorrell v. Hannah*, 80 Ind. 497; *Smith v. Wood*, 83 Ind. 522; *Gentry v. Purcell*, 84 Ind. 83; *Thompson v. Ross*, 87 Ind. 156; *Nowling v. McIntosh*, 89 Ind. 593; *State v. Melogue*, 9 Ind. 196; *McLaren v. Anderson*, 81 Ala. 106; *Vin-*

main case and all contrary to the constitution there given.

In Indiana where the exemption is against a judgment on a "debt growing out of contract or founded upon contract express or implied," there is no exemption on a judgment for tort. *Nowling v. McIntosh*, 89 Ind. 593.

But where such judgment is mixed with a judgment on contract, the creditor has reduced his rights to a level with his inferior judgment and the exemption applies. *Ries v. McClatchey*, 128 Ind. 125.

And there is no exemption in Georgia as against judgments for torts as the statute applies only to judgments on contracts. *Davis v. Henson*, 29 Ga. 345.

And under the Georgia statute the exemption is not given where the debtor is guilty of fraud, and he must make a full disclosure of his assets before entitled to exemption. *McNally v. Mulherin*, 79 Ga. 614.

Under the Pennsylvania Act of 1849, exempting the homestead from judgments on "contract" there is no exemption from judgments for slander or fraud. *Kenyon v. Gould*, 61 Pa. 222; *Edwards v. Mahon*, 5 Phila. 531.

In *Robinson v. Wiley*, 15 N. Y. 499, it was stated that if the referee had found that the statement by the purchaser of goods, that his house and lot was unincumbered except by a mortgage of \$—, and that there was no other claim or incumbrance thereon, was made with fraudulent intention to cause the vendor to believe that no exemption existed, the exemption would not apply.

A claim for damages for breach of promise is not a "debt" so as to prevent an exemption where judgment is not rendered until after the filing of claim of homestead, under the proviso that no property shall be exempt for a debt contracted prior to the recording of the notice. See *Burton v. Mill*, 78 Va. 468; *Cook v. Newman*, 8 How. Pr. 524.

The court does not discuss the question as to liability for tort, and *Schouton v. Kilmer*, 8 How. Pr. 527, states that there is no exemption against judgments for tort.

Fines or costs.

Some courts hold that a homestead cannot be taken on a judgment for a fine or recognizance. *Whiteacre v. Rector*, 29 Gratt. 714, 26 Am. Rep. 420; *Com. v. Dougherty*, 8 Phila. 366; *Loomis v. Gerson*, 62 Ill. 11.

And in *Com. v. Lay*, 12 Bush, 283, 23 Am. Rep. 718, it was held that execution for fines imposed or for costs should not be levied on the homestead as the bill of rights required bail to be the owner of property above the statutory exemption, thereby implying that exemption was applicable in case of fines.

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But under Iowa Code, section 1556, providing that a homestead shall be liable for judgments for fines and costs for violation of the liquor law, it may be taken for such judgment when used for that purpose. *Arnold v. Gotshall*, 71 Iowa, 572; *McClure v. Braniff*, 76 Iowa, 88.

Under Ind. Rev. Stat. 1881, § 703, providing for exemption "for any debt growing out of or founded upon a contract express or implied," there is no exemption from a judgment for costs in an action of tort. *Russell v. Cleary*, 105 Ind. 502.

In *Donaldson v. Banta*, 5 Ind. App. 71, it was said that a judgment for costs disconnected from any other judgment for recovery whether in an action *ex delicto* or *ex contractu* is not a "debt growing out of contract or founded upon contract, express or implied," and there is no exemption.

But in *Massie v. Emyart*, 33 Ark. 688, and *Loomis v. Gerson*, 62 Ill. 11, it was held that a homestead was exempt from a judgment for costs, under the peculiar statutes of those states.

A homestead is not liable for a judgment in favor of the defendant, for costs in an action for tort or trover. *Kruger v. LeBlanc*, 75 Mich. 424; *Lane v. Baker*, 2 Grant, Cas. 424.

But in *Schouton v. Kilmer*, 8 How. Pr. 527, it was held that the homestead of the plaintiff was liable to a judgment for costs in an action of tort, as if execution be issued upon a judgment in tort there is no exemption and a judgment for costs is within the same rule as it is not a judgment for a "debt contracted."

"Official bonds."

There is no exemption in some states for liability on an official bond in the nature of a tort where the constitution exempts "for any debt contracted." *Schuessler v. Dudley*, 80 Ala. 547, 80 Am. Rep. 124; *Vincent v. State*, 74 Ala. 274.

So where the statute applies only to contracts. *Brooks v. State*, 54 Ga. 86.

And a constable is not entitled to the exemption laws in an execution against him for neglect of official duty. *Kirkpatrick v. White*, 29 Pa. 176.

No exemption will be allowed to sheriff in suit on his bond by the state as it would repeal by implication a statute making such judgment a lien—if exempt the right must be explicitly given. *Com. v. Cook*, 8 Bush, 250, 8 Am. Rep. 453.

But in *Hume v. Gossett*, 43 Ill. 297, it was held that the homestead of a tax collector could not be taken for money collected for the state, although the statute made the bond a lien on all the property of the collector—the repeal of the homestead law will not be presumed by implication.

In this note cases in regard to exemption of personality have not been included. I. T.

sent v. State, 74 Ala. 274; *Meredith v. Holmes*, 68 Ala. 190; *Williams v. Bowden*, 69 Ala. 483; *Davis v. Henson*, 29 Ga. 345; *McClure v. Braniff*, 75 Iowa, 38; *Burton v. Mill*, 78 Va. 468; *Thompson, Homesteads & Exemptions*, §§ 880-344; *Waples, Homesteads & Exemptions*, p. 322; *Kenyon v. Gould*, 61 Pa. 292; *Edwards v. Mahon*, 5 Phila. 531; *Kirkpatrick v. White*, 29 Pa. 176.

A broader construction has been permitted in Wisconsin, Illinois and North Carolina, but in each state the statute is much broader in its terms.

Wis. Stat. § 2983, p. 784; *Smith v. Omana*, 17 Wis. 395.

The word "liability" is much broader in its signification than "debts contracted," and includes torts.

McElfresh v. Kirkendall, 36 Iowa, 226; *Bouvier, Law Dict.*; *Black, Law Dict.*

In the Illinois statute "it is emphatically declared that it is the object of the act to require in all cases the wife's signature and acknowledgment as conditions to the alienation of the homestead."

Pardee v. Lindley, 81 Ill. 174, 88 Am. Dec. 219; *Conroy v. Sullivan*, 44 Ill. 451; *Loomis v. Gerson*, 62 Ill. 11.

As was pointed out in *Meredith v. Holmes*, 68 Ala. 190, the decision in Illinois was not reached upon a consideration of the terms of the statute alone, but by connection with and reference to certain other statutes peculiar to Illinois.

In North Carolina, also, the statute is unlike ours.

Messrs. Avery Bros. & Walsh, for appellee:

The word "debt" is used to describe an obligation to pay money, which is its general sense and so it is generally used.

The word "contracted" is not used in the restricted and narrow sense of meaning founded on contract but in its more general sense meaning incurred.

Hill v. Bowman, 85 Mich. 191; *Detroit Post & Tribune Co. v. Reilly* 48 Mich. 460.

Conroy v. Sullivan, 44 Ill. 451, in construing the statute says: "While a judgment for slander does not fall within the actual terms, yet under the act forbidding the alienation of the homestead without the signature of the wife it cannot be sold."

Loomis v. Gerson, 62 Ill. 11.

McGrath, Ch. J., delivered the opinion of the court:

The sole question in this case is whether, under our constitution, the homestead is exempted from levy and sale under an execution issued upon a judgment recovered in an action of tort. The constitution provides (art. 16, § 2) that "every homestead . . . shall be exempt from forced sale on execution or any other final process from the court, for any debts contracted after the adoption of this constitution." The statute provides (How. Stat. § 7721) that "a homestead . . . shall not be subject to forced sale on execution or any other final process from a court, for any debt or debts growing out of, or founded upon contract, either expressed or implied, made after the third day of July, 1848." This statute

was, however, passed in 1848, before the adoption of the present constitution. Upon examination of the proceedings of the constitutional convention of 1850, it will be observed that sections 1, 2, and 3 of this article, as first reported, read as follows:

"(1) The personal property of every resident of this state shall be exempted to the amount of not less than five hundred dollars, from sale on execution or other final process of any court of law or equity.

"(2) The homestead of every family, of not less than forty acres, shall not be included in any city, village, or recorded plat, or in lieu thereof, any lot in any city, village, or recorded town plat, shall not be subject to forced sale for any debt hereafter incurred; nor shall the owner of such homestead, if he be a married man, alienate the same by any deed of conveyance, without the consent of his wife, obtained in due form of law.

"(3) The homestead of any family, after the death of the owner thereof, shall likewise be exempt from the payment of his debts contracted after the adoption of this constitution, in all cases where any minor children shall survive the death of such owner, for their benefit and support during minority." Const. Deb. 1850, p. 240.

When these sections were under consideration, it was urged that the first section was retrospective in its action; and, to obviate that objection, Mr. Pierce offered the following as an addition thereto: "Issued for the collection of any debt contracted after the adoption of this constitution." Const. Deb. 1850, p. 667. The article was again taken from the table, when a substitute was offered for sections 1, 2, and 3. Thereupon, certain amendments were offered as a substitute for the former substitute, which amendment prevailed. The article was then recommitted, with instructions. The committee immediately reported back the article, "amended agreeably to instructions." The article was then passed, and, under the rule, referred to the committee on arrangement and phraseology. Up to this time, it nowhere appears that section 2 had been amended, or that any instructions had been given respecting amendments thereto, except such as appear on pages 740 and 741, which do not relate to this subject. The committee on arrangement and phraseology reported back the article, and, in their report, the language, "for any debt contracted after the adoption of this constitution," first appeared as substituted for the language, "for any debt thereafter incurred." This would appear to have been done to make the language of the three sections uniform. The subject of exemption was very fully discussed. The retrospective effect of the first section, as it appeared when first reported, was objected to, but nowhere was any distinction hinted at between debts founded on contract and those founded in tort; and it affirmatively appears that the language added to the first section was appended for the express purpose of obviating the objection raised. The statutes existing at that time relating to the exemption of personal property exempted the property specified from levy and sale, "under any execution, or upon any other final process of a court." The Statute of 1848, relating to real property, above quoted, was

clear and explicit, and clearly applies only "to debts growing out of, or founded upon, contract made after," etc. The debates furnish no indication of an intention to make the constitutional provision relating to the exemption of personal property more restrictive than the statutory provisions upon the same subject. Pending the discussion of these sections, which was a protracted one, the second section read, "any debt thereafter incurred;" and, although the section was amended in other particulars, no reference appears to have been made to this language. The word "debt" is one of large import, including debts of record or judgment. *Gray v. Bennett*, 3 Met. 522; *New Jersey Ins. Co. v. Meeker*, 87 N. J. L. 801; *Re Lambie's Estate*, 94 Mich. 489.

A judgment founded in tort is a debt. What, then, is the office of the language which follows the word "debt?" Is it to qualify the word "debt," or, in other words, to indicate what class of debts the exemption was intended to include, or was it used for the purpose of making the act prospective, instead of retrospective? In other words, to limit the operation of the provision to debts afterwards incurred. In view of the history recited, we are inclined to the latter view. The word "contracted" is sometimes used in a broader sense than that contended for by defendant. A disease may be contracted, while not contracted for. The words "liability, contracted," etc., have been said to have a broader signification than the words "debt contracted," etc.; but a contract liability is as much a liability growing out of a contract as is a contract debt a debt founded upon contract. In either case, if the word "contracted" can be said to qualify the word which precedes it, the result is the same, so far as the limitation of the qualified word is concerned. There are a number of authorities which hold that under such a provision the homestead is not exempt from execution issued upon a judgment founded in tort. *Robinson v. Wiley*, 15 N. Y. 489; *Lathrop v. Singer*, 39 Barb. 396; *Kenyon v. Gould*, 61 Pa. 292; *Kirkpatrick v. White*, 29 Pa. 176; *McLaren v. Anderson*, 81 Ala. 106; *Williams v. Bowden*, 69 Ala. 433; *Burton v. Mill*, 78 Va. 468.

In Indiana and Georgia the language is, "debts founded on contract." In Wisconsin the language is, "from liability in any form for the debts of such owner," and it is there held that the homestead is exempt from levy and sale upon a judgment founded in tort. *Smith v. Omas*, 17 Wis. 395. In Illinois the language is the same as ours, but there is another statute which prohibits an alienation of the homestead in any case by the husband, except with the consent of the wife, and the courts of that state have held that, in the light of both of these laws, it was the evident intent of the legislature to protect the homestead, as a shelter for the wife and children, independently of any acts of the husband. In *Conroy v. Sullivan*, 44 Ill. 451, the court says: "He (the husband) cannot deprive them of their right to it (the homestead) without the consent of the wife, either by his contracts or his torts.

There is no more reason, so far as the wife is concerned, for permitting it to be sold for the husband's tort, than for his violation of a contract, and it is the evident policy of the law to forbid its being sold under a judgment and execution in either case." See also *Loomis v. Gerson*, 63 Ill. 11. The Illinois cases have been criticised by some of the text-writers, but we think the rule laid down by that court is sound. As a general rule, only such property as the owner or debtor himself might sell can be taken in execution against him. *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 Am. Dec. 236; *French v. Mahan*, 56 Pa. 286; *Gentry v. Wagstaff*, 14 N. C. 270; *Knox v. Hunt*, 18 Mo. 243. It has frequently been held by our own court that any deed, release, or mortgage, except for purchase money, of the homestead exemption, by the husband, without the signature of the wife, is void as to both. As early as the case of *Beecher v. Baldy*, 7 Mich. 488, it was held that, where the householder is a married man, he cannot, by any waiver, consent to a sale on execution, so as to render such sale valid, without the consent of the wife. Justice Christiancy, in that case, speaking for the court, says: "For in such case the validity of the sale would rest upon his consent, in the same manner as if he had conveyed by deed; and, if deeded by him under the like circumstances, the deed would be void, even as to him, without the signature of the wife. Such, we think, is the effect of the express provision of the constitution. The object of the exemption was quite as much to protect the wife and family as the husband." *Mr. Justice Campbell*, in *Penniman v. Perce*, 9 Mich. 528, says: "The wife has an absolute vested right in the homestead, which the husband cannot waive, discharge, or destroy."

We do not think that it was the intention of the framers of the constitution to prohibit a voluntary alienation by the husband, and at the same time permit an involuntary alienation. It was not intended that a mortgage executed by the husband upon the homestead without the consent of the wife should be void, but that in case the husband represented that he was not married, and that the premises mortgaged were not a homestead, a judgment founded upon the fraud, and not upon the contract, could be enforced against the homestead property. In view of the language employed, the light thrown upon the use of the phrase by the record of the proceedings of the convention, the fact that the language of the existing statute upon the same subject was not adopted, and the effect which has already been given to this provision, as respects alienation by the husband, the provision must be construed as exempting the homestead from execution and sale upon all judgments, whether founded in tort or in contract. It may be said, also, that this constitution has for nearly 50 years received this construction, and to give it that contended for by defendant would be a surprise to the bar and people of this state.

The judgment is affirmed, with costs.

The other Justices concurred.

Edward LYNCH, *Plff. in Certiorari*,
v.

Edgar O. DURFEE, Probate Judge.

(.....Mich.....)

A weekly journal devoted primarily to the interests of the legal profession, but containing matters of interest to the general public, such as personal items, notices of passing events, a record of property transfers and mortgages, and general trade advertisements, and having bankers, brokers, real estate agents, merchants and business men as well as judges and lawyers among its subscribers, is a newspaper within the Michigan statutes providing for publication of legal notices in a newspaper.

(June 16, 1894.)

CERTIORARI to the Circuit Court for Wayne County to review a judgment denying a writ of prohibition to restrain the probate judge from appointing Patrick Lynch as administrator of the estate of Timothy Lynch, deceased, on the ground that proper notice of the application for the appointment had not been given. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edwin F. Conely and Orla B. Taylor for appellant.

Mr. Charles B. Warren for appellee.

Long, J., delivered the opinion of the court:

Petitioner is one of the heirs-at-law of Timothy Lynch, deceased. On April 23, 1894, a petition was filed in the probate court for Wayne county by Patrick Lynch, a brother of petitioner, praying for the appointment of an administrator, as the deceased died intestate. An order was entered that the matter be set for hearing on May 23, 1894, and that notice of hearing be published in the Wayne County Legal News. Petitioner filed a protest against the appointment, on the ground, among others, that the Wayne County Legal News, in which the notice was published, was not a newspaper printed and circulating in said county and state within the meaning of the statute. This protest was overruled, and petitioner made application to the Wayne county circuit court for a writ of prohibition against the probate court, restraining the appointment on that ground. An order to show cause was granted, and the probate court answered. Upon the hearing, the writ of prohibition was denied. The case now comes here on certiorari to review that finding.

Section 5801, How. Stat., provides that the probate court shall appoint a time and place for proving any will, and "shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court in such newspaper printed in this state as the judge shall direct, three weeks successively," etc. Section 5866 provides that "when application shall be made to the judge of probate for the appointment of an administrator on intestate estate, or for let-

ters of administration with the will annexed, he shall cause notice of the same, and of the time and place of hearing thereof, to be published for three successive weeks in such newspaper as he may direct." Section 6808 provides: "All probate and other legal notices required by law to be published by the judge of probate of any county . . . shall be published in some newspaper printed in the county where said probate judge shall hold his court;" and section 9031 provides that "all legal advertisements shall be published in a newspaper printed in the county in which the proceedings are carried on," etc. These are the only provisions of our statutes relating to such publication. The answer of the judge of probate made to the order of the court below to show cause sets up that the Wayne County Legal News is a newspaper, published weekly in the city of Detroit, and, while devoted primarily to the interests of the legal profession and the dissemination of legal knowledge, yet it is also intended to contain, and does contain, matters of interest to the general public. It contains the proceedings of the supreme court of the state of Michigan, the Wayne circuit courts, and the other courts of the city of Detroit, and also contains notices of future proceedings in said courts. It also contains, from time to time, opinions of the courts of the United States in Michigan and the other states, and also other courts in Michigan, where the same are of interest to the legal profession or to the general public; also, personal items of general interest, and notices of passing events; and respondent asserts on information and belief that it is intended, when the legislature is in session, to contain the proceedings thereof, and general items of interest in connection therewith. It contains a record of real estate transfers and mortgages, chattel mortgages and bills of sale; also advertisements, not only relating to the legal profession, but general trade advertisements, of interest to every one; that it is intended to circulate, and in fact has a present circulation, among judges, lawyers, bankers, brokers, real-estate agents, merchants, and business men, and is intended to contain items of importance to all, and is on sale at the news stands in the city of Detroit. The answer further asserts that the Wayne County Legal News is intended to fill the same position in the county of Wayne, state of Michigan, as is filled at present by the Chicago Legal News, the St. Louis Legal Record, and other papers of similar nature in other cities; that it is not an innovation in the newspaper field, there being, as respondent asserts, upwards of forty similar journals now published. A copy of the paper is filed with this return, as well as copies of the Chicago Legal News and other legal journals, which indicate the actual character of the Wayne County Legal News, and the field which it is intended to cover. Similar provisions as sections 5801 and 5866 above referred to are to be found in the Revised Statutes of 1846. The other provisions quoted were enacted in 1868, so that these statutes were on the statute books long before the news-

NOTE.—The multiplication of what might be called local periodicals devoted to the interests of the legal profession makes the above case one of 24 L. R. A.

considerable importance upon the question how far such papers may be used for the publication of legal notices.

paper field was occupied by the many thousands of publications we now find in circulation. But a newspaper, even in the days when these statutes were enacted, meant, what it means to-day, a sheet of paper printed and distributed at short intervals for conveying intelligence of passing events; a public print that circulates news, advertisements, proceedings of legislative bodies, public documents, and the like. Under the return here we are unable to say that this paper does not come within this definition. Our statutes are quite similar to those of other states in reference to the publication of such notices. The Chicago Legal News was held to be a newspaper within the meaning of the Illinois statute. *Kerr v. Hitt*, 75 Ill. 51. The St. Louis Legal Record was held to be such a newspaper within the statute in *Kellogg v. Carrico*, 47 Mo. 157. See also *Hernandez v. Drake*, 81 Ill. 84; *Railton v. Lauder*, 126 Ill. 219, 26 Ill. App. 655; *Mass v. Hess*, 140 Ill. 576; *Benkendorf v. Vincenz*, 52 Mo. 441; *Hull v. King*, 38 Minn. 349; *Beecher v. Stephens*, 25 Minn. 146. It was said in *Beecher v. Stephens*, *supra*: "Newspapers are of so many varieties that it would be next to impossible to give any brief definition which would include and describe all kinds of newspapers. It would therefore be unsafe to attempt to give any definition of the term except the very general one that, according to the usage of the business world and in the ordinary understanding, a newspaper is a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest. But if a publication contains the general and correct news of the day, it is none the less a newspaper because it is chiefly devoted to the dissemination of intelligence of a particular kind or to the advocacy of particular principles or views. Most newspapers are devoted largely to special interests,—political, religious, financial, moral, social, and the like; and each is naturally patronized mainly by those who are in accord with the views it advocates, or who are most interested in the kind of intelligence to which it gives special prominence. But if it gives the general current news of the day, it still comes within the definition of a newspaper."

In the case of *Kellogg v. Carrico*, *supra*, the question was raised as to the validity of a publication in the St. Louis County Legal Record and Advertiser. It was objected that such paper was not a newspaper. The court said: "The Legal Record and Advertiser was printed in St. Louis in the form of a newspaper, and was issued to its subscribers daily, except Sundays, when the publication was omitted. It was devoted to the dissemination of general legal intelligence, and engaged extensively in legal advertising, including the publication of notices of sales under deeds of trust and sales on execution, and all judicial sales. It was a law and advertising journal, and so, in a limited sense at least, a newspaper; for whether a newspaper or not is a question that cannot be determined by a consideration alone of the kind of intelligence it disseminates. It is not the particular kind of intelligence that constitutes one publication a

newspaper rather than another. Newspapers are devoted to the dissemination of intelligence on a great variety of subjects, such as politics, commerce, temperance, religion, and so on; and the law, and legal topics and occurrences, are not excluded from the range of newspaper enterprise. A paper devoted to the gathering up and dissemination of legal news among its readers is, or at least may be, a newspaper. I regard the Legal Record as a newspaper of that character." The statute of Illinois provides that the publication of legal notices shall be in a secular newspaper of general circulation, or some paper specially authorized by law to publish legal notices, and the question was raised as to whether the Chicago Legal News came within the definition of a secular newspaper. In the case of *Kerr v. Hitt*, the court said: "The Chicago Legal News is published in the city of Chicago, in the county where this proceeding was commenced; is published once a week; and is devoted principally to the dissemination of legal intelligence, but makes reference to passing events, contains advertisements, brief notices of legislative bodies, personal and political items of interest to the general reader, as well as to the legal profession. Thus it will be seen it comes, substantially at least, within the definition given by lexicographers of a 'newspaper.' It is none the less a newspaper because its chief object is the publication of legal news. Many newspapers published in this and other countries are chiefly devoted to special interests,—such as religious and political newspapers; others devoted exclusively to literature,—that contain advertisements, news items (personal and political), brief notices of matters of special public concern, and reference to proceedings of legislative and other public bodies. So it is with this journal. Besides legal it contains other items of news, not only connected with the bench and bar, but others of a general interest. It is that class of journal that will circulate among lawyers and real estate and other business men, for it contains information in regard to sales of real estate, whether under judicial process or under powers. Accordingly, its advertising columns contain notices of sales under trust deeds on execution, judicial sales under decrees of court, and all manner of notices of legal transactions, as well as a limited number of other advertisements usually found in a newspaper of general circulation." In the later case of *Railton v. Lauder*, *supra*, it was held that the Chicago Daily Law Bulletin was a newspaper within the meaning of the statute, the purpose of the paper being similar to that of the Chicago Legal News.

The court below was bound by the return of the probate court as to the character of the Wayne County Legal News, and by that return it appears that such paper is as much a newspaper within the meaning of our statute as were the Chicago Legal News and the St. Louis Legal Record newspapers within the meaning of the statutes of Illinois and Missouri. We think the return of the probate court shows this journal to be a newspaper within the meaning of our statute. It has a general circulation, and contains the general news of the day; and we have no power to de-

termine what particular paper shall publish probate notices. That question is left by statute to the probate court.

We find no error in the record, and the finding of the court below will not be disturbed. The other Justices concurred.

WASHINGTON SUPREME COURT.

Clark FERGUSON, *Appt.*,
v.
City of SNOHOMISH, *Respnt.*
(.....Wash.....)

1. The incorporation of a city so laid out as to include a dairy farm not laid out into lots or blocks, and occupied only by the owner and his family, does not violate a constitution authorizing the incorporation of cities and towns on the ground that those can extend only to cities and towns existing and cannot include any territory not actually covered by the city or town, but the boundaries of such corporations may include some territory for prospective expansion.
2. The taxation of a dairy farm included within city limits for general municipal purposes is not an unconstitutional taking of private property without just compensation, at least where the constitution requires that taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

(May 17, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for Snohomish County in favor of defendant in a proceeding brought to have certain proceedings which incorporated plaintiff's land in the city null and void, to remove a cloud by reason of sale of his land for city taxes, and to enjoin further assessment and sale of such land. *Affirmed.*

The facts are stated in the opinion.

Mr. W. R. Andrews, for appellant:

Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population of cities and towns. Wash. Const. art. 11, § 10.

This section of the constitution provides for the incorporation only of cities and towns, and being in derogation of the rights of those who do not consent, or of common right, it should be strictly construed.

People v. Bennett, 29 Mich. 451, 18 Am. Rep. 115; *Cooley*, Const. Lim. pp. 393, 394.

A town, according to Littleton, is a collection of houses, which hath, or in times past hath had, a church and a celebration of divine service, sacrament, and burials.

Co. Litt. 1155.

In the popular sense of the word a "town" is a congregation of houses so near to one another that the inhabitants may fairly be said to dwell together.

2 Rapalje & Lawrence, Dict. § 2, p. 1262;

Worcester, Dict. p. 1526; *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840. No authority is given to incorporate villages or sparsely populated districts. The word "town" is not synonymous with "village." *Truax v. Pool*, 46 Iowa, 256.

In the absence of statutory authority, to include farm lands within corporate boundaries, no such right exists, or ought to exist.

Vestal v. Little Rock, 11 L. R. A. 778, 54 Ark. 321; *Shumway v. Bennett*, 29 Mich. 453; 1 Dill. Mun. Corp. § 185, and note 1; *Borough of Little Meadows*, 85 Pa. 335; *Borough of Blooming Valley*, 56 Pa. 66; *Morford v. Unger*, 8 Iowa, 82; *Covington v. Southgate*, 15 B. Mon. 498; *Ewing v. State*, 81 Tex. 173.

Even if the power to arbitrarily include such lands within corporate limits must be conceded, yet the power to tax them for general corporate purposes must be denied, because it is taking private property without just compensation.

Wash. Const. art. 1, § 16; *Morford v. Unger*, and *Covington v. Southgate*, *supra*.

Mr. L. H. Coon, for respondent:

The appellant should have presented the question of the power and authority of the respondent to tax his lands for municipal purposes, to the board of equalization, by demanding that the board strike from the assessment rolls said lands. The city council, when sitting as a board of equalization, has power to correct, modify, or strike out any assessment made by the assessor. If denied the relief sought, remove the question to the superior court by certiorari, where the power of the corporation to impose the tax could be inquired into.

1 Hill's Wash. Code, 646; *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 9 Am. Rep. 591; *Denver v. Darrow*, 13 Colo. 460; Dill. Mun. Corp. § 926; *Miller v. Trustees of Twp. School 15 North Range 6 East*, 88 Ill. 26; *Cooley*, Taxn. 2d ed. 758; *People v. Ogdensburgh*, 48 N. Y. 390; *Le Roy v. New York*, 20 Johns. 480, 11 Am. Dec. 289; *Mason & Tazewell Special Drainage Dist. Comrs. v. Griffin*, 184 Ill. 330; *Ewing v. St. Louis*, 72 U. S. 5 Wall. 413, 18 L. ed. 657.

The legal existence, or the illegality, or the irregularity of the proceedings whereby the people of a certain territory became incorporated cannot be collaterally drawn in question at the suit of a private party. The appellant has mistaken his remedy.

Dill. Mun. Corp. § 43a; *Mendota v. Thompson*, 20 Ill. 197; *Hamilton v. Carthage*, 24 Ill. 22; *Kettering v. Jacksonville*, 50 Ill. 89; *Geneva v. Cole*, 61 Ill. 397; *Cooley*, Const. Lim. 5th ed. 811.

NOTE.—For a discussion with collection of authorities upon the question of the power of a municipal corporation to include agricultural land within its boundaries, see *Vestal v. Little Rock* (Ark.) 11 L. R. A. 778, and note.

land within its boundaries, see *Vestal v. Little Rock* (Ark.) 11 L. R. A. 778, and note.

The legal existence of a municipal corporation, or an acting *de facto* corporation, cannot be attacked and judicially examined, only in a direct proceeding by quo warranto, or an information in the nature of a quo warranto.

2 Hill's Wash. Code, § 679; *Osborn v. People*, 108 Ill. 224; *Lees v. Drainage Comrs.*, 125 Ill. 47; *Trumbo v. People*, 75 Ill. 561; *People v. Neuberry*, 87 Ill. 41.

The constitution makes it obligatory upon the legislature to provide, by suitable and proper laws, for the election, in the several counties of this state, of boards of county commissioners, prescribing their duties, and limiting their term of office. In obedience to this constitutional requirement, the legislature has passed the necessary law providing for the election, in each county in the state, of county commissioners, prescribing their duties and fixing their term of office.

Wash. Const. art. 11, § 5; 1 Hill's Wash. Code, §§ 265, 266, 270, 271, 273, 281, 494, 495.

The legislature in the further exercise of its constitutional powers, passed the Act of March 27, 1890, which is known as the act providing for the incorporation and classification of municipal corporations, and prescribing the powers of such corporations. This act, among other things, provides that any portion of a county, containing not less than three hundred inhabitants, and not incorporated, may become incorporated as a municipal corporation.

1 Hill's Wash. Code, § 493; *Rohde v. Seavey*, 4 Wash. 91.

When there is no constitutional impediment, the boundaries of a municipal corporation may be so changed as to include contiguous territory; and the fact that land thus brought into a corporation will be subject to taxation to discharge a pre-existing municipal indebtedness, or that it is brought in contrary to the wishes of the owner, affords no constitutional objections. Agricultural lands which have not been platted, and which are not needed for town lots, and which will receive no direct benefit from the municipal government, may thus be brought into a corporation, and taxed for municipal purposes. So, a statute which provides that lands outside of a corporation may be brought into the corporation by petition to the county commissioners, and by a majority vote of the people, is not unconstitutional, although the owner of such lands protest against having them included within the corporation. This constitutes no impairment of the owner's liberty, neither is it taking private property for public use.

Powers v. Wood County Comrs., 8 Ohio St. 285; *Blanchard v. Bisell*, 11 Ohio St. 96; *Washburn v. Oshkosh*, 60 Wis. 453; *Taber v. Grafmiller*, 109 Ind. 206; *Cary v. Pekin*, 88 Ill. 154, 80 Am. Rep. 543; *Turner v. Althaus*, 6 Neb. 54; *Kountze v. Omaha*, 5 Dill. 443; *Davis v. Point Pleasant*, 32 W. Va. 289; *East Dallas v. State*, 73 Tex. 870; *Santa Rosa v. Coulter*, 58 Cal. 537; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 733; *Williams v. Nashville*, 59 Tenn. 497; *State v. Baird*, 79 Tex. 63; *Hurla v. Kansas City*, 46 Kan. 733; *State v. Brown*, 53 N. J. L. 162; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

24 L. R. A.

Legislative action in the matter of taxation is conclusive.

Norris v. Waco, 57 Tex. 635; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 733; *Hewitt's App.*, 85 Pa. 55; *Cary v. Pekin*, 88 Ill. 154, 80 Am. Rep. 543; *Oliver v. Omaha*, 8 Dill. 368; *Cooley*, Taxn. 2d ed. 158, 159.

The rule adopted by the courts in some of the states, which goes to the extent of denying the power to municipal corporations to tax agricultural lands within the boundaries for general municipal purposes, and in such cases affording judicial relief is, in effect, insurmountable and the decided weight of authority is against this rule. In effect this rule changes the boundaries of municipal corporations, which is a legislative and not a judicial act, and courts cannot be vested with such power.

It would work an injustice to other taxpayers of the city; taxation must be equal.

Wash. Const. art. 7, § 9; *Daly v. Morgan*, 1 L. R. A. 757, 69 Md. 460; *Galesburg v. Hawkenson*, 75 Ill. 152; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *People v. Whyler*, 41 Cal. 351; *People v. Eddy*, 43 Cal. 331, 18 Am. Rep. 143; *Santa Rosa v. Coulter*, 58 Cal. 537; *People v. Townsend*, 56 Cal. 633; *Norris v. Waco*, 57 Tex. 635; *State v. Hannibal & St. J. R. Co.*, 75 Mo. 212; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *Dill. Mun. Corp. 4th ed. § 795*; *Cooley*, Const. Lim. 5th ed. 620; *Cooley*, Taxn. 2d ed. 159.

In the absence of express constitutional limitation, legislative power over the boundaries of corporations is unlimited.

Dill. Mun. Corp. 4th ed. § 738; 1 *Desty*, Taxn. 81; *Cooley*, Const. Lim. 5th ed. 593; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Williams v. Nashville*, 59 Tenn. 487; *State v. Baird*, 79 Tex. 63; *Hurla v. Kansas City*, 46 Kan. 733; *State v. Brown*, 53 N. J. L. 162; *Mendenhall v. Burton*, 42 Kan. 570; *Davis v. Point Pleasant*, 32 W. Va. 289; *Baldwin v. Hastings*, 83 Mich. 639; *Daly v. Morgan*, 1 L. R. A. 757, 69 Md. 460; *Cary v. Pekin*, 88 Ill. 154, 80 Am. Rep. 543; *Turner v. Althaus*, 6 Neb. 54; *Kountze v. Omaha*, 5 Dill. 443; *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658.

The people may organize municipal bodies and put them into operation by means of the ballot box, and this act, being political in its nature, should not be questioned by the judiciary, unless power has been delegated to the courts which authorizes them to act in such cases, and they should only interfere when it is evident that a plain and positive law has been willfully violated, and a flagrant wrong suffered. No law has been violated and no wrong suffered in this case.

Cooley, Const. Lim. 5th ed. 747; *Galesburg v. Hawkenson*, 75 Ill. 152; *Dickey v. Reed*, 73 Ill. 261; *Lauffer v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581.

Anders, J., delivered the opinion of the court:

It is provided, among other things, in section 10, article 11, of the State Constitution, that "corporations for municipal purposes shall not be created by special laws; but the

legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." By virtue of the authority conferred by this section, the legislature of the state passed an act, approved March 27, 1890, entitled, "An act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency." Section 1 of this act declares that "any portion of a county containing not less than three hundred inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may hereafter be conferred, by law upon municipal corporations of the class to which the same may belong." Some time in the year 1888, the inhabitants of the village of Snohomish attempted to incorporate, under the Act of February 2, 1888, but as that act was declared void by this court in *Territory v. Stewart*, 1 Wash. 98, 8 L. R. A. 106, such village never had a legal corporate existence. On May 19, 1890, a petition, signed by the requisite number of persons residing within the boundaries therein prescribed, was presented to the county commissioners of Snohomish county, praying for the incorporation of a city of the third class, under the provisions of said Act of March 27, 1890. The boundaries of the proposed city, as described in the petition, included the former village of Snohomish, and, in addition thereto, some 240 acres of land belonging to appellant, which was contiguous to said village, but only forty acres of which was included therein under the attempted incorporation, by virtue of said Act of February 2, 1888. At the time of the presentation of the petition, these lands were occupied by appellant and his family only, were not laid out into town lots or blocks, but were used by him as a dairy farm exclusively; but a portion of appellant's lands abutted on the block of land upon which was situate the county court-house, and on the west and north of said premises were several additions to the town, containing altogether about sixty inhabitants. Upon the hearing of the petition, the appellant appeared before the commissioners, and objected to their including his lands within the boundaries of the proposed corporation, but offered to be satisfied if they would include the forty acres formerly included in the original village, and allow the balance to remain outside. The commissioners, however, did not see fit to change the boundaries as prayed for; and an election was ordered and held, the votes canvassed, and the incorporation was thereupon declared complete. No legal proceeding, however, was instituted by appellant to correct any supposed error on the part of the board of commissioners, or to prevent them from submitting the question of incorporation to the vote of the people, in accordance with the provisions of the statute. But after the formation of the corporation, and 24 L. R. A.

after his land had been sold for city taxes, which he neglected to pay, he brought this action to have the proceedings of the county commissioners by which his land was included within the city of Snohomish declared null and void, to remove the cloud cast upon his title to said land by said tax sale, and to enjoin said city, its officers and agents, from further assessing, or attempting to assess, or selling, or attempting to sell, his said lands and premises, or any part thereof.

The first contention of the learned counsel for the appellant is that the board of county commissioners of a given county have no right, under the constitution and laws of this state, to include, within the boundaries of a municipal corporation, lands which are used purely for agricultural purposes. But we are of the opinion that the appellant is not in a situation to question the validity of the incorporation of the city of Snohomish, for the reason that he has brought his action against it as a municipal corporation, and alleged it to be such in his complaint; and, even if he had not done so, he could not, according to the weight of authority, attack the corporate existence of the city in a collateral action like this. 1 Dill. Mun. Corp. 4th ed. § 43a, and cases cited; Cooley, Const. Lim. 5th ed. p. 811.

But, irrespective of the foregoing considerations, we think the appellant's contention cannot be sustained. No irregularities in the proceedings whereby the respondent city claims to have become incorporated have been pointed out, and only the right to establish the boundaries thereof so as to include the lands of appellant is questioned. It is not denied that, in the absence of constitutional inhibition, the legislature might, by special act, have incorporated the city with its present boundaries; but it is insisted on behalf of the appellant that, inasmuch as the constitution of this state only authorizes the legislature to provide for the incorporation of cities and towns, nothing but cities and towns proper can legally be incorporated; or in other words, no territory not actually covered by the city or town desiring to become incorporated can be embraced within its limits. Several cases are cited in support of counsel's position, all of which, no doubt, were decided in accordance with the local statutes upon the subject and the facts before the court. Prominent among these cases is that of *Ewing v. State*, 81 Tex. 172, in which the supreme court of Texas held that the attempted incorporation of the city of Oak Cliff, containing about 2,000 inhabitants, and actually covering an area of about two square miles, so as to include within its new boundaries about ten square miles of rural territory, not part of that city, nor of any other city, and comprising farms, pastures, and unoccupied surveys of land, could not be sustained, under a statute providing that "when a city or town may contain one thousand inhabitants or over, it may incorporate as a city or town in the manner prescribed by chapter 11 of this title." But the same court, under the same statute, held in *State v. Baird*, 79 Tex. 68, that the incorporation of a town may properly include the territory occupied by the persons attending church, sending to the schools, and residing near to others making up the proposed town; and that

this may be done regardless of whether the lands be laid out into lots or blocks. In the course of the opinion, the court observed that "it may not always be practicable to incorporate a town without including within its limits some territory devoted to purely pastoral or agricultural pursuits. Something may be allowed for prospective expansion." Our statute concerning the incorporation of towns and cities is broader than that of Texas, upon which those decisions were based. In providing a method for the incorporation of cities, and towns, the legislature recognizing the impossibility of fixing by a general law the exact boundaries of every municipality that might be organized thereunder, left that important question to be determined by the county commissioners and the people within the limits of the proposed incorporation; and, when they provided that any portion of a county containing not less than three hundred inhabitants may become incorporated they did not intend to confine the corporation to the exact limits of any pre-existing town or city, but did intend to allow something for "prospective expansion." We are not prepared to say that the statute under which the city of Snobomish became incorporated is in contravention of the constitution; nor are we prepared to hold that the appellant's lands were not legally included within the city limits. This court held in *Re Campbell*, 1 Wash. 287, that the inhabitants of towns which had attempted to incorporate under the void Act of February 2, 1888, may incorporate under the Act of March 27, 1890, with a larger territory than that included in the original boundaries. While it is true that a town or city cannot exist upon entirely vacant and unoccupied lands, we think it is

equally true, as was said in *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 653, that the question of "how thickly or how sparsely a territory within a city must be settled is one of the matters within legislative discretion."

But it is further contended by the appellant that, even if his lands were properly included within the corporate limits of a city, they are not subject to taxation for general municipal purposes, because such taxation would be a taking of private property without just compensation. This view of the law, although favored by the courts of Iowa and Kentucky (*Morford v. Unger*, 8 Iowa, 82; *Corington v. Southgate*, 15 B. Mon. 498), is contrary to the great weight of authority in this country. In regard to municipal taxation, our constitution provides that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same;" and the doctrine contended for by appellant is in direct contravention of that provision, and must therefore be rejected. *Cooley*, Const. Lim. 5th ed. 626; *Cooley*, Taxn. 2d ed. pp. 158, 159; 2 Dill. Mun. Corp. 4th ed. §§ 794, 795; *Powers v. Wood County Comrs.* 8 Ohio St. 285; *Blanchard v. Bissell*, 11 Ohio St. 96; *Washburn v. Oshkosh*, 60 Wis. 458; *Cary v. Pekin*, 88 Ill. 154, 30 Am. Rep. 543; *Kountze v. Omaha*, 5 Dill. 448, Fed. Cas. No. 7928; *Davis v. Point Pleasant*, 83 W. Va. 289; *Santa Rosa v. Coulter*, 58 Cal. 537; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 Am. Rep. 738; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *State v. Baird*, *supra*; *Hurla v. Kansas City*, 46 Kan. 738.

The judgment of the court below is affirmed.

Dunbar, Ch. J., and Hoyt, Scott, and Stiles, JJ., concur.

RHODE ISLAND SUPREME COURT

Annie E. BURGESS

v.

John F. MULDOON.

(.....R. L.....)

All inchoate interest as tenant by the curtesy is destroyed by an absolute divorce, unless it is preserved by statute.

(June 1, 1894.)

PILL to compel specific performance of an agreement to purchase certain real estate which defendant refused to do because he alleged that the title was defective. *Decres for plaintiff.*

The facts are stated in the opinion.

Messrs. McGuinness & Dolan, for complainant:

Upon a decree dissolving a valid marriage, equally as upon a sentence of nullity, all the husband's claim to the lands of his wife ceases;

and she is entitled to recover immediate possession of them.

2 Bishop, Mar. & Div. 5th ed. 1873, § 712, and cases.

Mr. John W. Hogan, for respondent:

4 Kent, Com. 10th ed. p. 84, note a, says:

"Whether a divorce *a vinculo* will destroy curtesy depends on circumstances, and there is some variety in the laws of the several estates. If the cause for divorce be for causes arising before marriage, the right to curtesy, as well as to other rights growing out of marriage is gone but if for causes subsequent to marriage, the rule is not absolutely stable and uniform."

Curtsey initiate in Rhode Island is an assignable estate. It was so at common law. So that whatever may be said in favor of the wife's right of dower surviving the shock of divorce will apply with greater force to the right of curtesy of the husband.

2 Scribner on Dower, 2d ed. pp. 542-557, shows that while in England the divorce for adultery was in form only *a mensa et thoro*, yet

NOTE.—For a collection of authorities as to the effect of divorce upon the respective rights of husband and wife see note to *Adams v. Storey* (Ill.) 11 L. R. A. 790.
24 L. R. A.

For the effect on dower of a divorce in a foreign state, see note to *Van Cleaf v. Burns* (N. Y.) 15 L. R. A. 542.

a divorce for that cause enabled the husband to marry again; yet by § 13, p. 548, a divorce *a mensa et thoro* for adultery by the wife did not bar dower. And it shows § 18, p. 547, that when divorces were granted by act of parliament, it was the custom to add a clause expressly barring the dower of the wife.

It was established in New York by the case *Wait v. Wait*, 4 N. Y. 95, that where a divorce was granted for a cause accruing subsequent to marriage, dower was not affected by the divorce.

Our Married Woman's Property Act (Pub. Stat. chap. 166, § 14), saves the husband's right by the curtesy.

Tillinghast, J., delivered the opinion of the court:

This is a bill for the specific performance of an agreement to purchase a lot of land in the city of Providence. It is resisted on the ground of an alleged imperfection in the title to said land. The bill shows that the complainant purchased the land in 1878 (she then being the wife of William H. Burgess), and has owned it ever since; that at the October term, 1890, of this court, the said William H. Burgess was granted a divorce from the complainant on the ground of extreme cruelty and desertion; and that the respondent refuses to carry out and perform his agreement to purchase said land because the complainant being a married woman, as aforesaid, at the time when she purchased said land, and having had children of said marriage, the said William H. Burgess, being still alive, is entitled, under the statutes of this state, to an estate for life in said land.

The only question raised by the bill and answer may be stated thus, viz.: Has a husband who obtained a divorce from his wife in this state in 1890, on the ground of extreme cruelty, any interest, as tenant by the curtesy, in the real estate owned by his wife at the time of the granting of the divorce; she having purchased said estate in 1878, and having had children by him, born alive, during the subsistence of the marriage? We think this question must be answered in the negative. At the common law, the husband, upon the birth of living issue of the marriage, becomes tenant by the curtesy initiate of all the real estate of his wife, but can only become tenant by the curtesy consummate by her death. *Day v. Cochran*, 24 Miss. 261; 4 Am. & Eng. Encyclop. Law, p. 958. In short, in order to constitute tenancy by the curtesy consummate, three things must take place while the marriage continues, viz., seisin of the wife, issue born alive capable of inheriting, and death of the wife. 1 Bishop, Mar. & Div. § 479; *Wheeler v. Hotchkiss*, 10 Conn. 280; 1 Washb. Real Prop. 5th ed. pp. 172, 173; Schouler, Dom. Rel. 3d ed. § 202. See also *Re Voting Laws*, 12 R. I. 589.

In the case at bar the divorce put an end to the marital relations, by absolutely dissolving the bond of matrimony, and thus rendering it impossible for the husband's right as tenant by the curtesy to ever become consummate. 2 Bishop, Mar. & Div. 5th ed. § 712, and cases cited; *Gould v. Crow*, 57 Mo. 24 L. R. A.

204. In other words, the divorce cut off and destroyed the husband's right as tenant by the curtesy, unless the right is preserved to him by statute. *Barrett v. Failing*, 111 U. S. 524, 28 L. ed. 505, and cases cited.

The respondent's counsel contends that it is thus preserved, under the provisions of R. I. Pub. Stat., chap. 167, § 5. Said section provides as follows: "Whenever the divorce shall be occasioned by adultery or other of the causes aforesaid, done or committed on the part of the wife, the husband shall hold the personal estate not secured to her by law, forever, and her real estate not secured to her by law during his natural life, in case they have had issue born alive of her body during the marriage, otherwise during her natural life only, if he shall survive her." This statute, in substance, appears as early as the Revision of 1798, which was long before any act had been passed regulating the property rights of married women. It appears in the Revision of 1822, on page 869, in the following language, viz.: "Sec. 5. And be it further enacted, that when a divorce shall be had for the causes of affinity, consanguinity, impotency, idioy or lunacy of either of the parties, the wife shall have restored to her all her lands, tenements, and hereditaments, and a judgment may be passed for a restoration to her of all or such part of the personal estate specifically, or the value thereof, which hath come to the husband's hands, by virtue of the marriage, as the justices of the supreme judicial court, from all the circumstances of the case, shall deem equitable, and they may make use of such process to carry their judgments into effect, as shall be necessary; and when the divorce shall be occasioned by adultery, or other of the causes aforesaid, done or committed on the part of the wife, the husband shall hold the personal estate forever, and her real estate during his natural life, in case they have had issue born alive of her body during the marriage, otherwise during her natural life only, if he shall survive her: provided nevertheless, that the court may allow her, for her subsistence, so much of such personal or real estate as they shall judge necessary." This statute, without any material modification, appears in the Revision of 1844, in which revision also appears the first act concerning the property of married women. In the Revision of 1857 the statute last above quoted was modified so as to permit the husband, when the divorce was obtained for any of the causes mentioned, done or committed on the part of the wife, to hold the personal estate, "not secured to her by law," forever, and her real estate, "not secured to her by law," during his natural life, in case they had issue born alive of her body during the marriage; otherwise, during her natural life only, if he should survive her. Under the provisions of chapter 136 of said last-named revision, the real estate, chattels real, and personal estate, which were the property of any woman before marriage, or which became hers after marriage, or which was acquired by her own industry, were so far secured to her sole and separate use that the same was not attachable, or in any way liable to be taken, for the debts of the hus-

band, either before or after his death, and, upon his death in the lifetime of the wife, remained her sole and separate property. In the Revision of 1872, while the provision relating to the effect of a divorce, on the property of the wife, obtained by the husband, remains precisely the same as in said Revision of 1857, yet the property rights of married women were very materially changed, in that her property above specified was absolutely secured to her sole and separate use. The Revision of 1882 contains the same provisions, respectively, concerning the effect of a divorce on the wife's property, and of her absolute right to said property. Construing said provisions relating to the effect of a divorce on the separate property of the wife, with those absolutely securing said property to her, as we are bound to do, it will be seen

that the former has been so far modified by the latter as to be practically nullified that is to say, as the real estate of a married woman is now absolutely secured to her sole and separate use subject only to the husband's right as tenant by the curtesy (R. I. Pub. Stat. chap. 166, § 14), and as the divorce cuts off this right also, as we have already seen, there is no real estate left which is not secured to the wife by law, and hence nothing upon which the statute can operate. See last part of *note* on page 823, of 1 Washburn on Real Property.

We are therefore of the opinion that said William H. Burgess has no interest whatever in the land in question, and hence that the complainant is entitled to the relief prayed for.

INDIANA SUPREME COURT.

Mary E. HORN, *Appt.*,

v.

Charles O. BENNETT *et al.*

(.....Ind.....)

1. A mortgage securing several notes maturing at different periods is pro tanto a security for each in the order of its maturity.

2. The fact that all the notes secured by a mortgage are made due by default does not change the rule of their priority according to their respective dates of maturity, as stated in the notes themselves.

On rehearing.

3. Proving blank indorsements after alleging indorsements to plaintiff will

NOTE.—Priority of notes falling due at different times secured by the same mortgage.

Pro rata rule.

There is a great deal of conflict in the decisions as to whether or not the maturity of a note which is one of several secured by a mortgage controls as to its priority, or whether such priority shall be controlled by the date of the assignment or whether the proceeds of the sale of the property shall be divided pro rata between the holders of the several notes without regard to the maturity of the note or to the date of the assignment. The line of decision having been adopted in several states, it has been maintained by them and it would be impossible to reconcile them. Many states hold that the pro rata rule of distribution should govern, as, Smith v. Stevens, 49 Conn. 181; Lewis v. De Forest, 20 Conn. 427; Phelan v. Olney, 6 Cal. 430; Grattan v. Wiggins, 23 Cal. 18; Penzel v. Brookmire, 51 Ark. 105; McClanahan v. Chambers, 1 T. B. Mon. 43; Adams v. Lear, 3 La. Ann. 144; Johnson v. Candage, 31 Me. 28; Moore v. Warr, 38 Me. 496; Holway v. Gilman, 51 Me. 185; Lane v. Davis, 14 Allen, 225; Eastman v. Foster, 8 Met. 19; Hall v. McCormick, 31 Minn. 280; Wilson v. Eigenbrodt, 30 Minn. 4; Dixon v. Clayville, 44 Md. 573; Jennings v. Moore, 83 Mich. 231; Cooper v. Ulmann, Walk. Ch. 251; Wilcox v. Allen, 86 Mich. 160; McCurdy v. Clark, 27 Mich. 445; English v. Carney, 26 Mich. 178.

The rule in Michigan has been changed by statute. See *Edgar v. Beck*, *infra*; *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438; *Cage v. Her*, 5 Smedes & M. 410, 43 Am. Dec. 521; *Terry v. Woods*, 6 Smedes & M. 139, 45 Am. Dec. 274; *Henderson v. Herrod*, 10 Smedes & M. 631; *Pugh v. Holt*, 27 Miss. 461; *Jeffersonville College Trustees v. Prentiss*, 29 Miss. 46; *Goar v. McCanness*, 60 Miss. 244; *Furbush v. Goodwin*, 26 N. H. 425; *Johnson v. Brown*, 31 N. H. 406; *Bridenbecker v. Lowell*, 32 Barb. 9; *Pattison v. Hull*, 9 Cow. 752; *Orleans County Nat. Bank v. Moore*, 48 Hun, 70, affirmed, 3 L. R. A. 302, 112 N. Y. 543; *Re Preston*, 64 Hun, 10; *Donley v. Hays*, 17 Serg. 24 L. R. A.

& R. 400; *Perry's App.* 22 Pa. 43, 60 Am. Dec. 63; *Mohler's App.* 5 Pa. 418, 47 Am. Dec. 413; *Hancock's App.* 84 Pa. 155; *McLean's App.* 103 Pa. 255; *Betz v. Heebner*, 1 Penn. & W. 230; *Patrick's App.* 105 Pa. 356; *Waterman v. Hunt*, 2 R. I. 298; *Lynch v. Hancock*, 14 S. C. 66; *Ellis v. Roscoe*, 4 Baxt. 418; *Ewing v. Arthur*, 1 Humph. 537; *Gordon v. Hazard*, 38 S. C. 351; *Andrews v. Hobgood*, 1 Lea, 698; *Christian v. Clark*, 10 Lea, 630; *Smith v. Cunningham*, 3 Tenn. Ch. 565; *Shields v. Dyer*, 86 Tenn. 41; *Ellis v. Singletary*, 45 Tex. 27; *Delespine v. Campbell*, 53 Tex. 4; *Tinsley v. Boykin*, 46 Tex. 592; *Paris Exchange Bank v. Beard*, 49 Tex. 358; *Robertson v. Guerin*, 50 Tex. 817; *Blair v. White*, 61 Vt. 110; *Miller v. Rutland & W. R. Co.* 40 Vt. 399, 94 Am. Dec. 414.

In *Todd v. Cremer*, 36 Neb. 430, it is held that an assignment of different notes to different parties is an assignment pro tanto of the mortgage securing them and the several holders are entitled to share pro rata in the proceeds. This term of an assignment pro tanto would seem to imply that an assignment transfers to the holder thereof so much of the mortgage and is based upon the statement in *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 501, where it states that in those states where a mortgage is a mere lien, an assignment of one of the notes is an assignment pro tanto; but it was held in the *Studebaker Case* that all the notes share pro rata. The same expression is copied from the *Studebaker Case* and used in *Harmon v. Barhydt*, 20 Neb. 625. The same expression in regard to an assignment pro tanto is used in *Burnett v. Hoffman* (Neb.) May 15, 1894, which holds that a suit by the holder of one installment note cannot prejudice the rights of others.

In the absence of express stipulation, there is no priority between the assignees of mortgage notes, and all are entitled to share in the proceeds pro rata without regard to the maturity. *First Nat. Bank of Aberdeen v. Andrews*, 7 Wash. 261.

But in *Miller v. Washington Sav. Bank*, 5 Wash. 200, it was held that the holder of the note first as-

not constitute a failure of proof to sustain a finding in plaintiff's favor where the execution of the indorsements was not denied so as to require them to be put in evidence.

(May 23, 1893.)

A PPEAL by defendant Mary E. Horn, from a judgment of the Circuit Court for Fulton County and from an order denying her motion for a new trial in a proceeding to foreclose a mortgage which secured notes held by plaintiff and by the appealing defendant, which judgment provided that from the proceeds of the foreclosure the notes held by the plaintiff should be first paid. *Affirmed.*

The facts are stated in the opinions.

Mr. Isaiah Conner for appellant.

Mr. J. W. Rickel for appellees.

Olds, Ch. J., delivered the opinion of the court:

This is a suit for the foreclosure of a mortgage, instituted by the appellee Charles O. Bennett against the appellant, Mary E. Horn, and Enock Myers and his wife, Mahila, and William W. McMahan and his wife, Julia F., to foreclose a mortgage on lands therein described, and situate in the county of Fulton, in the state of Indiana, to secure the payment of a series of seven notes, each dated December 2, 1889, the first one of which notes, by its terms, became due on or before December 2, 1890, and each of the others, by

its terms, on or before the 2d day of December thereafter, annually, until all should mature. The mortgage securing the notes contained the following stipulation: "It is agreed and understood by the parties hereto, upon the failure to pay any one of said notes at maturity, then all of said notes shall become due and payable, and this mortgage may be foreclosed." Each of said notes had been assigned, before this action was commenced, by indorsement on the back thereof,—the first five to the appellee Bennett, and the last two to this appellant, who was made a defendant in the complaint of said appellee Bennett to foreclose the mortgage, and she filed her cross complaint to foreclose said mortgage as to the two notes which she owned. Issues were joined, and trial had, and a decree of foreclosure entered, giving to the appellee Bennett priority as to the notes held by him, and that the proceeds arising from the sale be first applied to the payment of the sum found due on the notes owned by said Bennett, and the surplus, if any, to be applied on payment of the sum found due on the notes owned by the appellant.

Appellant moved the court to modify the judgment and decree so as to place the sums due on each on an equality, and allow her to share pro rata in the fund derived from the sale, which motion was by the court overruled, and exceptions reserved, and this

signed had the priority. In *First Nat. Bank of Aberdeen v. Andrews, supra*, the court says that no general rule was attempted to be announced but that this decision was upon the particular circumstances of the case.

It was stated in *Pennybaker v. Tomlinson*, 1 Tenn. Ch. 111; *Re Sewall's Petition v. Brainerd*, 38 Vt. 364; *West Branch Bank v. Chester*, 11 Pa. 290, 51 Am. Dec. 547,—that the creditors share in the funds pro rata without regard to the maturity of the note held by them secured by the same mortgage, but this was not the question involved.

Where several notes are secured by the same mortgage and assigned to different persons, each one will acquire an equitable interest in the mortgage; but the interest of any one may be lost where an innocent person has been misled by improper representations, or by the silence of the holder of such mortgage, when it was his duty to speak. *Anderson v. Baumgartner*, 27 Mo. 80.

It was held in *Swartz v. Leist*, 13 Ohio St. 419, "that if several promissory notes are jointly secured by mortgage, the assignee of one of these notes so secured becomes equitably entitled to a pro rata participation in the benefit of the security." But in that case there was no question as to priority of right as between notes differing in date of maturity. A note was given to the mortgagee, who assigned it, and then canceled the mortgage. The property having been sold the point was, Could the note be enforced against an innocent purchaser of the land? But see *Bank of United States v. Covert*, and *Kyle v. Thompson, infra*.

Pro rata as to notes made to different parties.

And it is generally held that, where two mortgage notes are executed at the same time maturing at different times and given to different parties, they are entitled to share pro rata in the proceeds. *Collered v. Huson*, 34 N. J. Eq. 38; *Thayer v. Campbell*, 9 Mo. 277; *Burnett v. Pratt*, 22 Pick. 556; 24 L. R. A.

Chaplin v. Sullivan, 128 Ind. 50; *Shaw v. Newsom*, 73 Ind. 335; *Moffitt v. Roche*, 76 Ind. 75; *Cain v. Hanna*, 63 Ind. 409; *Goodall v. Mopley*, 45 Ind. 335; *Russell v. Carr*, 38 Ga. 459.

A note secured by mortgage indorsed to A and B, entitles each to one half the note and its proceeds, as well as the security, and neither can transfer any other or greater interest. *Herring v. Woodhull*, 29 Ill. 92, 31 Am. Dec. 293.

Priority as regulated by maturity.

Many cases hold that the priority of notes secured by the same mortgage in the hands of different holders is controlled according to the date of their maturity without regard to the date of the assignment, sustaining the rule announced in the main case.—*HORN v. BENNETT*. *Walker v. Schreiber*, 47 Iowa, 529; *Sangster v. Love*, 11 Iowa, 580; *Grapengether v. Fejervary*, 9 Iowa 163, 74 Am. Dec. 336; *Rankin v. Major*, 9 Iowa, 297; *Gerber v. Sharp*, 72 Ind. 553; *Doss v. Dittmars*, 70 Ind. 451; *People's Sav. Bank of Evansville v. Finney*, 63 Ind. 460; *Minor v. Hill*, 55 Ind. 180, 26 Am. Rep. 71; *Crouse v. Holman*, 19 Ind. 30; *Murdock v. Ford*, 17 Ind. 53; *Hough v. Osborne*, 7 Ind. 140; *Harris v. Harlan*, 14 Ind. 439; *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 438; *Humphreys v. Morton*, 100 Ill. 523; *Koester v. Burke*, 61 Ill. 438; *Herrington v. McCollum*, 73 Ill. 476; *McCullum v. Herrington*, 50 Ill. 362; *Flower v. Elwood*, 66 Ill. 438; *Fink v. McReynolds*, 38 Ill. 431; *Smith v. Smith*, 32 Ill. 198; *Vansant v. Allmon*, 23 Ill. 30; *Wilson v. Hayward*, 6 Fla. 171; *Winters v. Franklin Bank of Cincinnati*, 33 Ohio St. 250; *Aultman-Taylor Co. v. McGeorge*, 31 Kan. 329; *Huffard v. Gottberg*, 54 Mo. 271; *Bank of United States v. Covert*, 13 Ohio, 240. See *Swartz v. Leist*, 13 Ohio St. 419; *Wood v. Trask*, 7 Wis. 508, 76 Am. Dec. 230; *Kyle v. Thompson*, 11 Ohio St. 616; *Hinds v. Mooers*, 11 Iowa, 211; *Reeder v. Carey*, 13 Iowa, 274; *Masie v. Sharpe*, Id. 542; *Isett v. Lucas*, 17 Iowa, 503, 35 Am. Dec. 572; *Stanley v. Beatty* 4 Ind. 134.

ruling is assigned as error. The same question is presented by a motion for new trial, the court finding as a fact that appellee Bennett had a prior lien for the sum found due him on the first five notes, and the appellant had a subsequent or junior lien for the sum found due her on the two notes owned by her, being the sixth and seventh notes, and the notes last due in the series of seven. That under the stipulation in the mortgage all the notes matured and became due on the failure of the payor to pay the note due first, and that this was a failure to pay the note first due before the commencement of the suit, making all of the notes due before suit was commenced, is not doubted or questioned by either the appellant or appellees. That the notes did all mature upon failure to pay the first has been settled by this court. *Moore v. Sargent*, 112 Ind. 484. It is also the settled law of this state that when a series of notes falling due at various dates are secured by mortgage, without any condition in the mortgage such as is in the one in the suit at bar, whereby they mature earlier than the date fixed in the note on failure to pay any one when it matures, in case of an assignment of the notes to various persons they will be treated as several mortgages, and the persons holding the notes maturing first will have a prior lien to those holding the notes maturing subsequently thereto. This has been the rule in this state since the decision

in the case of *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486, and has been uniformly so held whenever the question has been presented. *Doss v. Ditmars*, 70 Ind. 451; *Gerber v. Sharp*, 72 Ind. 553, and authorities cited in this opinion. Many other authorities might be cited. In this case it is contended by counsel for the appellant that the notes must be treated as all maturing at the same time, and that assignment transferred but a pro rata interest in the mortgage security, and that this question is an open and new one in this state, never having been passed upon by this court, while, on the other hand, counsel for appellees contend that the condition in the mortgage, upon which all of the notes should mature on failure to pay the note first due, in no way changed the rights of the parties; that they are the same as if they matured in the order and at the time named in the note; and that the decisions in *People's Sav. Bank of Evansville v. Finney*, 63 Ind. 460, and *Doss v. Ditmars*, 70 Ind. 451, are decisive of the question in appellees' favor. In the latter case there was a condition in the mortgage similar to the one in this case, but it was not considered or discussed, or treated as having any bearing upon the case; and in the case of *People's Sav. Bank of Evansville v. Finney*, *supra*, the assignee of the first note extended the time of payment until after the subsequent notes matured, and the holders

It was said in *Anderson v. Sharp*, 44 Ohio St. 260, no doubt exists but that between the assignees of notes maturing at different times and secured by the same mortgage, the holders, in the absence of any agreement to the contrary, are entitled to be paid in the order that the notes mature, and, in the case of a sale of the land, the proceeds are to be marshaled accordingly.

And it was said in *Re Sewall's Petition v. Brainerd*, 38 Vt. 364, that where the bondholders had obtained a decree for a receiver, the net earnings only after paying the rent and expenses is to be appropriated upon the mortgage debt, and the coupons first falling due were to be paid first, but that would be different on a final distribution, as then it would be pro rata.

And in *Hunt v. Stiles*, 10 N. H. 466, it was said that where only one note had fallen due, that an entry to foreclose must be on that note.

And in *Crouse v. Holman*, 19 Ind. 30, it was held that a judgment of foreclosure on one note cannot be pleaded as a bar to a subsequent suit on another note secured by the same mortgage—as each note might be considered as a successive mortgage.

And Mich. Stat., subdivision 4, section 8498, providing that in installment mortgages each note after the first shall be a separate mortgage and may be foreclosed as such, includes installments of interest as well as principal. *Edgar v. Beck*, 98 Mich. 419.

The party paying off the first of a series of notes and taking an assignment of the same without the knowledge of the mortgagee is not entitled to preference. *Bailey v. Malvin*, 53 Iowa, 371.

And the last note held by an assignee has priority over a note falling due before which in reality was paid by an exchange of property between the mortgagor and mortgagee. *Massachusetts Loan & T. Co. v. Moulton*, 81 Iowa, 155.

So it has been held that mortgage notes secured by the same instrument have priority according 24 L. R. A.

to their maturity as originally made, without regard to the clause in the mortgage that the nonpayment of the note or interest shall mature the whole. *Leavitt v. Goodwin*, 7 L. R. A. 335, 79 Iowa, 348; *Freeman v. Elliott*, 48 Mo. App. 74; *Gardner v. Diederichs*, 41 Ill. 158; *Hurok v. Erskine*, 45 Mo. 485; *Mitchell v. Ladew*, 36 Mo. 523, 38 Am. Dec. 156.

So maturity as originally written controls and the overplus after satisfying the first note must be held by the trustee for the holders of the others although the deed does not state that default in one shall mature the others. *Huffard v. Gottberg*, 54 Mo. 271.

But some cases hold that the maturity of all the notes by reason of nonpayment of one changes the order of priority, and that all being matured, the proceeds will be distributed pro rata. *Bushfield v. Meyer*, 10 Ohio St. 334; *Pierce v. Shaw*, 51 Wis. 516.

And in *Marine Bank of Buffalo v. International Bank*, 9 Wis. 37, it was held that as there was no election by the holder of the mortgage to mature, that it would be incorrect to assume that all became due at the same time.

Priority as regulated by contract of assignment.

The priority rights of the holder of any note and the liens securing the same may be regulated by contract of assignment so that the usual rules of maturity or pro rata distribution would not apply. *McVay v. Bloodgood*, 9 Port. (Ala.) 547; *Exchange Bank v. Eddy*, 10 Week. L. Bull. 369; *Morgan v. Kline*, 77 Iowa, 681; *Rolston v. Brookway*, 23 Wis. 407; *Landron v. Keith*, 9 Vt. 229; *Wright v. Parker*, 3 Ark. 212; *Thayer's App. (Pa.) May 2, 1867*; *Granger v. Crouch*, 38 N. Y. 494; *Mechanics Bank v. Bank of Niagara*, 9 Wend. 410; *Norton v. Stone*, 3 Paige, 222, 4 L. ed. 407; *Dunham v. W. Steele Pkg. & Provision Co. (Mich.)* April 10, 1894; *Norton v. Palmer*, 142 Mass. 423; *Foley v. Rose*, 123 Mass. 567; *Bryant v. Damon*, 6 Gray, 564; *Anglo-American*

of the junior notes sought to postpone the lien of the holder of the senior notes, and have it decreed to be a junior lien, on account of the extension of time of payment, and it was held that this could not be done; that the priority of liens was not affected by the extension of the payment.

The question presented in this case does not seem to have been considered and decided by this court, although the two decisions last referred to tend to support the contention of the appellees. The decisions of other states where the question has been passed upon are in conflict,—some holding that the assignees take pro rata, and some that they take pro tanto; but it may be remarked that there is a like difference in the holdings of the courts of other states, where the notes held by assignees mature at different dates. In *Parkhurst v. Watertown Steam Engine Co.*, 107 Ind. 594, the law of this state is stated to be "that an indorser of a part of such notes so secured by mortgage is entitled, in equity, to payment out of the mortgage funds in preference to the notes retained by the mortgagee and assignor, although the notes so assigned may fall due subsequently to those retained by the mortgagee." This modifies to some extent the rule as held in *State Bank v. Twedy*, *supra*. It is also intimated, or suggested, rather, in the case of *Parkhurst v. Watertown Steam Engine Co.*, *supra*, that a difference in the rule as to priority might

exist between the assignees of notes assigned at different dates, and the assignees of notes assigned at the same date. It is a well-settled rule in equity that when the owner of real estate incumbered conveys a part to one purchaser for value, and afterwards conveys to another purchaser the remainder, equity will compel the creditor to resort to the real estate last conveyed, and in case it is sufficient to pay the debt the tract first sold will be freed from the lien, thereby giving the first purchaser the priority or advantage. When the notes and mortgage in suit were executed and assigned the presumption existed that the note would be paid at maturity. At the time the parties took the assignment the notes were payable at different dates, the notes assigned to the appellee Bennett being payable at a prior date than those assigned to the appellant. As they stood at the date of the assignment, they were not collectible until the date named in each for their maturity. Had the maker and mortgagor not made default in the payment, under the law of this state the appellee Bennett had the prior mortgage, securing the notes assigned to him. We do not think the rights of the parties were changed by the subsequent default of the mortgagor in the payment of the first note. Such default was not brought about by any act of the assignee of the notes first due, nor had he any control over the matter. In considering this ques-

Land Mortg. & Agency Co. v. Bush, 84 Iowa, 272; *Walker v. Dement*, 42 Ill. 272; *Redman v. Purrington*, 65 Cal. 271; *Bank of England v. Trelton*, 23 Miss. 173; *Solberg v. Wright*, 33 Minn. 224; *Chew v. Buchanan*, 30 Md. 367.

And so a contract may control giving the holders of the various notes pro rata rights. *Howard v. Schmidt*, 29 La. Ann. 129.

But an agreement that one who advances money to pay one note shall have a preference does not affect any one except the party so contracting and as to the others it will be concurrent. *La Place v. La Place*, 43 La. Ann. 284.

But the consent of the second mortgagee that the balance of the proceeds of sale under a first mortgage may be paid to the purchaser of the equity of redemption will not authorize such payment as against the mortgagor without discharging the debt secured by such mortgage, and a holder of one of the notes may levy on the equity of redemption to satisfy the same. *Andrews v. Fiske*, 101 Mass. 422.

In *Kimmell v. Willard*, 1 Dougl. (Mich.) 217, it was held that on the foreclosure of an installment note under Mich. Rev. Stat., 501, chap. 8, where the bid was only for the amount of such note, that the premises was forever disencumbered of the mortgage. But see *Edgar v. Beck*, 96 Mich. 419, as to present statute.

But in *Sample v. Rowe*, 24 Ind. 208, it was held that the assignment of one or more obligations secured by the same mortgage will carry with it so much of the mortgage. This was a controversy between the owner of land purchased from the mortgagor and a bondholder.

And the holder of a mortgage note could redeem from mortgage sale notwithstanding a judgment by the holder of an assigned prior note, to which judgment such holder was a party. *Davis v. Langsdale*, 41 Ind. 399.

Some cases hold that parol evidence is not admissible to vary the legal effect of priority as 24 L. R. A.

given by a written assignment. *Hancock's App.* 34 Pa. 155; *Jennings v. Moore*, 33 Mich. 231; *Lane v. Davis*, 14 Allen, 226.

So many of the cases *supra*, as *Grattan v. Wiggins*, 23 Cal. 16; *Winters v. Franklin Bank of Cincinnati*, 33 Ohio St. 250; *Humphreys v. Morton*, 100 Ill. 522; *Dixon v. Clayville*, 44 Md. 578; *Penzel v. Brookmire*, 51 Ark. 105; *Cooper v. Ulmann*, Walk. Ch. 261; *English v. Carney*, 25 Mich. 178; *Hall v. McCormick*, 31 Minn. 281; *Pugh v. Holt*, 27 Miss. 461; *Jeffersonville College Trustees v. Prentiss*, 29 Miss. 46; *Terry v. Woods*, 6 Smedes & M. 139, 45 Am. Dec. 274; *Goar v. McCanless*, 60 Miss. 244; *Furbush v. Goodwin*, 25 N. H. 425; *Orleans County Nat. Bank v. Moore*, 3 L. R. A. 802, 112 N. Y. 543; *McLean's App.* 103 Pa. 255; *Ewing v. Arthur*, 1 Humph. 537; *Christian v. Clark*, 10 Lea, 630,—state that priority may be regulated by the contract at the time of assignment, but that was not the question involved.

In *Stevenson v. Black*, 1 N. J. Eq. 338, it was said that an assignment of one of several bonds makes the assignee equitably interested in the mortgage to the amount of his debt or bond, and the assignor holding the mortgage was a trustee for such assignee pro tanto and so in like manner he is the trustee for the assignees of the other bonds to the amount of their bond.

And in *Brown v. Delaney*, 22 Minn. 349, where three notes first maturing out of five secured, were assigned by a sealed instrument as follows: "The mortgage and the lien created thereby . . . or so much thereof as shall secure the payment of the three notes," it was held that the assignee had the legal title for the purpose of collecting his three notes.

But in *Henderson v. Herrod*, 10 Smedes & M. 631. It was questioned whether the assignor could affect the priorities by his assignment.

And it is generally held that as against the assignor the assignee of notes assigned is entitled to a prior lien over any retained by the assignor.

tion in the case of *Leavitt v. Reynolds*, 79 Iowa, 848, 7 L. R. A. 365, the supreme court of Iowa says: "In this state, and in Ohio, Indiana, Illinois, Alabama, and some other states, the pro tanto or priority rule is followed, under which the notes first maturing are treated as prior, and to be first paid in full out of the security." The appellant contended in favor of the pro rata rule, and the court further says: "To apply the rule contended for by the appellant in a state where the pro tanto rule is the established law would add an element of uncertainty to mortgage securities that would affect their value. Such a rule would render it uncertain whether, under mortgages like this, the security would be applied pro rata or pro tanto. Take the case of three notes and mortgage, like these under notice, as an illustration: A party knowing that under the laws of the state the notes are entitled to priority according to the order of their maturity, and knowing the security to be sufficient for the first two notes, but insufficient for the whole, purchases and pays for the two notes first falling due on that basis. If the maker may, by defaulting, deprive these notes of their priority, then surely they would not be purchased so readily, nor at such a price. The rule contended for would render it possible for the mortgagor and holder of the notes last falling due to defeat the holder of the first notes of his priority by the makers failing to pay the interest on the last note, whereby all became due, and the holders of the last be entitled to a pro rata share of the security. Notes of this description, secured by mortgages and deeds of trust, enter largely into the business transactions of the state, and the courts should hesitate before pronouncing a rule that would render it uncertain whether security for such notes would be applied pro rata or pro tanto. Our conclusion is that the maturity of the notes by reason of default in making prior payment is not such a falling due as should change the rule for the application of the security." The court further says: "One of the grounds upon which the pro tanto rule is supported is that making

the notes mature at different times evidences an agreement that they are to have priority in the order in which they fall due. Hence cases of default, like this, are not such a falling due as expunges from the contract the agreement as to priority." We think this statement of the Iowa supreme court enunciates the better rule, and is in harmony with the holdings of this court, on the question of priority of liens, and assignees of notes take a pro tanto interest in the mortgage security, with priority according to the dates at which their notes mature, as stated in the notes, and that this rule, or their priority, is not changed by the default in payment by the mortgagor and maker, in the failure to pay either the principal or interest of any note at maturity, by which default all of the notes mature. It follows from the conclusion we have reached that there is no error in the record.

Judgment affirmed.

A petition for rehearing was subsequently filed in response to which on October 11, 1893, *Dailey, J.*, on behalf of the court delivered the following opinion:

In the petition for a rehearing in this case the appellant does not challenge or question the doctrine declared in *State Bank v. Tweedy*, 8 Blackf. 447, 46 Am. Dec. 486, that a mortgage given to secure the payment of two or more notes, maturing at different times, must be considered as if there were as many successive mortgages as there are notes secured, and that the holder of the note first due has priority, and each note has preference in the order of its maturity; but she urges that there is more than this involved in the controversy, because the mortgage securing the notes contains this stipulation: "It is agreed and understood by the parties hereto, upon the failure to pay any one of said notes at maturity, then all of said notes shall become due and payable, and this mortgage may be foreclosed,"—and takes the case out of the operation of the rule, places it within the exception, and entitles the holders to participate ratably in the funds derived from the

Knight v. Ray, 75 Ala. 363; *Sargent v. Howe*, 21 Ill. 148; *Abney v. Walmsley*, 33 La. Ann. 589; *Parkhurst v. Watertown Steam Engine Co.* 107 Ind. 594; *Salzman v. Creditors*, 2 Rob. (La.) 241; *Gumble v. Boyer*, 46 La. Ann. —; *Ventress v. Creditors*, 20 La. Ann. 359; *Barkdull v. Herwig*, 30 La. Ann. 618; *Jenkins v. Hawkins*, 34 W. Va. 799.

And in *Forwood v. Dehoney*, 5 Bush, 174, it was stated that the assignee would have a priority as against the assignor, but as he did not claim more than pro rata, he was not allowed priority.

But it was held in *Donley v. Hays*, 17 Serg. & R. 400, that where the mortgagee assigns part of the bonds payable at different times as between the assignee and mortgagee the fund is to be distributed pro rata.

In *Church v. Smith*, 39 Wis. 492, it was held that a transfer of a part of the purchase money note is a transfer of the lien pro tanto, and on a foreclosure by the assignor on notes held by him he will hold the title to an undivided portion as trustee for his assignee. The amount of the assignee's interest being proportioned to his interest in the unpaid purchase money.

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Priority as affected by the date of the assignment.

Some courts hold that the priorities of different notes secured by the same mortgage held by different assignees is regulated by the date of the assignments and that the note first assigned will be a prior lien. *McClintic v. Wise*, 25 Gratt. 448, 18 Am. Rep. 694; *Richardson v. McKim*, 20 Kan. 346; *Gwathmey v. Ragland*, 1 Hand. (Va.) 406; *Cullum v. Erwin*, 4 Ala. 452; *Bank of Mobile v. Planters & M. Bank of Mobile*, 9 Ala. 648; *Nelson v. Dunn*, 15 Ala. 501; *Griggaby v. Hair*, 25 Ala. 331; *Alabama Gold & Ins. Co. v. Hall*, 58 Ala. 1.

And in *Paris Exchange Bank v. Beard*, 49 Tex. 358, and *Page v. Pierce*, 26 N. H. 317, the court declined to pass on that question as it was not pleaded.

And an indorsement of a note last maturing with an assignment of all right, title, and interest of the mortgagee in the mortgage, gives priority. *Noyes v. White*, 9 Kan. 640.

And in *Lyman v. Smith*, 21 Wis. 674, it was held that the right of an assignee of a note first due attaches from the time of the assignment, and that he had a preference over the others.

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security, if there be not enough to pay all. Under this doctrine the proceeds would be applied pro rata in part payment of the several notes, irrespective of the dates of maturity or assignment. Upon this question there are two lines of decision; the one declaring that there is a preference in the distribution of the proceeds in favor of the holders of the pre-existing priorities, the other that the parties must share the proceeds pro rata. The latter position is not supported by an Indiana authority, and we cannot adopt appellant's contention. We think the policy of this state as to the point involved has been long since settled; that is, that the assignment of the note first maturing carries with it a pro tanto interest in the mortgage security,—pro tanto, and not pro rata,—for so much, in other words, and not in proportion. When the notes first maturing were assigned to the appellee Bennett, such act constituted a contract between him and the mortgagee, Landis, which may be formulated in these words: "I herewith transfer to you so much of this mortgage as is sufficient to pay the five notes which I have sold you. If it require all, you shall have it; but, if not, then what remains shall be applied to the other notes secured thereby." Such an assignment is not a transfer of the undivided five sevenths of the mortgage security. After such an assignment, what is left in the mortgagee to sell and transfer to the appellant is measured by what remains after deducting what he sold appellee Bennett from all he had originally. When he sold the remaining two notes to the appellant, the contract arising from the transfer may be thus stated: "I herewith assign to you whatever is left of this mortgage after the notes assigned to Bennett have been fully paid out of it." If the pro rata rule obtained, this last would be a transfer of two sevenths of the mortgage security. The rule in this state is not affected by a previous transfer of the notes last due. When Landis had completed the last assignment, and appellee Bennett became the owner of the first five notes of the series, and the appellant of the last two of the notes so secured, the rights of the assignees were fixed and vested as between themselves, and the parties are presumed to have contracted with a knowledge of the law governing such transactions. Bennett, then, had a right, as against appellant, to use just as much of the mortgage security as might be required to pay his notes in full. This correctly defines the rights of the parties during the whole of the period between the completed assignment of the notes and the maker's default in paying the note first due. We do not think the

maker's default could change the rights of the assignees as between themselves, and divest the right of Bennett to priority of payment out of the property pledged. The legal presumption is that contracts will be performed, not violated. Bennett will be presumed to have purchased his notes, and paid more for them than he otherwise would have done, because of the priority which he would obtain. The appellant may be presumed to have purchased her notes and paid less for them on account of that priority. Under such presumption, it would be inequitable to hold that the maker's default, over which Bennett had no control, destroyed the priority, and placed all the notes on an equality, thus substituting pro rata for pro tanto rights. The appellant's contention that if the parties agree upon a contingency upon which a debt shall become due, then, when the event happens, the debt is due, is recognized law, but the rule cannot be carried to the extent of defeating the vested rights of the parties. The priority of payment is fixed and governed by the notes themselves, upon their face, and not by a contingency. This precise question is considered and determined in the case of *Leavitt v. Reynolds*, by the supreme court of Iowa. It was decided February 5, 1890, and will be found in 79 Iowa, 348, 7 L. R. A. 865. The same doctrine is adhered to in *Humphreys v. Morton*, 100 Ill. 593; *Koester v. Burke*, 81 Ill. 436. The case of *People's Sav. Bank of Evansville v. Finney*, 68 Ind. 460, settles the principle as stated by us, and *Doss v. Dilmars*, 70 Ind. 451, disposes of the case.

Appellant's suggestion that the evidence is insufficient to sustain the finding of the court was presented by assignment of error and argument on the original hearing. The allegations of the complaint with respect to the rights of the appellee Bennett in the notes in suit are "that since the execution of the notes and mortgage described said five notes, marked Exhibits 'A,' 'B,' 'C,' 'D,' and 'E,' had been sold, transferred, and indorsed to plaintiff, who is now the owner thereof." The evidence offered and appearing in the record of the case is a blank indorsement of each of the notes, "B. F. Landis." Appellant insists that this was not only a failure of the evidence to sustain the finding of the court, but an absolute failure of proof upon a material issue in the case. There was no answer in general denial putting in issue the execution of the indorsements, and hence no issue tendered requiring Bennett to put the indorsements in evidence.

Petition for rehearing overruled.

FLORIDA SUPREME COURT.

Courtland BUCKMAN, *Appl.*,
 v.
 STATE of Florida, *ex rel.* Champlin H.
 SPENCER.

(.....Fla.....)

1. The plea of non usurpavit is not a proper plea in a proceeding by information in the nature of a quo warranto on the relation of a private person upon the refusal of the attorney-general to institute the suit.
2. The circuit courts of this state have jurisdiction to inquire by informations in the nature of a quo warranto into the legality of the election of a person to the office of mayor of a city or town organized under the general laws of this state for the incorporation of such municipalities, and the city or town council has no power by any action it may take in reference to such an election to deprive the courts of their jurisdiction over such matters.
3. The right of trial by jury on issues purely of fact arising in proceedings by information in the nature of quo warranto is guaranteed by the third section of the bill of rights of our constitution, which provides that the right of trial by jury shall be secured to all and remain inviolate forever.

(June 30, 1894.)

*Headnotes by MABRY, J.

NOTE.—Right to jury in quo warranto proceedings.

The practice has been almost universal to submit the questions of fact arising in quo warranto proceedings to a jury as will be seen by the authorities cited in the above case and those collected in the case of Reynolds v. State, 61 Ind. 392, but the cases in which the question of the right to such trial has been adjudicated are very few.

There are many early English cases decided before the passage of Statute 3 Geo. II., chap. 25, in which the aid of a jury was obtained in trying questions arising in quo warranto proceedings, but there seems to be no expression as to the right to have the questions submitted to the jury.

The early practice books are equally silent on the subject. After the passage of 3 Geo. II., chapter 25, which provides for a jury in such cases, decisions may be found to the effect that such questions must be submitted to a jury, but even then it is not stated whether such ruling is based upon the statute or upon prior existing law or practice.

In Nevill v. Payne, 1 Cro. Eliz. 304, 35 & 36 Eliz., a jury trial was had.

In a case decided in 10 Geo. I., where the right to the office depended on the qualification of the electors, the court made the rule absolute, on the ground that being a matter of right it was fit to be tried by a jury, they being the proper judges of evidence. King v. Whitchurch, 8 Mod. 210.

In a case decided in 1731, 5 Geo. II., a rule was granted to show cause why an information in the nature of quo warranto should not go against defendant for exercising the office of capital Burgess of the town of New Radnor, and his counsel asked the court to determine the point on the rule for showing cause and not put defendant to the expense of a special verdict, but the court made the rule absolute, thinking this a matter fit to be determined by a jury.

A PPEAL by defendant from a judgment of the Circuit Court for Volusia County in favor of relator in a proceeding brought to try defendant's title to the office of mayor of the Town of Daytona. *Reversed.*

On July 24, 1889, an election was held for corporate officers in the town of Dayton, including the mayor. The candidates for mayoralty were Courtland Buckman and Chaplin H. Spencer. Buckman was declared elected, took the oath of office and was duly installed as mayor. Spencer instituted proceedings in the nature of quo warranto, charging Buckman with usurpation of the office and claimed that Spencer was entitled thereto. Motions to quash and various demurrers were overruled, and defendant pleaded to the information *non usurpavit* and a special plea to the merits; further that the town council by its proceedings had rendered the matter *res judicata*. The plea of *non usurpavit* was stricken out, together with all others, except the special plea as to the facts. Issue was joined on this plea, and a jury demanded. The court refused a jury and referred the case to a master who made a report upon which judgment of ouster was entered.

Further facts appear in the opinion.

Mr. H. H. Buckman, for appellant:

The plea of not guilty was a good plea and should have been allowed. The proceeding was on the private relation of relator, the state was no party and was not making the inquiry,

made in a more solemn way. King v. Pool, 3 Barnard. 93.

In King v. Clarke, 1 East, 38, the court said: "The question is put too much in *dubio* by the affidavits by either side for the court to say that it is not proper to be inquired into by a jury." And similar remarks were made in King v. Bingham, 3 East, 303.

In King v. Bridge, 1 W. Bl. 40, 23 Geo. II., it is said that the case must be tried by jury.

In King v. Harwood, 2 East, 177, it was admitted by defendant that the merits of the election must be submitted to a jury.

The present English practice under the crown office rules is stated by Shortt on Mandamus, p. 168, to be that either party may obtain a trial with a jury on application for it, otherwise the mode of trial will be by a judge without a jury. But the court may at any time order the trial to be before a jury.

In this country the courts which have passed upon the question have not agreed as to whether the right to a jury was a common-law right which was preserved by the constitutions. A very few of the states are in the same condition as Florida in which all statutes passed in England prior to July 4, 1776, are in force. See *note* to McKennon v. Wins, 22 L. R. A. 508. Of course in such states there can be no question because it is settled by the Statute of 3 Geo. II., chap. 25.

In State v. Johnson, 26 Ark. 261, the supreme court of Arkansas determines that there is no right of trial by jury, basing its ruling principally upon the fact that jurisdiction was given to the supreme court, and that no provision was made for a jury in that case, although a part of the argument is to the effect that the Statute of 3 Geo. II., chap. 25, gave a right to jury trial in quo warranto proceedings.

and the proceeding was narrowed down to a substitute for a civil suit between two claimants to a municipal office. While the state need show nothing, and may always call on respondent to show his title, so far as the private relator is concerned he has no such power, he must show title and if he fail he cannot have judgment, hence the rule as to the plea of *non usurpavit* does not apply, and it was a proper plea to relator's alleged claim.

State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265; *Wood*, *Mandamus*, 234.

The relator is bound to show his title and has the affirmative.

McClelland's Dig. p. 846, § 2; *State v. Anderson*, 26 Fla. 249; *High*, *Extr. Legal Rem.* § 629, note 3; *State v. Hunton*, 28 Vt. 594; *People v. Thatcher*, 55 N. Y. 525, 14 Am. Dec. 312; *State v. Boni*, 46 Mo. 528.

The party in possession is presumed regularly elected and the burden of proof is on the relator and he is bound to show he is entitled and the defendant not.

State v. Kupferle, *supra*; *People v. Iacoste*, 37 N. Y. 192; *Clark v. People*, 15 Ill. 217; *State v. Norton*, 46 Wis. 332; *State v. Hunton*, *supra*; *People v. Phillips*, 1 Denio, 397; *State v. Boni*, *supra*; *People v. Thatcher*, *supra*; *Paine*, *Elections*, 905.

The refusal of the court to grant a trial by jury and his making the order and referring said cause to a master, over the objection of defendant, made all the proceedings and judgment irregular and they must be reversed.

ings, from which the conclusion is drawn that prior to that time no such right existed.

So under the Minnesota constitution, which gives the right to trial by jury in actions at law, and gives the supreme court jurisdiction of certain remedial cases, but provides that there shall be no trial by jury in said court, it is held that the remedial cases embrace quo warranto, and that therefore a jury trial is not demandable as of right in such cases. *State v. Minnesota Thresher Mfg. Co.* 3 L. R. A. 510, 40 Minn. 213.

So in Missouri it is said that a constitutional provision that the right of trial by jury should remain inviolate cannot be understood to require the supreme court to summon juries in quo warranto proceedings. *State v. Vail*, 53 Mo. 97.

And in that state it is settled that there is no constitutional right to trial by jury in such cases. *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253.

So under the Arkansas Usurpation of Office Act, which was enacted in lieu of proceedings by *scire facias* and quo warranto there is no constitutional right to trial by jury. *Wheat v. Smith*, 50 Ark. 265.

If there is no dispute as to the facts, there can be no jury trial. *Lee v. State*, 49 Ala. 43.

So in *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451, the action of the trial court in withdrawing the case from the jury was approved on the ground that the evidence did not make such a case as should go to the jury.

But in *State v. Burnett*, 2 Ala. 140, it is said, when the relation is made at the instance of one claiming a disputed office or franchise, if a *prima facie* case is made by his affidavit, he is entitled to be placed in a proper condition to assert his rights in due course of law, and to have all disputed facts determined by a jury.

And in *People v. Doesburg*, 16 Mich. 133, the supreme court sent an issue of fact down to be tried at circuit, and upon the trial court's refusing a jury, 24 L. R. A.

The proceeding was a common-law proceeding.

State v. Anderson, 26 Fla. 240; *People v. Richardson*, 4 Cow. 100; 3 Bacon, Abr. p. 643; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *Robinson v. Jones*, 14 Fla. 257; *State v. Gleason*, 12 Fla. 251.

As such the right of trial by jury is a constitutional right and cannot be taken away.

Const. 1887, Declaration of Rights, § 8; *Wint River S. B. Co. v. Roberts*, 2 Fla. 102, 43 Am. Dec. 186.

The right of a trial by jury in proceedings by information in the nature of quo warranto existed at common law even under the ancient writ, and from the earliest times to the present day it has been conceded, until it has become part of the body of the law, that all issues of fact in such proceedings are triable by jury.

See *King v. Jones*, 8 Mod. 201; *King v. Penryn*, 8 Mod. 216; *King v. Whitchurch*, 8 Mod. 210; *King v. Bingham*, 2 East, 308; *King v. Clarke*, 1 East, 38; *King v. Francis*, 2 T. R. 484.

The issues in informations in the nature of quo warranto are legal and triable by jury.

Wood, *Mandamus & Quo Warranto*, p. 234.

Even when the proceeding is by the state on the part of the attorney-general.

People v. Albany & S. R. Co. 57 N. Y. 161. See also *Paine*, *Elections*, § 903, and cases cited in note, also § 906; *State v. Norton*, 46 Wis. 332; *Haskins v. Wilson*, 5 Wis. 106; *High*, *Extr. Legal Rem.* § 740; *State v. Burnett*, 2

the supreme court intimated that the trial by jury was a matter of right and sent the case back for a new trial.

In *State v. Allen*, 5 Kan. 213, the court says that at common law in quo warranto proceeding the respondent was probably entitled to a jury for the trial of questions of fact.

In *People v. Albany & S. R. Co.* 57 N. Y. 161, the action was against the directors of a private corporation, and the court said there was before the court in the pleadings a legal question in respect to the title to the corporate office of directors in the railroad company. To the trial of that question only the people and the two sets of directors were proper parties. This issue being strictly a legal issue in its character is one in the trial of which, in the language of the constitution, the trial by jury has been heretofore used. Such a trial was, therefore, the constitutional right of the parties. S. C. 5 Lans. 85.

In *Com. v. Delaware & H. Canal Co.*, 43 Pa. 235, it was said that it was a matter of no importance to the parties whether the authority granted to the court by the quo warranto acts was exercised in the common law or in the equity form, provided the right of trial by jury is not interfered with.

There is a right to trial by jury under the Indiana statutes. *Reynolds v. State*, 61 Ind. 302.

In *State v. Messmore*, 14 Wis. 115, a jury was called to try the issues of facts in the supreme court, and there are several other cases in which a similar practice obtained. But such cases are not valuable in settling the question of right, because it is readily conceivable that in many cases the court would desire to be relieved of the necessity of deciding questions of fact and seek the aid of a jury for that purpose not because it regarded such proceeding as demandable of right but because it was a matter of convenience. C. P. P.

Ala. 140; *People v. Doesburg*, 16 Mich. 183; *People v. Oicott*, 15 Mich. 826; *People v. Richardson*, 4 Cow. 118; *People v. Thacher*, 55 N. Y. 527, 14 Am. Dec. 312; *Shaw v. Kent*, 11 Ind. 80; *Reynolds v. State*, 61 Ind. 392; *Hins v. Sweeney*, 3 G. Greene, 511; *Simpson v. Richardson*, 18 La. Ann. 121; *Wilson v. State Bank of Alabama*, 3 La. Ann. 196; *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503; *Parson v. Bedford*, 28 U. S. 3 Pet. 483, 7 L. ed. 732; *Isom v. Mississippi Cent. R. Co.* 36 Miss. 810; *Ex parte Grace*, 19 Iowa, 208; *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206, note; Proffatt, Jury Trial, § 105.

Even where it appears substantial justice has been done a trial without a jury is error and must be reversed.

Paine, Elections, § 904; *Reynolds v. State*, *supra*.

All questions of fraud must be tried by a jury.

Freeman v. Atlantic Mut. Ins. Co. 13 Abb. Pr. 124.

A compulsory reference is unconstitutional. *Grim v. Norris*, *supra*.

Messrs. Hamlin & Stewart for appellee.

Mabry, J., delivered the opinion of the court:

An information in the nature of a quo warranto was filed in the circuit court for Volusia county in the name of the state of Florida, on the relation of appellee, upon her refusal of the attorney-general to institute the proceeding on such relation, for the purpose of testing the right of appellant to hold the office of mayor of the town of Daytona, in this state. The information alleges, among other things, in substance, that appellee and appellant were the only candidates for said office at a regular election of municipal officers for said town held on the 24th day of July, A. D. 1889, and that appellee was duly elected by a majority of the electors of said municipality as mayor, but that the judges and inspectors of said election, or a majority of them, fraudulently canvassed the votes cast and wrongfully declared appellant elected, and that he took the oath of office, and was then wrongfully exercising the franchises thereof.

The proceedings in the circuit court terminated in a judgment that appellant be ousted from the office of mayor of said town, and that appellee be inducted therein.

The pleadings in this case are similar in many respects to those in the case of *State v. Anderson*, 26 Fla. 240, both cases growing out of the same election. The respondent in the circuit court, appellant here, filed a motion to quash, and also demurred to the information, and both being overruled, pleas were filed, to which a demurrer was sustained. The pleas were amended, and upon the issues of fact made on them the trial was had that resulted in the judgment mentioned.

The first two errors assigned are the rulings of the court on the motion to quash, and the demurrer to the information. In reference to these assignments of error counsel for appellant says: "But as the court has virtually passed on the matter raised by them lately

in a similar proceeding, these two grounds of error are therefore not now urged, except as such matters differ from the case referred to, and are hereafter specially set up." It is then urged, first, that the court erred in overruling the plea of *non usurpavit* which was filed by respondent. The contention under this head being that while such a plea would not be good as against the people, where the attorney-general institutes the proceedings, the same rule does not obtain when a private individual comes in on his own relation upon the refusal of such officer to commence the suit. This point was settled in the case mentioned, *State v. Anderson*. Where the suit is instituted on the relation of a private individual, and a prima facie right to the office is shown, the respondent must show by what right he holds. The relator having shown a right to contest for the office, and to call upon the respondent to show by what authority, quo warranto, he exercises the functions thereof, and an issue being made up to try such right between the parties, the fact that the relator may be found not entitled to the office will not authorize the respondent to hold it unless he is entitled to it. Upon such an issue the statute provides that no person shall be adjudged entitled to hold the office then in question except upon full proof of his title to it. As decided in the case referred to, the plea of *non usurpavit* by the respondent is not proper, and the court did not err in overruling it.

It is further insisted under the assignments of error mentioned that the court erred in overruling respondent's third original plea. It is not necessary to set out all the allegations of this plea, as the only objections to it urged here may be clearly stated without such recital. The information alleges that the town of Daytona was a municipal corporation duly incorporated under the laws of the state of Florida, and was such corporation on the day of the election therein mentioned; and that said election was ordered and held in pursuance of an ordinance duly passed by said municipality in May, 1884; and that the provisions of another ordinance passed by said town on the 22d day of July, 1889, two days before said election was held, were enforced by the inspectors of the election up to the closing of the polls. In the second plea to the information it is alleged that the ordinance of the 22d of July, 1889, was inoperative at the date of the election because it was passed two days prior thereto, and had not then been properly promulgated. The third plea sets out the provision of the ordinance passed in 1884, prescribing that the inspectors of elections in said town shall proceed substantially as the state laws shall direct, and after reciting what was the state regulation as to the ballot to be used at a general election, it is further alleged that said election was held in pursuance of the act under which said town was incorporated, the said ordinance passed in 1884, and the said state regulation as to the ballot to be used. Also that on final canvass of the votes cast at said election by the inspectors, respondent was found by them to be duly and legally elected to the office of mayor of said

town, giving the votes cast for both parties, and upon the completion of said canvass the inspectors duly certified the result of the election to the mayor of said town, who, with the aldermen thereof, in regular session assembled for that purpose, and in the presence of relator, who made no protest or objection thereto, received the returns of said election, and by resolution adopted the same as the only valid result of said election. It is also alleged that the respondent then took the oath of office as said mayor, and was lawfully exercising the functions thereof.

It will be seen by an examination of the case already referred to (*State v. Anderson*), that the validity of the ordinance passed on the 22d day of July, 1889, so far as shown by the record, was passed upon and held to be valid. The ordinance took effect from the date of its passage and approval.

The points argued by counsel under the third plea are "that the matter was *res judicata*, having been acted upon by the council, a body empowered by the statute to judge of the qualifications and election returns of its own members," and that the plea set up a full defense to the relator's claims for the reason, according to the authorities cited on this point, that the jurisdiction over such matters is vested exclusively in the town council. The fact that relator was present when the return of the inspectors was received by the council, and made no protest thereto, was not sufficient to estop him from resorting to the courts for the redress of such rights growing out of the election as he may have had. In reference to the grant of power by the general law incorporating cities and towns in this state to the council to judge of the election returns and qualifications of its own members having the effect to deprive the courts of jurisdiction over such matters, it is said in *State v. Anderson* that "the better authority, as we think, and it seems, the weight of it, is against the proposition that the above grant to the council ousts, of itself, the jurisdiction of this court to inquire, upon information in the nature of quo warranto, into the defendant's title." But we fail to find any grant at all to the council to judge of the election of the mayor, or to entertain any contest over the title to this office. It may be that the legislature can confer such exclusive authority on the town council to pass upon the election and qualifications of the mayor as to deprive the courts of jurisdiction over the same; but no such power had been conferred upon the town council of Daytona at the time of the election, and relator had a right to resort to the court to have his right to the office determined.

What is here said covers the objections urged to the rulings of the court on the pleadings, and we find no errors so far as the objections urged extend.

A demurrer was overruled to the amended pleas filed, and upon issues tendered thereon the defendant demanded a trial by jury. This was refused, and the court appointed a master to take testimony; upon the report of the master the court proceeded to adjudicate the cause. The defendant excepted to the rulings of the court denying the trial by

jury, and also to the proceedings before the master, and they are assigned as error. The ruling of the court on the demurrer to the amended pleas, it may be stated, is not before us for review, and we will not stop to discuss it, though we entertain some doubt about the legal sufficiency of the pleas on demurrer. Accepting the issues of fact, as was done by the court, tendered on the pleas, we proceed to consider the errors assigned.

These assignments of error present the question whether a defendant is entitled to a jury trial on questions of fact in a proceeding by information in the nature of a quo warranto. This right is claimed under the guarantee of the constitution. The present constitution provides that "the right of trial by jury shall be secured to all, and remain inviolate forever." The first constitution, framed in 1838 for our state government, provided that "the right of trial by jury shall forever remain inviolate." These provisions, it is evident, were not designed to grant or create the right of trial by jury, but they were framed for the purpose of guaranteeing such a right already existing. It has been said that a constitution is not the beginning of government, and is adopted in harmony with existing conditions of things. The following is the language of *Judge Cooley*, quoted by us in the case of *English v. State*, 31 Fla. 340: "It is also a very reasonable rule that a state constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for definitions we are to draw from that great fountain, and that in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes.

Donald v. State, 31 Fla. 255. *Judge Douglas* said for this court in *Flint River S. B. Co. v. Roberts*, 2 Fla. 103, 48 Am. Dec. 186, in speaking of the right of trial by jury that "It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. 8 Story, Com. 638, 639, § 1760. In Magna Charta it is more than once insisted on, as the principal bulwark of our liberties, but especially in chapter 29, by which it is provided: That no freeman shall be hurt, in either his person or property (*nisi per legale iudicium parium suorum vel per legem terre*), unless by lawful judgment of his peers or equals, or by the law of the land. . . . Chapter 29 of Magna Charta is in force in this state by virtue of the Act of November 6, 1829, adopting the common law and statute laws of England."

When the right of trial by jury is secured by constitutional provision in general terms like ours, and without any qualification or

restriction, it must be understood as retained in all those cases that were triable by jury according to the course of the common law. The provision in the first constitution, framed in 1838, "that the right of trial by jury shall forever remain inviolate," contemplated, without doubt, a continuation of jury trials in all cases where such was the practice at the common law, and there is nothing in the subsequent constitutions to indicate a change of meaning in this respect. It will be remembered that in 1829, prior to the formation of the Constitution in 1838, the legislature had expressly adopted the common law of England as in force in the territory of Florida. But it was never understood that the right of trial by jury secured by such a constitutional provision, extended to all cases, as there were many trials and proceedings according to the course of the common law, in which juries did not participate.

The old common-law writ of *quo warranto* was a prerogative writ, to be applied for on behalf of the crown as a matter of right, as against one who had usurped franchises or liberties and for the purpose of inquiring by what right he claimed to do so. It was clearly a civil remedy at law, and the process to bring the party into court was a summons. In process of time the old writ became superseded in great measure by the proceeding by information in the nature of *quo warranto*. This writ, in its origin, was criminal in its nature designed not only to oust the usurper of the franchise claimed by him, but to punish him by fine for such usurpation. The question of the right to exercise the franchise was, however, involved in the prosecution. This writ at first, like the old one, could only be prosecuted on behalf of the crown, and at the present it must be in the name of the crown, and with us in the name of the state.

The Statute of 9 Anne made some changes as to the mode of instituting this writ, confined probably exclusively to municipal offices, and certain crown officers were permitted by that statute, by leave of the court first obtained, to institute the suit in the name of the crown on the relation of parties claiming a right to the office. This statute extended, to some extent, the writ so as to permit under the conditions prescribed a contest in reality between private individuals to the office in question. It was very much debated for quite a while whether the information in the nature of *quo warranto* was strictly a criminal prosecution or a civil suit. It is clear, however, that for some time before the revolution the writ was regarded in England, though criminal in form, as a civil proceeding to test the right of a party to exercise a franchise, and of ousting a wrongful possessor. It has always been considered as a civil remedy at law by the great majority of the American courts, and our own court has so regarded it. *State v. Gleason*, 12 Fla. 190; *State v. Saxon*, 25 Fla. 342; *State v. Anderson*, *supra*; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 492; note to case of *People v. Richardson*, 4 Cow. 97.

The question, whether or not the issues purely of fact made upon the pleadings in

information in the nature of *quo warranto* were triable by jury at the common law, has given rise to some diversity of opinion in some of the American courts. In the present investigation we are confined to the proceedings by information in the nature of *quo warranto* which, in its origin, was undoubtedly criminal in nature as well as purpose in part. Our examination into the matter has conducted us to the conclusion that at the time of the revolution the trial of pure questions of fact in such proceedings was by jury. It is stated in 5 Bacon's Abridgment, page 188, under the head of informations, that "as an information of this kind (*quo warranto*) is now considered rather as a civil proceeding, a new trial may be granted as well where there has been a verdict in favor of the defendant, as where it has been given in favor of the crown." Again on page 187, "where the defendant sets forth a bad title to the office, and confesses the user, that amounts to a confession of the usurpation, and if an immaterial issue is joined, and a verdict found on which the court cannot give judgment, yet they will not grant a repleader, but will give judgment on the plea." In the following English decisions in such cases trials by jury on the issues of fact were had, viz.: *Rez v. Bennett*, 1 Strange, 101; *Rez v. Bell*, 2 Strange, 995; *Neuill v. Payne*, 1 Cro. Eliz. 304; *Rez v. Francis*, 2 T. R. 484; *Rez v. Philips*, 1 Burr. 293; *King v. Carpenter*, 2 Show. 47; *Rez v. Malden*, 4 Burr. 2135; *King v. Bridge*, 1 W. Bl. 46.

In *Rez v. Bennett* all the judges of England were equally divided, the division being equal in each court, over the question whether a new trial could be granted after a verdict in favor of the defendant in such proceeding. The view that the suit was criminal then widely prevailed, but this point was finally settled in favor of the view above announced, that the action, though criminal in form, was regarded as a civil suit for the purpose of trying the right to the franchise. It seems also that a bill of exceptions was allowed in such proceedings. Bacon, Abr., *supra*. And in *People v. Sackett*, 14 Mich. 243, it was held that the appellate court would not review the proceedings on the trial of issues of fact in such cases by a jury in the circuit court without the judge's report of the proceedings, rulings, and evidence before him.

Angell & Ames on Corporations states (§ 741), "that if a prima facie case of usurpation is made out, and there appears a fair doubt on the title of the defendant, the court will not discuss the question in the summary way of motion, but send the facts to a jury." Several English cases are referred to in which the court thought proper to send the question to a jury, or leave the parties to bring the matter more solemnly before the court on demurrer. In a great many of the American courts, and we think a clear majority of them, parties have a right to have the jury pass upon purely questions of fact in such proceedings. We refer to some of them: *People v. Albany & S. R. Co.* 57 N. Y. 161; *People v. Doesburg*, 16 Mich. 133;

Harbaugh v. People, 88 Mich. 241; *State v. Norton*, 46 Wis. 332; *State v. Burnett*, 2 Ala. 140; *Lee v. State*, 49 Ala. 43; *Com. v. Woolper*, 8 Serg. & R. 29, 8 Am. Dec. 628; *Com. v. Smith*, 45 Pa. 59; *State v. Funck*, 17 Iowa, 365; *State v. Norwalk & D. Turnp. Co.* 10 Conn. 157.

In *People v. Oicott*, 15 Mich. 326, a question arose in the supreme court on issues of fact made there as to the county to which they should be sent for trial by jury, and it was held that in such cases, "the statute being silent as to the place of trial of issues of fact involved therein, the supreme court will not send any such case for trial to a court other than that where the election took place, without the same showing as would authorize a change of venue." The supreme court of Wisconsin in the case of *State v. Mesmore*, 14 Wis. 115, ordered a trial by jury in that court on issues of fact raised in such a proceeding on the ground that it was a case of public interest and importance, and should be then determined. That court, as we understand it, exercises its own discretion whether trials by jury shall be had there on issues of fact in such proceedings, or be sent to a trial court for such purpose. In *King v. Amery*, 1 T. R. 363, it was held that upon an application for a trial at bar, the court will in every case exercise its own discretion upon the peculiar circumstances of the case, and where a fair trial cannot be had in the county where the matter arises, the trial will be awarded in the next English county where the king's writ of venue runs. The case of *State v. Foster*, 32 Kan. 14, presents a complete trial by jury on issues of fact before the supreme court in an information in the nature of quo warranto. The right of trial by jury on such issues was demanded and accorded by the court, though it is stated to have been done *ex gratia*. *Vide* Paine on Elections, § 908, where it is stated, "the weight of authority is in favor of the proposition that, at the common law, an information in the nature of a quo warranto was triable by jury;" *Reynolds v. State*, 61 Ind. 392; *Wood, Mandamus & Quo Warranto*, p. 284; *High, Extr. Legal Rem.* §§ 740, 741. There are some authorities to the contrary: *State v. Vail*, 53 Mo. 97; *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253; *State v. Johnson*, 26 Ark. 281. In the first and last of the cases just mentioned applications for jury trials on issues of fact were made in the supreme courts and refused. In the last case mentioned the proceeding was by quo warranto. In this case it is said that "in the proceeding by information in the nature of quo warranto it was expressly provided by an act of parliament (8 Geo. II., chap. 25), that a jury shall be struck before a proper officer on demand of the king or the respondent," and it is argued from this fact that no such right existed at the common law, as the statute would have been useless if it did. We have not been able to find the Statute of Geo. II., referred to in the opinion, and cannot say whether or not it was declaratory of the common law on the subject, but from the date given, it would be old enough to become law here by virtue of the Act of 1839, adopted 24 L. R. A.

ing the common law and English statutes in force prior to and down to 1776.

In *State v. Suwannee County Comrs.*, 21 Fla. 1, an original proceeding by mandamus in this court, it was held that a jury trial could not be demanded here. The view expressed was that the constitution conferred the jurisdiction on this court in such cases, and the proceeding was at common law, and according to this proceeding there was no jury trial, as the return was conclusive. Under the Statute of 9 Anne issues of fact were permitted to be made on the return and trial had thereon, but as there was no statute requiring or authorizing such issues to be tried by jury in this court, the proceeding should be as it was at common law without a jury. In *State v. Vail, supra*, it was decided that the supreme court had jurisdiction in such cases, but it would generally decline to investigate them when other courts had been provided for their adjudication, and possessing the same powers as the appellate court over such matters subject to appeal, and having more facilities for the trial of such issues.

The Statute of Anne in reference to permitting informations in the nature of quo warranto to be filed on the relation of private persons provides that such actions shall proceed in such manner as usual in cases of information in the nature of quo warranto. The proceedings in the case before us were instituted in the circuit court, and we are to determine whether or not such issues of fact are triable by jury in that court, and not in the appellate court. As before stated, our conclusion is, that in informations in the nature of quo warranto the right to have issues of fact determined by a jury existed at the common law, and that such right existed down to the time of the revolution. There is nothing in the terms of the Act of 1872 (chap. 1874) that will prevent a construction in harmony with such right as it existed at common law, and as such secured by the constitutional provisions to which we have referred.

It may be well to say that we are not dealing with a statutory regulation as to the contest of the election of a mayor of a town or city. It was decided in *State v. Anderson, supra*, that the grant of power to the council to judge of the election returns and qualifications of its own members did not deprive the courts of jurisdiction by the remedy of information in the nature of quo warranto. Rights asserted by such remedy are controlled by common-law principles, and not by statutory regulations providing exclusive modes for settling contests over municipal offices. *State v. Lewis*, 51 Conn. 118.

The issues raised on the pleas filed in the case under consideration presented questions purely of fact, and we think the court erred in refusing to submit them to the consideration of the jury.

The denial of this right, it will not be questioned, is good ground for a reversal of the judgment appealed from, and an order will be entered reversing the judgment and remanding the cause to the Circuit Court.

Mary E. HODGES, *Appt.*,

v.

A. G. COOKSEY.

(33 Fla. 715.)

- *1. The relation of landlord and tenant existed between the parties appellant and appellee, as shown by the record in this case.
2. The constitutional exemption of personal property to the head of a family residing in this state cannot be claimed by a tenant as against the lien for rent in favor of the landlord on any of the agricultural products raised on the land rented. The land in such a case is regarded as such a factor in the production of the crops as to subordinate the title of the tenant thereto to the superior lien given by statute for the use of the premises.
3. The statutory remedy for the enforcement of a claim for rent is embraced within the terms "any process

*Headnotes by MARRY, J.

NOTE.—Availability of exemptions against claim for rent.

Statutory lien for rent.

Where the landlord is given a lien by statute paramount to the tenant's claim of exemption, the landlord's lien will prevail. *Cathcart v. Turner*, 18 Fla. 337; *Slaughter v. Winfrey*, 35 N. C. 159; *Durham v. Speake*, 82 N. C. 57; *Prince v. Nance*, 7 S. C. N. S. 351; *Bryan v. Kelley*, 35 Ala. 593.

And in such a case the lien is not lost by the landlord taking a note from the tenant in which note the exemption is waived. *Stephens v. Adams*, 33 Ala. 117.

So leasing a storeroom after a statute was passed which statute gave landlords a lien for rent, makes the statute a part of the contract of lease and waives the exemption as to such lien. *Ex parte Barnes*, 34 Ala. 540.

But a landlord has no lien against the property of his tenant that is exempt, where there is no statute creating such lien. *Abraham v. Davenport*, 73 Iowa, 111; *Mason v. O'Brien*, 42 Miss. 420.

But see "*Equitable Lien*," *infra*.

And under Ky. Gen Stat., chap. 55, art. 6, § 5, providing that property exempt from execution is exempt from distress or attachment for rent, but not for money or property furnished, the property of a subtenant is also exempt notwithstanding chapter 66, article 2, section 13, gives the landlord a lien on the property of the tenant or under tenant. *Rudd v. Ford*, 91 Ky. 183.

And in *Livingstone v. Wright*, 68 Tex. 706, and *Marshall v. Pitman*, Id. 624, it was stated that the landlord has a lien on the property of the tenant not exempt from forced sale situated in the house rented.

The case of *HODGES v. COOKSEY* holds that the constitutional provision exempting one thousand dollars worth of property does not apply where the statute gives a landlord a lien on products raised on the land, but does apply to other property. This distinction made on the ground that the land is a factor in producing the crops does not seem to have been discussed in other cases. Although in Georgia the landlord was allowed an equitable lien on that ground against an exemption claim of the tenant. See subhead "*Equitable Lien*."

Waiver of exemption.

A pledge of property to be acquired in the future will not give a landlord a lien as against the widow. 24 L. R. A.

of law," contained in the exemption article of the Constitution of 1868, and the personal property exemption secured by that instrument, other than agricultural products raised on the land rented, may be claimed by the head of a family residing in this state, as against the lien for rent given by statute, in favor of the landlord.

(May 31, 1894.)

A PPEAL by defendant from a decree of the A Circuit Court for Bradford County in favor of complainant in a proceeding to enjoin the sale of certain property which had been levied upon under a distraint warrant for rent on the ground that it was exempt. *Affirmed*.

Cooksey bought for a term of years, or leased, from Mary E. Hodges a piece of property on which was a mineral spring and a good stand for a country store. Cooksey owned a saw-mill, and his scheme was to operate the mill, improve the spring for the accommodation of summer visitors, and sell goods. He undertook to pay a rent of \$500 per annum.

ow's claim of exemption. *Vinson v. Hollowell*, 12 Bush, 538.

So where the lease gives the landlord a lien but was not specific as to the property on which exemption was waived, it was construed to give a lien only on nonexempt property. *Selling v. Gunderman*, 35 Tex. 544.

And in *Wilder v. Stewart*, 21 N. Y. Week. Dig. 93, it was stated that a householder could not by an executory agreement estop himself in a lease from his right to claim the exemption. But in that case the landlord united his claim for rent with other claims and took judgment thereon, and the exemption then applied.

And under Iowa Code, § 2017, providing for a landlord's lien on non-exempt property, where a lien is given in the lease, it is in the nature of a chattel mortgage and must be recorded. *Sioux Valley State Bank v. Honnold*, 35 Iowa, 352.

See note to *Dickey v. Waldo* (Mich.), 23 L. R. A. 449, as to sale or mortgage of future crops.

But a lease constituting the rent a lien on the crop and stock on the premises "whether exempt from execution or not" is a valid mortgage of exempt property. *Fejavary v. Broesch*, 52 Iowa, 32 35 Am. Rep. 261.

This case does not show whether the lease was recorded or not.

And under Kansas Comp. Laws 1879, chap. 55, § 20, a tenant may waive in writing the benefit of the exemption laws for debts contracted for rent. *Holkington v. Huff*, 24 Kan. 379.

So a waiver of the "benefit of all laws or usages exempting any property from distress or execution for rent" waives the exemption. *Beatty v. Rankin*, 129 Pa. 358.

But in *Mitchell v. Coates*, 47 Pa. 202, it was held that a waiver of exemption in the lease from levy and sale "for arrears of rent" does not extend to a judgment note given thereafter in lieu thereof.

Equitable Lien.

In Georgia it has been held that a landlord has an equitable lien on the tenant's crops for the rent which is paramount to the claim of the tenant for exemption. *Davis v. Meyers*, 41 Ga. 95; *Taliaferro v. Fry*, 41 Ga. 622; *Harrell v. Fagan*, 43 Ga. 330.

In *Taliaferro v. Fry*, *supra*, there was a mortgage to secure the lien made by the tenant and one judge held that this would bind the tenant's wife without her signature. L. T.

Having failed to pay installments when due until there was nearly \$1,500 due, the defendant levied a distrait warrant upon all his property, including crops of himself and his tenant and some goods belonging to his son. Cooksey then instituted this proceeding to enjoin the sale of the property on the ground that it was exempt from execution to him as the head of a family.

Further facts appear in the opinion.

Messrs. King & King for appellant.

Mr. Thomas E. Bugg, for appellee:

An exemption of personal property from forced sale under legal process, to the amount of \$1,000 in value, may be claimed under the constitution, by a tenant entitled to claim exemption when his property is levied upon for the satisfaction of a claim for rent or supplies furnished by the landlord; but such exemption cannot be claimed out of the products of the land rented, when an express lien exists under the statute.

Cathcart v. Turner, 18 Fla. 337.

The distress warrant in this cause was sued out in October, 1889, and the rent distrained for accrued prior to the year 1889. By chapter 3247 Laws of Florida, Pamphlet Acts of the Legislature, 1881, page 64, it is provided that distress for rent can only be made on crops grown during the current year of the accrual of the rent for which distress is made.

Mr. L. B. Rhodes also for appellee.

Mabry, J., delivered the opinion of the court:

Appellee filed a bill in chancery against appellant and the sheriff of Bradford county to enjoin the sale of personal property levied on by virtue of a distress warrant to collect rent alleged to be due appellant. The injunction prayed for in the bill was granted, to continue in force until the further order of the court, and after answer filed a motion was made to dissolve the injunction on bill and answer. The motion to dissolve the injunction was overruled, and from this ruling the respondent, Mary E. Hodges, appealed.

The bill contains many allegations of matters of which a court of chancery has no jurisdiction, and we do not deem it necessary to set them out in this opinion. As no objection was made to the sufficiency of the pleadings, we will consider no allegation therein except these relating to appellee's right of exemption in and to the property seized under the distress proceedings. The theory of the bill is that the complainant appellee here, is entitled to the constitutional exemption of \$1,000 worth of personal property out of the property seized under the distress warrant. Chapter 3246, Laws of 1881, confers upon the circuit courts "equity jurisdiction to enjoin the sale of all property, real and personal, that is exempt from forced sale under the constitution and laws of the state of Florida," and such matters in the case before us as relate to the claim and right of appellee to hold as exempt from such forced sale the property, or any part of it, levied on by the sheriff, come properly within the jurisdiction of the court of chancery.

The relation between appellant and appellee, as shown by the written contract between

them, a copy of which is attached to the bill and not questioned by the answer, was, we think, that of landlord and tenant. The lease of the premises therein described was for five years, beginning on the first day of January, 1885, at a yearly rental of six hundred dollars, evidenced by five promissory notes, due respectively January 1, 1886, January 1, 1887, January 1, 1888, January 1, 1889, and January 1, 1890, and the claim for rent alleged to be due under this lease on the 10th day of October, 1889, when the distress warrant was issued, was \$1,446.23. The property levied on under the warrant consisted of horses, mules, cattle, hogs, wagons, cart, buggy and harness, farming implements, corn, fodder and cotton, gathered and ungathered, a steam saw-mill and machinery attached, a grist-mill, cotton gins and a cotton press, a lot of sawed lumber and a stock of merchandise consisting of dry goods, groceries, and medicines. All of the property levied upon was found on the leased premises except about thirty-three head of cattle, one wagon and one cart, and this part of the property was found on another place. Appellee was the head of a family residing in this state, and claims that he is entitled to hold one thousand dollars' worth of the property levied on exempt from sale under the distress proceedings, and this is the only question we need consider in determining the correctness of the court's ruling in refusing to dissolve the injunction.

Claims for rent under section 1, chapter 3181, Acts of 1879, are declared to be a lien on all agricultural products raised on the land rented superior to all other liens and claims though of older date, and also a lien on all other property of the lessee or his sub-lessee or assigns usually kept on the premises superior to any lien acquired subsequent to such property having been brought on the premises leased. The distress warrant may be levied on any property of the tenant liable for the rent whether it be found on or off the leased premises, and in whosoever possession found, but the lien of the warrant on property not mentioned in the first section of said act dates from the day upon which the levy is made. Chapter 3247, Acts of 1881, gave the landlord a lien on the crops grown on the rented land for rent for the current year, and also for advances made for the sustenance or well-being of the tenant or his family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market. This act gave a further lien on articles advanced and on property purchased with money advanced, which need not be considered in this case. We regard it as settled in this state that the constitutional exemption of personal property cannot be claimed as against the lien for rent on the agricultural products raised on the land rented. *Cathcart v. Turner*, 18 Fla. 337; *Blanchard v. Raines*, 20 Fla. 467. There are many decisions sustaining the view taken by this court in the cases mentioned. The land rented is regarded as such a factor in the production of the crops as to subordinate the title of the tenant thereto to the superior or paramount lien for the use

and occupation of the land. As expressed in *Cathcart v. Turner*: "As to such products there can be no claim of exemption, because the very title of the tenant to such products is subordinate to the lien." *Slaughter v. Winfrey*, 85 N. C. 159. The lien given by the Act of 1879, *supra*, is on the agricultural products raised on the land rented, and no reference is made to the crop of any year during the lease being bound only for the rent of that year. By this act the lien for rent is a charge as between landlord and tenant upon any of the agricultural products raised on the rented premises during the pendency of the lease. Whether the lien for rent on the other property of the tenant usually kept on the premises, and found either on or off the same, is superior to the claim of exemption from forced sale under the constitution, presents another question. In the absence of any right to the exemption provided for in the constitution, it is entirely clear that the Act of 1879 gives a lien on all the property other than agricultural products of the lessee or his sub-lessee or assigns usually kept on the premises superior to liens acquired subsequent to the carrying of such property on the premises leased. *Jones v. Fox*, 23 Fla. 454; *Fox v. Jones*, 26 Fla. 276.

It is contended by counsel for appellee that the right to claim the constitutional exemption as against a demand for rent has been decided by this court in the case of *Cathcart v. Turner*. A careful examination of that case will show that it cannot be regarded as a direct adjudication of the point. It is true that in that case the distress warrant was levied upon agricultural products, and also on some "household goods," and as to the household goods the opinion says that the claimant, "if he is entitled to claim the benefit of any exemption of property 'from forced sale on any process of law' he can lawfully claim them as exempt from distraint for rent or any other process of law under the terms of section 1, article 9, of the Constitution, to the value, if not more, of one thousand dollars." The statement of the case shows that Cathcart, the landlord, had a special contract for rent by which all the crops grown on the place were to be appropriated to the payment of the rent and for supplies furnished, and that none of the crops were to be sold by the tenant until the rents and supplies were paid for. This contract is referred to in one place in the opinion as being a paper mortgaging the crops to pay the rent. As we understand the facts of that case the landlord had taken a specific lien by contract on the agricultural products alone to secure his rent and supplies, and that he was insisting on that lien in his bill to enjoin the sheriff and the tenant from allowing a claim of exemptions. The further statement in reference to the household goods, that the sheriff should not be enjoined from allowing the debtor entitled to the exemption to select personal property within the constitutional limit as to value upon which the lien did not exist, indicates that such goods in the case then before the court were regarded as not being subject to the lien relied upon in the bill. Counsel for appellant insist that

the case of *Blanchard v. Raines*, *supra*, is an authority against the right of the tenant to claim an exemption as against a demand for rent. We do not understand that the claim of exemption was presented in that case. An affidavit based upon a claim for rent and supplies furnished was made and the warrant issued thereon levied upon agricultural products and horses, and the question presented to the court arose on a motion to quash the distress warrant on the grounds that the affidavit was not sufficient, and that the writ was void because it was not made returnable on a rule day, and no service of it on any one was required. The principal point considered in the case is whether the procedure provided by the statute for the collection of rent by warrant of distress was in conflict with the constitutional provisions securing the right of trial by jury, and providing that no person shall be deprived of his property without due process of law. The common-law proceeding by warrant of distress is referred to and it is said that "our statute adopts the common-law right of distress for rent, but requires the landlord to make oath to the amount due. It has further provided that the landlord shall have a like lien upon crops for the price or value of supplies and advances made by him, or under his order, to the tenant, to enable him to make and harvest his crops. The contract of leasing is made under these conditions imposed by the statute, and of course the statute enters into and forms part of the contract, regulating and limiting the rights and duties of each party. This statute, as before remarked, makes the rent and advances a specific lien upon the property mentioned, and thereby the landlord has a right of property in the crops, etc., which he is by the act authorized to foreclose by seizure and sale in the manner prescribed." The court was speaking, it must be remembered, with reference to the necessity of notice and a trial by jury before the seizure of property under a distress warrant, and not as to the right of a tenant who was entitled to the benefit of exemptions to shield a part of his property other than agricultural products to the value of \$1,000 from sale under such proceedings. The contract of lease in the case before us arose under the Constitution of 1868, and the homestead article in that instrument provided that certain real estate together with \$1,000 worth of personal property "shall be exempted from forced sale under any process of law." It is clear, we think, that the statutory remedy for the enforcement of a claim for rent is embraced within the terms "any process of law." At common law the landlord could himself distrain for rent or employ a bailiff or servant to do so for him, but under our statute he must make an affidavit setting forth his right to distrain and the amount due, and procure the issuance of a warrant to be levied by designated officers. Clearly the proceeding authorized under the distress warrant is a process of law. *Smoot v. Strauss*, 21 Fla. 611. By entering into a lease of land we can readily see how it is that a tenant voluntarily subjects himself to the remedies provided by law for the collection of rent due by the terms

of the leases to the extent that his property is liable to be taken in satisfaction of such claim. To this extent the decision in *Blanchard v. Raines* went, but we do not understand that it was there decided that by entering into a mere rental contract the tenant waived his right of exemption under the constitution. It is conceded of course that the party entitled to such exemption can waive it, and it is contended here that by entering into a lease of appellant's land appellee has consented to the sale of his property to satisfy the lien given by statute for the rent, and cannot claim any exemption as against such claim. While the lease in this case contains conditions to be performed by both lessor and lessee, there is no stipulation in it for a lien on any property to secure the rent agreed to be paid. It was decided in *Patterson v. Taylor*, 15 Fla. 336, that the exemption from forced sale under the constitution was expressly waived by voluntarily executing a mortgage on specific property, and the mortgagor was estopped from asserting his exemption as to such property in the face of such a contract. A waiver of any benefit of the exemption laws, or an agreement that all the debtor's property shall be subject to levy and sale, contained in a promissory note, was held, in *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618, to be inoperative as against the policy of the exemption laws. It is said in this case that "the object of exemption laws is to protect people of limited means and their families in the enjoyment of such property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill-advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasions of others." It was decided in *Baker v. State*, 17 Fla. 406, that the real estate exemption of a party who had enjoyed the same accrued to his heirs notwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should

constitute his homestead. It cannot be said that the property of the tenant carried on the leased premises or left off is the immediate product of the soil leased, nor does the tenant acquire the title to such property as a result of the tenancy and in subordination to the lien of the statute. If the legislature can declare a lien in favor of the landlord for his rent on all the property of his tenant other than agricultural products, and it follows that by entering into the rental contract alone the tenant thereby pledges his property to pay such claim and waives his constitutional right of exemption therein, then it seems to us that the legislature can by providing similar liens to secure the payment of other debts avoid and annul not only the policy but the plain provisions of the constitution on the subject of exemptions. Food and raiment are as essential to life as a habitation and shelter, and we might find insurmountable difficulty in discriminating against the lien for one class of demands and in favor of the other. The claim for rent was highly favored at the common law, but we are unable to discover any purpose in the constitution to except this demand from those against which the exemptions provided for may be claimed. The constitution exempts to the person entitled thereto \$1,000 worth of personal property from forced sale under any process of law, and the legislature cannot indirectly deprive him of such right any more than it can directly do it.

The appellee on the showing made was entitled to his personal property exemption to the limit of \$1,000 worth in the personal property other than agricultural products levied upon by the sheriff, and the court did not err in refusing to dissolve the injunction restraining the sale until the further order of the court adjudicating such exemption right. This is the only question arising on the appeal involving the correctness of the order refusing to dissolve the injunction, and the decree of the court below must be affirmed.

Ordered accordingly.

CONNECTICUT SUPREME COURT OF ERRORS.

John FAWCETT

v.

SUPREME SITTING OF THE ORDER OF IRON HALL.

(.....Conn.....)

1. A court will not turn over to a receiver and assignee of a foreign corporation, who is appointed in another state, a fund which is in the hands of a local receiver, unless satisfied that no injustice would thus be done to citizens in that state.

2. The facts that the seal of a benefit society contains the words "\$1,000 in

seven years" and the by-laws are so worded as to lead persons to expect not to exceed two assessments per month, which return from such assessments is impossible of accomplishment, thereby furnishing designing men an easy means for entrapping the unwary, do not establish fraud as a matter of law, so as to give the association no right to assessments collected.

3. The Order of Iron Hall was a secret and fraternal society, within the Connecticut statute excepting such societies from the law requiring the authority of the insurance commissioner to entitle a foreign corporation to do insurance business within the state.

NOTE.—Some of the conclusions reached in the above case seem to be at variance with those reached by the Massachusetts court when the rights of the Indiana receiver came before it (*Buswell v. Supreme Sitting Order of Iron Hall (Mass.)* 23 L. R. A. 846), although in that case the question was 24 L. R. A.

raised in a more preliminary form it being a petition for intervention on the part of the receiver, and the court may not be willing to actually send the funds to Indiana when the time for such action is reached.

4. Funds in the hands of a Connecticut receiver received from trustees of local branches of the Order of Iron Hall in that state and made up of the reserved funds which were in the hands of the trustees of such local branches which had been created by retaining, under the laws of the order, 20 per cent of assessments collected, are subject to an equitable lien on the insolvency of the corporation for repayment of certificate holders in that state, if they elect to treat the contract as rescinded and will be retained for distribution among them instead of paying them over to a receiver and assignee appointed in Indiana, where the corporation was created and is being wound up,—especially where he claims the money for distribution among the creditors of the corporation generally, without any distinction in favor of certificate holders.

(March 6, 1894.)

RESERVATION by the Superior Court of the Supreme Court of Errors as to the distribution of funds belonging to local branches of the Order of Iron Hall, for which Edwin L. Scofield had been appointed receiver for the collection of funds in the state of Connecticut, and for which applications were made by the Indiana receiver, James F. Failey, and by such local branches. *Judgment in favor of the local branches advised.*

The facts sufficiently appear in the opinions. *Messrs. Lucius P. Deming and James Bishop*, for Branches 894 and 1175:

As the property is all located in this state the appointment of the receiver in Indiana has no effect on the money here, and cannot pass title because the courts of Indiana have no extraterritorial authority.

Paine v. Lester, 44 Conn. 196, 26 Am. Rep. 442; *Pond v. Cooke*, 45 Conn. 183, 29 Am. Rep. 668; *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 822, 48 Am. Rep. 557; *Booth v. Clark*, 58 U. S. 17 How. 322-340, 15 L. ed. 184-171; *Hunt v. Columbian Ins. Co.* 55 Me. 297, 92 Am. Dec. 592; *Atkins v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 172; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616.

There are three funds and they are separate and distinct:

1. The general fund, raised by taxation and the sale of paraphernalia, supplies, etc., which is used for the payment of expenses.

Articles of Association, Fifth, p. 5; Constitution & Laws, art. 8, § 1, p. 26.

2. The benefit fund which is created by 80 per cent of each assessment and is governed by Law I., p. 29, which law lays down the manner in which it shall be collected and disposed of.

3. The reserve fund.

The reserve fund is a separate and distinct fund governed by a separate law and is under the control and supervision of the branch which creates it.

Constitution, etc., pages 35, 36, 37.

This reserve fund could not be touched by the supreme sitting until after the expiration of six years and six months. Up to that time it could not be used or called for by it for any purpose whatsoever.

At the end of that period, to wit, six years
34 L. R. A.

and six months, one seventh could be called for and used in the payment of benefits. No more could be called for until the next year, and no branch could be compelled to draw from its reserve fund or pay any more until the expiration of seven years and six months, and yearly thereafter the supreme sitting could call for one seventh for the purpose of paying benefits, and for that purpose only.

This is the contract between the branches, or the members composing each branch, and the supreme sitting.

Torrey v. Baker, 1 Allen, 120; *Borgmeyer v. Supreme Lodge Knights & Ladies of Honor*, 23 Mo. App. 142; *Hallenberg v. District No. 1 Independent Order of B'nai B'rith*, 94 N. Y. 580; *Illinois Masons' Benev. Soc. v. Baldwin*, 86 Ill. 482; *Yoe v. Howard Masonic Mut. Benev. Assn. of Baltimore*, 68 Md. 86.

The supreme sitting is now in such a condition that it is impracticable and impossible for the defendants "(i. e. the supreme sitting) to lawfully proceed with or to continue its business."

So that it is impossible and impracticable for the supreme sitting to lawfully collect this money and use it for the payment of benefits.

By the contract made with the branches it was agreed that this money should not be used for any other purpose save the purpose which the supreme sitting and the receiver cannot carry out and fulfill.

The receiver is attempting to force a contract which was never made and claims that the money belongs to the supreme sitting which is a claim never made by that body itself.

Courts will see that a trust fund is appropriated to the object designed and will not suffer it to be diverted unless with the consent of the contributors.

Bacon, Ben. Soc. § 89; Duke v. Fuller, 9 N. H. 586, 32 Am. Dec. 392.

Funds contributed by members of a voluntary society for a specific purpose must be paid back to the contributors in proportion to their contributions when not needed for the object.

Niblack, Mut. Ben. Soc. § 150; Koehler v. Brown, 2 Daly, 78.

This court should do what the courts of other states, notably Massachusetts, New Hampshire, and New York have done, where this question has been tried, order the money back into the hands of the people who paid it and let them dispose of it as they see fit.

Lindquist v. Glines, 8 Misc. 314.

Mr. Henry G. Newton, for Durham Branch:

Section 2983 of the General Statutes, as amended by chapter 96 of Public Acts 1889, provides that "it shall not be lawful for any corporation or association organized under other authority than the laws of this state for the purpose of furnishing health or accident insurance or indemnity, upon the assessment plan, to do any business in this state unless authorized by the insurance commissioner."

Said corporation has never been authorized to do insurance business in the state of Connecticut.

Clearly it cannot maintain an action in this state and cannot recover this money.

It is more equitable that this money should

be left in the hands of those who have paid it. For every dollar which has been paid into this reserve fund four dollars have already been sent to Indiana for the benefit of the older Indiana branches. Has not Indiana had enough from Connecticut by means of this new order which her citizens have the credit of originating?

If the Connecticut members retain this fifth part of what they have paid in, the Indiana members will still reap a bountiful harvest.

Lindquist v. Glines, 8 Misc. 214.

No holder of a certificate in an insurance company should by law or custom lose his right to share in the assets because of the failure to pay any premium coming due after the insolvency; neither should one of these branches.

Es Equitable Reserve Fund Life Assn. of New York, 181 N. Y. 354.

The courts of this state will not send its citizens to a foreign state for a remedy which can be had equally well here.

Stanton v. Embry, 46 Conn. 595; *Redmond v. Hoge*, 3 Hub. 171.

If a citizen of this state should attach the fund which belonged to the insolvent corporation in the hands of debtors in this state, the right of the attaching creditor would be preferred to that of the receiver.

Upton v. Hubbard, 28 Conn. 374, 78 Am. Dec. 670; *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442; *Egbert v. Baker*, 58 Conn. 819; *Crouse v. Phoenix Ins. Co.* 56 Conn. 177.

Under these circumstances the court owes a legal duty to the plaintiff which is far more imperative than the demands of mere hospitality to a stranger.

Paine v. Lester, 44 Conn. 204, 26 Am. Rep. 442.

Mr. William F. Henney also for Connecticut local branches.

Mr. Henry C. Robinson, for James F. Failey, principal receiver:

Because of certain irregularities in the management of the affairs of the order the members of the fraternity at headquarters thought the funds would be more likely to get to their owners if the supreme justice and supreme cashier and other supreme officers could be relieved of their care and the same could be put into honest hands under the control of the court. And so citizens of Indianapolis, members of the corporation, brought their petition to the Marion county court in Indiana asking for a receiver. The prayer was granted and Mr. Failey, a gentleman of character and responsibility, was appointed and was duly qualified with an immense bond. The rascally managers fought the application again and again, but the court stood by the fraternity.

Supreme Sitting Order of Iron Hall v. Baker, 20 L. R. A. 210, 134 Ind. 293.

Mr. Failey was appointed in August, 1892. The officers were compelled by the court to assign everything to him for the certificate holders.

In our own state Mr. Fawcett, the plaintiff in this suit, on the petition now before the court, obtained the appointment of a receiver for the property in Connecticut belonging to the fraternity. Some of the property has been paid into court, and the principal receiver and the

several contributing branches have filed their claims under order of court, and the court asks the advice of the supreme court as to the proper disposition of the funds.

The claim made by the domiciliary receiver is sound by every principle of law and equity.

The limitation upon the supreme sitting as to calls for the reserve fund is not a limitation in favor of a branch, nor does the feature contain any suggestion that the branch owns the fund.

It is a limitation by the brotherhood upon its own property for its own reasons of prudence and attractiveness.

For safety's sake, and especially to make the order popular, local loans were encouraged and the supervision of these loans, which had to be given to some local residents, was naturally given to the branches, who were required by the order to protect the order against loss by taking bonds.

In this the branches, as branches, were merely the agents of the order.

Schunck v. Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 369; *Erdmann v. Mutual Ins. Co. of Order of Herman's Sons of Wisconsin*, Id. 376; *Lyons v. Supreme Assembly of Royal Soc. Good Fellows*, 153 Mass. 83.

All the title which the association had in the reserve fund has been vested in the principal receiver by decree of the home court and by the forced assignment made by its officers.

He is the successor of the corporation itself which owned it.

He is the successor of the parties who created the fund.

The principal receiver alone represents the general purpose of the fund.

The principal receiver is especially vested by the decree of the domiciliary court with all the funds held by the branches.

To order these funds to be distributed upon state or any other geographical lines would make hotch-pot of the property.

There can be no claim that the members here are local creditors.

But if they are creditors they are only creditors in common with the whole fraternity.

The corporation is an Indiana corporation, and may travel into all the states carrying its charter with it, subject to such restrictions as sister states choose to impose, and these funds vest in Mr. Failey under that charter.

The rights of receiver Failey are paramount, and the court will assist to enforce them.

Under the principle of comity, the courts of one jurisdiction can recognize the authority and permit the exercise of functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy will be displaced or the rights of its own citizens invaded or impaired. This is especially true where such receiver is, by the terms of his appointment to gather the assets wherever found.

Hurd v. Elizabeth, 41 N. J. L. 4; *Boutwell v. Davis*, 9 L. R. A. 601, 90 Ala. 207; *Sercomb v. Catlin*, 128 Ill. 563; *Merchants Nat. Bank of Louisville v. McLeod*, 88 Ohio St. 184.

It is altogether unnecessary that the property should be within the jurisdiction of the court making the original appointment.

Merchants Nat. Bank of Louisville v. Mo-

Leod, supra; Houlditch v. Donegal, 8 Bligh, N. S. 343; *Beach, Receivers*, §§ 17, 19; *High, Receivers*, § 47 *et seq.*

Where the corporation is chartered by a single state and does business through agencies and through branches organized by itself in other states, if it becomes insolvent its assets should be gathered at the domicil and there distributed according to the principles of equity.

Relf v. Rundle, 103 U. S. 222, 26 L. ed. 387; *Rundel v. Life Asso. of America*, 10 Fed. Rep. 720; *Davis v. Life Asso. of America*, 11 Fed. Rep. 781; *Taylor v. Life Asso. of America*, 18 Fed. Rep. 498; *Bockover v. Life Asso. of America*, 77 Va. 85; *High, Receivers*, § 50; *Prate v. Phipps*, 49 U. S. 14 How. 874, 14 L. ed. 461; *Parsons v. Charter Oak L. Ins. Co.* 81 Fed. Rep. 805; *Fry v. Charter Oak L. Ins. Co.* 81 Fed. Rep. 197; *Re Equitable Reserve Fund Life Asso. of New York*, 131 N. Y. 354; *Jepson v. International Fraternal Alliance*, 17 R. I. 471; *Burdon v. Massachusetts Safety Fund Asso.* 1 L. R. A. 146, 147 Mass. 860; *Fogg v. Supreme Lodge United Order of Golden Lion*, 159 Mass. 9.

See also, as showing the supremacy of the central organization—

Chamberlain v. Lincoln, 129 Mass. 70; *Karcher v. Supreme Lodge K. of H.* 137 Mass. 868; *Oliver v. Hopkins*, 144 Mass. 175.

The constitution of the order must be accepted as the fundamental, organic and controlling law.

Supreme Lodge K. of P. of the World v. Kalski, 57 Fed. Rep. 348; *Stamm v. North-Western Mut. Ben. Asso.* 65 Mich. 317.

So sacred are the rights of individual members in these benevolent associations, that the courts hold that one cannot be dissolved in the absence of organic provisions excepting by the unanimous consent of the members.

Altman v. Benz, 27 N. J. Eq. 831; *State Council Order of United American Mechanics v. Sharp*, 38 N. J. Eq. 24; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; *Gowland v. De Faria*, 17 Ves. Jr. 20.

Baldwin, J., delivered the opinion of the court:

The Supreme Sitting of the Order of the Iron Hall was duly incorporated, under the General Laws of the state of Indiana, in 1881. Its corporate purposes were defined, in the third of its articles of association, as being "to unite in bonds of union, protection, and forbearance all acceptable white persons of good character, steady habits, sound bodily health, and reputable calling, who believe in a supreme intelligent being, the creator and preserver of the universe; to improve the condition of its membership, morally, socially, and materially, by instructive lessons, judicious counsel, and timely aid, by encouragement in business, and by assistance to obtain employment when in need; to establish a benefit fund, from which members of the said order who have complied with all its rules and regulations, or the heirs of such member, may receive a benefit in a sum not exceeding one thousand dollars (\$1,000), which shall be paid in such sums and at such times as may be provided by the laws governing such payment, or in the certificate of

membership, and when all the conditions regulating such payment have been complied with." Its "proper officers" were to have "power at any time when a liability on account of the sickness, disability, or maturity of certificate of a member entitled to a benefit under number three of these articles occurs, to make the proper and specified assessment, under the prescribed regulation, to meet such liability."

By article 2, section 8, of the "constitution" of the order, duly adopted pursuant to its articles of association, one of its objects was particularly declared to be "to establish a benefit fund, from which those who have held membership in the order for thirty days or more may, should they so desire, on proper application, and complying with all the rules and regulations governing said benefit fund, become participants therein, and may receive the benefit of a sum not exceeding twenty-five dollars per week, nor more than one half of the sum total held by each member, when, by reason of disease or accident, they become disabled from following their usual occupation, or an amount of not more than one thousand dollars when they have held a continuous membership in the order for seven years: provided, however, that the sum total drawn from this order by any of its members shall never exceed, both in sick, disability, and other benefits, the sum named in the certificate of membership."

Among the "Laws of the Supreme Sitting," made pursuant to its constitution, were the following:

"Law I. Benefit Fund.

"Section 1. There shall be attached to this order a benefit fund, in which members may participate (except social members), as they may severally elect, either in the sum of one thousand dollars, eight hundred dollars, six hundred dollars, four hundred dollars, or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table. The members of the sisterhood branches (except social members) may participate in the benefit fund, as they may severally elect, either in the sum of six hundred dollars, four hundred dollars, or two hundred dollars, on which they shall pay the rates and be entitled to the benefits prescribed in the following table: provided, that all payments shall be made in accordance with the following sections, and in no other way or manner:

"Table of Rates and Benefits.

Amount Paid on Each Assessment.	Weekly Benefit when Sick or Disabled.	Amount Paid on Total Disability	Payable at Death.	Benefits Paid at End of Seven Years not to Exceed
\$2.50	\$25.00	\$500.00	\$500.00	\$1,000.00
2.00	20.00	400.00	400.00	800.00
1.50	15.00	300.00	300.00	600.00
1.00	10.00	200.00	200.00	400.00
.50	5.00	100.00	100.00	200.00

"Law II. Reserve Fund.

"Section 1. Twenty per cent of the amount received by each branch on each assessment

shall be set aside and retained as a reserve fund. At the expiration of the first term of six years and six months from the date of the organization of the order, one seventh of the reserve fund then on hand shall be called for by the supreme accountant, and used by the supreme cashier in the payment of benefits, and annually thereafter one seventh of the reserve fund on hand shall be called for, and used in like manner.

"Sec. 2. Each branch shall have supervision of the reserve fund, and when said reserve fund shall amount to fifty dollars, the trustees, in conjunction with the cashier of the local branch, shall invest the same in registered United States government bonds, county and city bonds, in first-class mortgages on real estate, or it shall be deposited at interest in some reputable savings bank; provided, that no loan shall be made for a longer period than six years from the end of the term to which said reserve fund belongs, interest to be computed, or paid, semi-annually. Should a loan be made on real estate, it shall be on first mortgage, and not exceed one half of the taxed value of said real estate. No local branch of the order shall loan any portion of its reserve fund on chattel mortgages, and any local branch that shall allow its officers to loan any of the reserve fund or its accumulations contrary to law shall be declared suspended by the supreme justice, and shall not be reinstated until all funds are safely secured to the order as the law directs.

"Sec. 3. Each branch may remit its reserve fund to the supreme cashier for investment by the supreme trustees to the credit of said branch, charging him with the amount of such reserve fund so remitted for investment, and the supreme cashier shall receipt for the same on an official blank for that purpose. The supreme trustees are hereby empowered to invest said funds in accordance with section 2 of this law."

"Law I.

"Sec. 2. When the amount received for one assessment, less the reserve fund, as provided for in Law II., section 1, shall equal an amount less than one thousand dollars, the sum to be paid shall in no case exceed the amount of one assessment, less the reserve. In such case, if the member's certificate be in the amount of one thousand dollars, he shall receive not more than the whole amount of said assessment; if in the amount of eight hundred dollars, not more than four fifths of said assessment; if in the amount of six hundred dollars, not more than three fifths of said assessment; if in the amount of four hundred dollars, not more than two fifths of said assessment; and if in the amount of two hundred dollars, not more than one fifth of said assessment; and said amounts shall be all that can be claimed by any one."

"Sec. 4. Each member of the benefit fund, on becoming liable, shall pay to the accountant the amount prescribed in the foregoing table on account of the benefit fund, and the same amount on each assessment thereafter while he remains a member of this order. The accountant shall keep the date

when such payment is made, and credit the member with the same in the books provided for that purpose.

"Sec. 5. The sum as prescribed in the member's certificate shall be paid to the member, his widow, or the legal heirs of said member, in case of sickness, disability, or maturity, and such payment shall be made as hereafter prescribed, and according to the conditions set forth in said certificate.

"Sec. 6. On the sickness or disability of a member, or the maturity of a certificate, the accountant of the local branch shall immediately notify the supreme accountant, upon the official blanks provided for that purpose by the supreme sitting, giving full particulars and the date of the last assessment paid by said member."

"Sec. 11. On receipt of duly approved claims for sickness or disability or maturity of certificate of a member, the supreme accountant shall draw an order on the supreme cashier in favor of the proper person or persons for the amount due, signed by the supreme justice, and forward the same to the accountant of the local branch of which the beneficiary is a member: provided, that, in case of continuous sickness or disability, a member shall be entitled to present a claim for benefits at intervals of four weeks or less, and shall be entitled, when approved, to a payment on account of said claim, for which the members shall give to the supreme sitting a receipt in full of said payment, and in all cases it shall be charged upon the benefit fund ledgers of the supreme accountant and supreme cashier.

"Sec. 12. Upon receipt of the order for the payment of a sickness or disability benefit, or a matured certificate, the accountant shall immediately turn the same over to the person or persons in whose favor it is drawn; before delivering the order, he shall obtain a receipt in full of said payment on the certificate, and instruct the members to forward the warrant to the supreme cashier for payment: provided, that in cases of the maturity of certificate, when the payment cancels the certificate, the certificate, duly canceled and attested by the officers of this local branch, must accompany the warrant for collection."

"Sec. 14. After paying any of the above benefits, if the supreme treasurer requires, an assessment shall be made; the supreme accountant shall make a call on each local branch for the money of each member belonging to the benefit fund. Such call shall be in accordance with a form prescribed by the supreme sitting, and shall include a list of all claims received for adjustment subsequent to the last assessment.

"Sec. 15. Whenever an assessment is called for, the accountant shall certify to the cashier the amounts due the supreme treasurer, on account of the benefit fund, by the terms of the call of the supreme accountant. The cashier of the local branch shall thereupon immediately forward to the supreme cashier the amount so certified by the accountant, and at once notify the accountant of this branch, in writing, of the amount so forwarded. A branch failing to comply with this section within thirty days shall stand suspended

from that date until all arrearages are paid. And should a branch fail to pay all arrearages within thirty days from the date of suspension, they shall be declared defunct, and the reserve fund, charter, and all other property shall be at once demanded by the supreme accountant, in accordance with laws governing the same.

"Sec. 16. When an assessment is made, it shall be the duty of the accountant to at once notify every member liable to the said assessment that the same has been issued. Assessment notices shall bear the seal of the branch, and shall be upon the blanks furnished by the supreme sitting, and its date shall be the same as that of the notice received from the supreme accountant. Each member who fails to pay the assessment called for, to the accountant, within thirty days from the date of the notice, shall stand suspended, without further notice. Any branch failing to enforce the law against any member who becomes delinquent on assessments shall pay out of its general fund all assessments and fines which become due from such member, and which are not paid by them, so long as they are permitted to remain in good standing."

"Law V.

"Sec. 8. Any branch failing to comply with the constitution and laws of this order, after becoming suspended, shall become liable to the supreme sitting for all that appears in its benefit, reserve, and general fund accounts, as kept by the supreme accountant, and more, if so shown by the accounts of the branch; and does hereby agree, should suit be instituted against such branch, upon proper proof of the correctness of the account, to confess judgment for the same, and all costs incurred by the supreme sitting in making such collections, and that each officer and member thereof agrees thereto to become immediately responsible to the supreme sitting for the whole amount of such judgment."

Each local branch annually elected, among other officers, an accountant, cashier, and three trustees; and the "constitution governing local branches" contained the following provision:

"Article V.

Sec. 10. The trustees shall have the general supervision of all the property of this branch. They shall, in conjunction with the cashier, invest in such securities as they know to be safe such sums as this branch orders drawn from the treasury for that purpose. They shall have the custody of all securities of this branch for money loaned or invested, except, should the branch become suspended, they then go into the hands of the supreme trustees. They shall collect or realize all such sums when so directed by this branch. They shall collect all the interests, rents, or other money arising from said investments belonging to this branch, and pay the money collected by them to the accountant. They shall, on the 30th day of June and the 31st day of December of each year, report their transactions to this branch, and make an inventory of all property. Before

entering upon the duties of their office, they shall each give bond, with approved security, for such sum as this branch may require for the faithful performance of their duties: provided, the sum shall not be less than five hundred dollars each, which bond shall be approved by the branch and deposited with the supreme justice."

Every member electing to participate in the benefit fund received, on the application of his branch, a certificate from the supreme accountant, in a form, duly prescribed by the supreme sitting, reading as follows:

"No. _____ \$1,000.00.
"Supreme Sitting of the Order of the Iron Hall.

"Membership Certificate.

"This certificate is issued to _____, a member of Local Branch No. _____, Order of the Iron Hall, located at _____, state of _____, upon evidence received from said local branch that _____ was duly initiated on the _____ day of _____, 189____, and upon the conditions that the statements made by him in his application for membership in said local branch and the statement, certified to by him, by the medical examiner, both of which are filed in the supreme accountant's office, be and are hereby made a part of this contract, and upon conditions that the said member complies with all the laws, rules, and regulations now governing said local branch and its funds; and that said member further agrees to comply with all future laws that may be hereafter enacted by the supreme sitting to govern said branch and funds. These conditions being fully complied with, the Supreme Sitting, Order of the Iron Hall, hereby promises and binds itself to pay out of its relief and reserve funds a sum not exceeding one thousand dollars, in accordance with, and under the provisions of the laws, of the order governing such funds and their payments, upon satisfactory evidence of the sickness, disability, or death of said member, or upon its termination, upon the proper receipt of partial payments made thereon, and upon the surrendering of the certificate at its legal termination: provided, that said member is in good standing in this order, and provided, also, that this certificate shall not have been surrendered by said member to any other person or persons, except, in case of death, to his legal heirs, in accordance with the laws of this order. It is fully understood and agreed that the mailing of notices of assessments to the last-known residence or address of the member, ten days prior to the expiration of the time, named therein, within which the payment called for thereby should be made, or the personal delivery of such notices three days prior to said expiration of time, shall be a final and legal serving of the same, and, when so mailed or delivered, all responsibility of the order, or any branch or officer thereof, shall finally cease and determine. This certificate shall be in force from its date, when attested by the signatures of the chief justice and accountant, and an impression of the seal of the above-named branch, and accepted by the aforementioned

member, all in accordance with the form printed thereon. If not so attested and accepted, within three months from its date, it shall become, *ipso facto*, null and void, and of no effect whatever. In witness whereof, we have hereunto attached our signatures, and affixed the seal of the Supreme Sitting of the Order of the Iron Hall, this _____ day of _____, A. D. 189—.

"[Seal] E. J. Walker, F. D. Somerby,
"Supreme Accountant. Supreme Justice.

"I accept this certificate on the conditions named herein, to take effect on the _____ day of _____, 189—, on which date I became a beneficial member, in accordance with the laws of the order.

"Witnessed and delivered in our presence:

"_____, Chief Justice,

"_____, Accountant,

"Of Local Branch No. _____, O. I. H.
"_____, Signature of Member."

On the back of this paper was printed the following form of a receipt for the payment of the benefits stipulated, on a final settlement:

"Final Surrender.

"Received of _____, cashier of Local Branch No. _____, Order of the Iron Hall, benefit fund warrant No. _____, on the supreme cashier of said order, in the sum of _____ dollars, the same being in full of all claims against the Supreme Sitting of the Order of the Iron Hall, or against any branch or officer of said order, which exists under or on account of the within membership certificate, which is hereby surrendered. _____, Person Receiving Benefit.

"We hereby certify that the person who has signed the above receipt and surrender is the proper party to receive the benefit, and that _____ signature is genuine. _____, Chief Justice. _____, Accountant.

[Seal of Branch.]"

All the funds now in the hands of the Connecticut receiver were collected by him from local branches of the order in this state, or from trustees appointed by them, and belonged to the "reserve funds" held for the benefit of members of the order who had elected to take benefit certificates. It is plain that the contract set forth in these certificates is one between the holder and the Supreme Sitting of the Order of the Iron Hall, and that the promise of the latter for the ultimate payment of the stipulated benefit is not made dependent on the sufficiency of the reserve fund of the particular local branch to which the holder belongs, nor secured by any pledge of such fund. If the entire reserve fund of any local branch should be lost, by unfortunate investments, whether made by the local trustees or the "supreme trustees" of the corporation, its obligation to meet the certificates held by members of such branch would be unaffected. Of the assessments payable from time to time under Law 1, section 1, 80 per cent went immediately into the treasury of the corporation, to reimburse it for payments already made on matured certificates, or to be used for the payment of certificates as they might mature, without any discrimination between the members of dif-

ferent branches. The remaining 20 per cent was to be retained and invested, subject to be drawn upon, in favor of the order, only to the extent of one seventh of its total amount annually, which was to be "used by the supreme cashier in the payment of benefits." Each local reserve fund was therefore a fund held in trust for the payment, through the general officers of the corporation, in its behalf, and out of its treasury, of benefits to certificate holders. In the hands of the receiver appointed by the superior court, it stands, of course, charged with the same trust. If the corporation were now in a condition to fulfill its obligations to certificate holders, by the aid of the several trust funds held by the local branches, and to discharge the trusts upon which it might receive them, according to the terms of the certificates and the rules of the order, it would be our duty to advise that the receiver in this state should remit all moneys in his hands to the proper officers of the order. But the corporation is insolvent, and unable to carry out the purposes of its organization, and has assigned all its right and title to these funds to James F. Failey, a citizen of Indiana, who had previously been appointed, by a court of that state, receiver of all its estate, wherever situated. Mr. Failey, as such receiver and assignee, has appeared as a defendant in this cause, and claims the funds.

Before the courts of Connecticut can sanction such a change of trustees, they must be satisfied that no injustice would thus be done to the citizens of their own state. The local branches and trustees, out of whose charge these funds have been taken by the order of the superior court, have appeared before us, and, in behalf of those whom they represent, unanimously object to any transfer to the Indiana receiver. By the decree of the court under which he, Failey, was appointed, made on August 28, 1893, he was ordered to collect all reserve funds in the hands of any local branches, whether within or without the state of Indiana, and all such branches were ordered to pay the same to him, and enjoined from any other disposition of them. He was also required to report to the court any instance of neglect to comply with the terms of such order, on the part of any person or branch, "when such further order will be made in such behalf as to the court shall in such case seem meet." All branches making such payments by October 10, 1893, were to be entitled to share in the distribution of the estate. On December 2, 1893, another decree was passed in the same suit, confirming that of August 28, as to the provisions above mentioned, except that the receiver was directed to inform the courts in other states, which had appointed receivers of the corporation, of the terms of both decrees, and request them, and the receivers by them appointed, to account to him, and to pay over to him all moneys in their hands, "to be by him taken and held, together with the funds on hand, as the property of said defendant, the Supreme Sitting of the Iron Hall, which moneys, together with all the other moneys coming to the hands of said receiver herein, shall be hereafter equitably distributed

among the creditors and certificate holders of the said defendant." All members of local branches thereafter properly accounting for and paying over to him, within a reasonable time, all money and property in their possession, or who had accounted, or might within a reasonable time account, in any other state, to any local receiver, who thereafter, within a reasonable time, should account for the same to Mr. Failey, as principal receiver, were declared entitled to share in the distribution of the funds in the latter's hands, when made, equally and ratably "with the creditors and certificate holders of the said defendant corporation." Any neglect or refusal of any courts or receivers to comply with the request of the Indiana receiver for a transfer to him of the funds in their custody, he was "directed with due speed to report," whereupon such order was to be made "as at such time may seem proper." These provisions of the decree were predicated on a finding that "attachment and receivership suits have been brought against the defendant, the Supreme Sitting of the Order of the Iron Hall, in very many states and jurisdictions throughout the United States, and that in such proceedings the courts have taken into possession and control the property of the said defendant, the Supreme Sitting of the Order of the Iron Hall, in such states and jurisdictions, and now hold the same under the orders of the various courts."

The following facts are also set forth in the same finding: At the commencement of the suit in Indiana, which was on July 29, 1892, there were over 1,000 local branches of the order in different parts of the United States and Canada, of whose members over 60,000 held benefit certificates. The order had received nearly \$6,000,000, net, from these certificate holders, and their certificates called for benefits which, at the maximum rate, would amount to about \$49,000,000. To meet these obligations the order had in its treasury, to the credit of the "benefit fund," about \$1,000,000, according to its books; of which, however, owing to fraud and mismanagement, less than a quarter of a million was available. It also had on hand nearly \$350,000 belonging to the "reserve fund," and the several local branches had under their control further sums belonging to the same fund, to the aggregate amount of \$1,360,000. The other funds of the order amounted to but about a quarter of a million dollars. The several local "reserve funds" held in Connecticut amounted to \$13,667.05, and the Connecticut certificate holders, who had paid it in, had therefore contributed to the "benefit fund" \$74,668.20, which had been remitted to the general treasury. They numbered 1,098. Four of the Connecticut branches had accounted to the Indiana receiver, and paid over to him, together, over \$3,000. Two of them, after his appointment, distributed the "reserve funds" in their hands among their members. All of them have ceased to hold regular meetings, and to carry out the purposes of their organization. On February 25, 1893, Mr. Failey filed in the superior court, in the present action, his

claim to all the funds in its custody, in which he states that they belong to him, as principal receiver, "for the benefit of all the creditors of the corporation, to be distributed according to the constitution and laws of the corporation, and that no particular branch, anywhere situated, has any claim to the reserve fund, but that the same and all reserve funds belong to the order." The local branches in Connecticut, from whom or whose trustees the Connecticut receiver has collected the funds in controversy, have a right to be amply protected by the court in obedience to whose decree they have made such payments; and this right extends equally to those by whom these funds were originally contributed,—the certificate holders, who became such as members of these branches. The first Indiana decree proposed to admit, to a share in the distribution of the funds coming into the hands of the Indiana receiver, those having property of the order in their possession who accounted to him by October 10, 1892. The decree of December 2, 1893, extended the limit to "a reasonable time" after notice from him of his claims. Such notice was given to the parties to this suit a year or more ago, by the pleadings on file. The Indiana decree does not appear to recognize, as a justification for delay in such accounting, the orders of courts in other states having jurisdiction of the parties in interest. It seems also to make no distinction, as to those entitled to share in the funds that may come into the hands of the Indiana receiver, between general creditors of the order and the holders of its benefit certificates.

In opposition to the claim of Mr. Failey, it has been urged in argument that he is before us in the position of a plaintiff, having no better rights than the order of which he was appointed receiver, and has since become the assignee; and founding his title to recover the funds in controversy upon a fraudulent compact, namely, the scheme under which the order was organized and conducted. The fraud is said to consist in the offer to certificate holders of more than the assessments to be made upon them could justify; and it is argued that, if they were parties to the wrong, they occupy in this cause the position of defendants, in possession of the fund, so far as equitable right is concerned, and may therefore invoke the protection of the rule, "*In pari delicto melior est conditio possidentis.*" But the certificates contain no promise to pay any particular sum, nor do the constitution or laws of the order impose any limit on the number of assessments that can be laid. The obligation of the corporation,—so far as appears from the face of the papers which express it,—would be satisfied by paying the holder of a matured certificate any sum, however small, and its right to enforce contribution from him is only limited by reference to the necessities of the treasury on account of previous payments on other certificates. There was no representation that the assessments or other funds of the order, except the 20 per cent reserve fund, were to be left to accumulate, to provide means for the ultimate payment of

what might become due on certificates. On the contrary, it was expressly stated that such assessments were to be used to reimburse the order for prior expenditures. The obligations of each year were to be discharged by the use of four fifths of the assessments of the year, and the remaining fifth, only, was to be kept for future recourse. In ordinary contracts of life insurance, where a fixed sum is promised, in consideration of fixed premiums, payable at stated intervals, the maintenance of an adequate and accumulating reinsurance reserve is an essential part of the plan; but what is known as "co-operative insurance" proceeds upon a different theory, and relies mainly upon the assessments and lapses of each year to meet the calls for maturing benefits.

It has also been argued that, if there be no fraud apparent in the constitution, rules, and laws of the defendant order, yet its whole dealings in this state have been of so fraudulent a character as to deprive its assignee and receiver of any right to claim the fund in controversy by an appeal to the doctrine of comity. The superior court has found that the order was duly incorporated under the laws of Indiana; and it has not found any facts showing as matter of law the existence of fraud in its contracts or management in this state. It is evident that the rules and laws of the corporation are such as to furnish an easy means for designing men, if placed in official positions, to entrap the unwary by false and alluring representations as to the large returns to be derived from small contributions. The seal of the order displayed on the benefit certificates, and on the pamphlet containing the constitution, rules, and laws, bears upon its face the device of a safe, with the figures "\$1,000" at its top, and beneath it the words "in seven years." One of the rules, which provides that, if two assessments are laid in any month, the first shall be laid on the first day of the month, and the second on the fifteenth, might easily give a casual reader the impression that in no month could more than two assessments be laid, whereas treble that number could hardly suffice to provide for the maximum benefits. But while these are all circumstances entitled to great consideration, upon any inquiry into the truth of charges of fraud against the officers of the order, they do not establish its existence as a conclusion of law. Fraud is never presumed. The place to prove it, in a case like this, is in the superior court, and the record of the proceedings in that court fails to show that the charge now made was there maintained. Nor do we think the standing of the corporation or its receiver before us is affected by Gen. Stat., § 2992, by reason of the fact that it has done business in this state without authority from the insurance commissioner, though it may have been incorporated in another state for the purpose, among other things, of furnishing insurance on the assessment plan. Every "secret or fraternal society" is excepted from the operation of that statute by Id. § 2903, and the defendant corporation appears to us to be one answering both these descriptions. "Secret work," by article 11

of the constitution, is one of the functions of the supreme sitting," and the branches are to meet with a "watchman" at the outer and "vidette" at the inner door. But while, restricted as we are to the consideration of questions of law, we cannot say that there was fraud in the original purposes of the defendant corporation, or in its dealings in this state, nor that there was any statutory impediment to its doing business here, the comity which permitted it to come here to organize its local branches, and contract with their members, does not require us, in determining the consequences of such contracts, in view of its present position, to overlook the claims of citizens of Connecticut to the protection of its courts. The controversy before us is as to the possession of a trust fund in the hands of the court. The trusts upon which it is held will be the same, whoever may be the trustee. It is made up of several smaller funds, each of which was under the control and management of local trustees in this state, until the court required them to surrender it to its receiver. He now, as regards the claim of Mr. Failey, represents their rights, as well as those of the *cestui que trustent*. These local trustees were properly constituted, and no act of maladministration is alleged against them. If their possession could not be disturbed by the Indiana receiver, neither can his be. *Cooke v. Warner*, 56 Conn. 284, 289. The contract between the certificate holder and the corporation was, by its express terms, made subject to the rules and laws of the order. For its due performance, on the part of either party, it was necessary that the corporation should maintain its connection with the local branch to which the holder belonged, and continue in active existence as a "going concern." Payments upon the certificate were to be made out of a "benefit fund," raised by assessments levied by the corporation on the several local branches, on account of those of their members who held certificates. The local branch was required to forward 80 per cent of the total amount called for, "immediately," to the "supreme treasury" of the corporation, and to notify each certificate member of the call, whereupon he was obliged to pay the amount of his assessment to the branch within thirty days from the date of the original call. Twenty per cent of this was to be left with trustees appointed by the branch, and under bonds to its "chief justice" and "vice justice." The bonds were all payable to these officers, "in trust for said branch," should the trustee fail to account for the funds, at the end of his term, to his "successor in office, or to whoever may be legally appointed to receive the same." Assessments were to be levied only when previous payments by the corporation out of the benefit fund had so reduced it that it required to be replenished. The amount to be paid on each matured certificate was also to be determined, within a certain maximum limit, by the managers of the corporation; and as it was to be liquidated by means of an order on the "supreme cashier," drawn by the "supreme accountant," and signed by the "supreme justice," it would seem that

the corporation intended to reserve some discretionary power to regulate the sum by the state of the treasury.

It is obvious, as we have already said, that the corporation looked to calls upon certificate holders in each year for the means to pay the benefits accruing during the year, and to maintain the "reserve fund," which, with the aid of lapses, it was hoped would avoid the necessity of any burdensome multiplication of assessments. In 1892, upon the insolvency of the corporation and the appointment of receivers in different states, the receipts from assessments stopped, the branches generally ceased to meet, and the order became disorganized, and practically dissolved. The carcass remained, but the life was gone. The end was reached, so far as the rights of certificate holders are concerned, on July 29, 1892, the day when the suit was instituted in Indiana for the appointment of a receiver. In view of the condition of the corporation at the time, and the probability of such an appointment, no certificate holder could have been expected to make any future payment to it for assessments. The performance, on its part, of the contract of the order with the certificate holders, having by its fault become impossible, each of these had the right to elect whether to treat the contract as rescinded, and demand a return of what he had paid on it, or to treat it as in force, and claim the damages resulting to him from the corporation having put itself in a condition incompatible with the fulfillment of its engagements. 2 Saunders, Pl. & Ev. *674; *Lyon v. Annable*, 4 Conn. 350, 355. The Connecticut certificate holders, represented before us through the several trustees or branches who have appeared or pleaded in the cause, have unanimously elected the former course, and such election has been sufficiently and seasonably made known by the answers and claims which have been filed. Under these circumstances, we think equity will best be done, as between the parties before us, by retaining the funds in controversy in the hands of the receiver appointed by the superior court, for distribution among the certificate holders of the order, by whose contributions they were originally accumulated. *Re Equitable Reserve Fund Life Assn.* 181 N. Y. 854; *Lindquist v. Glines*, 8 Misc. 214; *Peltz v. Supreme Chamber Order of Financial Union* (N. J.) 19 Atl. Rep. 668; *Fogg v. Supreme Lodge United Order of Golden Lion*, 156 Mass. 431, 159 Mass. 9. For every dollar paid by them to the accountant of their local branches, 80 cents has been transmitted to the general treasury of the order, to reimburse it for benefits paid to other certificate holders, and 20 cents has been reserved to meet similar claims to mature thereafter. It is to the reserve funds, thus constituted, that contributors, electing to rescind the contract evidenced by their benefit certificates, have a right to look primarily for repayment of their advances. These funds were manifestly left, by the laws of the order, in the hands of the local branches for their better assurance. As against the demand of a foreign receiver and assignee, we

think the members of each branch, whose contributions created its reserve fund, have, under the conditions disclosed in the record of this cause, an equitable lien upon it, which the courts of their own state can best protect, especially where he claims it for distribution among the creditors of the corporation generally, without any distinction in favor of certificate holders. In quoting the constitution and laws of the defendant corporation, the edition of 1888 has been followed. We have not found it necessary to consider the effect of the changes of phraseology found in later editions, and which it is claimed were made without authority; since, while they might serve to strengthen the legal title of the corporation to the custody of the various reserve funds, they cannot vary the trusts upon which they were created and must be administered.

The superior court is advised to direct the distribution of the funds now in the hands of Edwin L. Scofield, receiver, after payment of necessary costs and charges, among the holders of benefit certificates issued by the Supreme Sitting of the Order of the Iron Hall, to them, as members of branches of the order organized in Connecticut, and outstanding and obligatory upon said corporation on July 29, 1892; payments to be made, out of the fund received from the trustees of each local branch, to the certificate holders of that branch, in proportion to the amounts paid by them respectively for assessments laid upon them as holders of such certificates, deducting from such dividends, in each case, such amount, if any, as the certificate holder may have previously received from said order by reason of his rights under his certificate; and to dismiss and disallow the claim of James F. Failey, receiver of said corporation by appointment of the superior court for Marion county, in the state of Indiana, to said funds, or any part thereof.

Andrews, Ch. J., and Torrance and Fenn, JJ., concurred.

Hamersley, J., filed the following opinion:

In the result announced by the majority of the court I concur, but not with the reasons given in support of that result. If the funds in question were accumulated by the defendant corporation in the transaction in this state of a business lawful under our laws, then such funds ought to be placed in the hands of Mr. Failey, the principal and domiciliary receiver appointed by the Indiana court, unless there are facts in the case which establish some clear ground of exception to the general rule. The rule that when a corporation is chartered by a single state, and does a lawful insurance business in other states through agencies, and becomes insolvent, its assets should be gathered at the domicile, and there distributed according to the principles of equity, is sound, and should be universally observed. It is based upon a recognized principle of international comity, and that principle, as applicable between our several states, rests on reasons far more cogent than the reasons which support the prin-

ciple as applicable between nations wholly independent. While it is true that for many purposes our states are independent, as really as if they were for all purposes separate sovereignties, and for this reason the rules of international comity may apply to questions arising between citizens of different states, yet it is also true that the citizens of all the states are fellow subjects of one common government, supreme within the sphere of its operation, and that the necessities growing out of such common government impose upon the several states obligations of the highest authority, inconsistent with that cautious and self-protecting administration of the law of comity that may be safely indulged in by states wholly foreign to each other. The full faith and credit positively given in each state to the judicial proceedings of every other state; the good faith and confidence impliedly required in dealing with such judicial proceedings; the commercial necessity of a distribution of assets of an insolvent corporation by one court, growing out of the guaranteed freedom and infinite variety of commercial intercourse; the impossibility, in many cases, of an equitable distribution, except by one court; the concurrent jurisdiction, and at times exclusive jurisdiction, of federal courts in such cases,—all suggest cogent reasons for a loyal observance of the rule stated, unless the particular facts present a plain and unquestioned exception to the rule. It will not, however, be necessary to inquire whether the particular facts in this case do, or do not, present such exception. Mr. Failey practically appears in this matter as a plaintiff; and, as the foundation of his claim and right to the assistance of this court, sets out in full the organization, constitution, and laws of the defendant corporation, and a record containing the findings, orders, and decrees of the Indiana court. The Durham branch, in its demurrer, says that upon the documents set out by Failey, in connection with the findings and orders of the Indiana court, it appears that the business transacted in this state was unlawful, and contrary to public policy; and also, in its claim, alleges as a fact that the defendant corporation was not organized and qualified to do business in this state.

The superior court has made a finding of facts, for the purpose of submitting to this court the whole record, with the facts set forth in the finding, and of obtaining the advice of this court upon all questions arising upon the pleadings and record, including the questions arising upon the demurrer and the overruling thereof, and the question of what judgment upon the facts found should be rendered. In the finding of facts, the court finds, in addition to the facts otherwise appearing on the record, that the Indiana court had made certain further findings of fact, conclusions of law, and orders, which should be added to the record set out and relied upon by Failey in his claim, and makes such findings of fact, conclusions of law, and orders a part of this record; and also finds that of the funds on hand \$—— were accumulated in 1889 and subsequently (it was stated in

argument, and not questioned, that this blank should be filled by a sum representing nearly the whole amount accumulated); and that the corporation has never been authorized to do insurance business in this state. Thus the main and determinative question we are called upon to decide is, upon the facts contained in the record and found by the court, should the superior court now hold that the business transacted in this state by the insolvent corporation was a business contrary to our public policy? This question requires that we should first come to an understanding of the meaning and legal effect of the remarkable mass of words called the constitution and laws of the order of the iron hall. They contain the articles of association, *i. e.* the charter of the corporation, the constitution adopted by the corporation, the constitution prescribed by the corporation for governing local branches, the general laws adopted by the corporation for its own government and the few special laws governing delegated meetings of local branches, called district meetings, to be from time to time called by officers of, and subject to the control of, the corporation; special laws governing the life division,—which do not appear to have been put into operation; and an official summary of the effect of the constitution and laws in a number of enumerated cases. The meaning of this literature cannot be understood without the most thorough analysis of the whole and every part, and it is too voluminous to be quoted in full; but I am satisfied that a careful examination of the documents establishes the following conclusion: (1) The defendant was incorporated in December, 1881, by filing articles of association, in pursuance of a general statute of Indiana authorizing the incorporation of three or more persons for the purpose of organizing "divisions or associations of temperance, or other charitable associations or orders." The members of the corporation so organized consist, for all practical purposes, of its principal officers. The stated meetings of the corporation are biennial or quadrennial, and the officers are rechosen at such meetings. Eight specified officers must receive salaries, and may receive other compensation. A body called the executive committee exercises all power of the corporation concerning business matters, fixes the salaries and compensation of all officers, and is composed of nine officers, of whom six are of those required to be salaried. (2) The corporation undertakes to accomplish two distinct, though related, objects: First, to organize and govern local branches of a secret social society; second, to establish and carry on an insurance business on the assessment plan, in which the insured must first have been admitted members of the secret society, and must continue in good standing as such members. (3) While the secret social society is under the absolute control of the corporation, the members of the society are not members of the corporation, and the corporation assumes no liability to furnish them the pecuniary aid usually provided by fraternal and mutual aid societies. The members of the society, as such, are called "social members." One of their priv-

illeges is the right to apply for insurance, i. e. to become "participant in the benefit fund," and, by the laws governing the secret society, such insured members have the exclusive right to vote and hold office, the privilege of paying dues being common to all the members. The constitution provides that any person who has held a membership in the society for thirty days or more may, if he so desire, become a participant in the benefit fund. To become such participant he must make application, undergo medical examination, sign the obligations relating to conditions of insurance, etc., in the same manner as in the transaction of any insurance business, and the corporation states in its official summary of its laws that before insurance the insured must become "an acceptable social member of the order, which is purely fraternal;" and that, after being a social member thirty days, "he may, if he so desire, make application to become a member of the benefit fund;" or, at his option he may remain a social member for life, and "as such social member he would enjoy all the fraternal and social privileges of the order." And, again, "social members shall pay the same dues as the members of the benefit fund, and cannot vote or hold office neither are they entitled to any benefits for sickness or disability." It is through the local branches of this secret society that the corporation secures its agents and revenue for pushing its scheme of insurance. Each member, whether insured or not, pays into his local branch various fees and dues, by which all its expenses in maintaining attractive social features, and drawing in candidates for the insurance business of the corporation, are provided for. It is also through these local branches that the corporation provides the revenues which it uses for its corporate expenses and to divide as salaries and compensation among the corporators. For such purposes, the branches pay the corporation charter and registration fees, profits on the sale of paraphernalia and supplies, and such per capita tax on all members, whether insured or not, as the corporation sees fit to levy. It is necessary to keep in mind these distinctions. The secret society is not the corporation. The society supplies the corporation with funds for the use of the few corporators, but the corporation is by its laws forbidden to give to members of the society any pecuniary aid in case of sickness, accident, or death. No element of benevolence, charity, or mutual aid exists between the corporation and members of the society. The insurance business is a business distinct from the organization of the secret society, and is transacted directly between the corporation and its certificate holders, just as truly as if the business were carried on, as has been done in connection with the Masonic fraternity, by a corporation having no connection with the fraternity, beyond the fact that its field of insurance is confined to the members of the fraternity in good standing. These distinctions between the corporation and the secret society,—between the corporation as the organizer of the secret society, and as the manager of the insurance business,—are clearly deducible from the constitution and

laws submitted to us; although those documents are well calculated, and perhaps intended, to obscure and conceal such distinctions. (4) The insurance business established and carried on by the corporation consists in issuing certificates whereby the corporation undertakes to pay the holder \$1,000 in seven years, upon condition that the holder shall pay all assessments of \$2.50 when called upon in pursuance of the laws made by the corporation, and upon the further condition that he shall continue a member in good standing of the secret society organized and controlled by the corporation. In order to attract the savings of the very smallest earnings, provision is made for issuing similar certificates for the payment of one, two, three, or four fifths of \$1,000, upon condition of paying assessments of one, two, three, or four fifths of \$2.50. The obligation of the corporation also involves the payment of certain weekly sums in case of the disability of the certificate holder; but, as the whole amount so paid can in no case exceed one half of the sum named in the certificate, and in every case must be deducted from the sum agreed to be paid on its termination, this provision does not affect the character of the principal agreement. The obligation also involves the payment of one half the amount named in the certificate in case of the death of the holder after the first two years of the term: but this provision only covers a life risk for one and one half, or, at most, for five, years, and, in view of the small percentage of mortality in any one term of five years, cannot seriously affect the principle of the insurance. The substantive business consists in the payment of a fixed sum at the end of seven years. The subsidiary provisions may furnish an excuse for calling the business accident and life, as well as endowment, insurance, but are in fact mere incidental attractions for the prosecution of the main scheme, which the whole literature of the corporation, as well as the seal, indicative of its main object described in the charter, authoritatively announces to be the payment of "\$1,000 in seven years." The corporation promises to pay \$1,000 in seven years in consideration of the payment of the assessments of \$2.50 each, and upon the representation that those assessments shall not in the aggregate equal \$1,000. Counsel claim that the corporation does not promise to pay \$1,000, but only a sum "not exceeding \$1,000." I think this error arises mainly from misapprehension of the effect of the certificate. That paper, it is true, contains a promise to pay "a sum not exceeding \$1,000," but it contains no promise as to the time or as to any detail. The only promise is to pay a sum "in accordance with and under the provisions of the laws" of the corporation, and this paper is authenticated by the seal of the corporation, which contains the charter, and declaration of its main purpose and object,—"\$1,000 in seven years." To the laws we must look for the actual promise. The law says: "There shall be attached to this order a benefit fund, in which members may participate (except social members), as they may severally elect, either in the sum of \$1,000, \$800, etc., on which they shall pay

the rates, and be entitled to the benefits, prescribed in the following table:

Table of Rates and Benefits.

Amount paid on each assessment.....	\$2 50
Weekly benefit when sick or disabled.....	\$25 00
Amount paid on total disability.....	\$500 00
Payable at death.....	\$500 00
Benefit paid at end of seven years not exceeding.....	\$1,000 00

Here is a direct promise that the certificate holder shall participate in the fund "in the sum of \$1,000," and "shall be entitled" to "\$25 a week during sickness, \$500 on total disability, \$500 at death (the obligation to pay these sums is absolute,—it is not a mere promise to pay a sum not exceeding \$500), and at the end of seven years benefits not exceeding \$1,000, i. e. the benefits remaining unpaid of the sum of \$1,000, which he has elected as the sum which specifies his participation in the benefits. No other construction can be given this language except as a subterfuge for palpable fraud, and such construction the court cannot give. And this construction of the direct promise of "\$1,000 in seven years" is fully confirmed by a careful examination of the whole body of the laws. The only exception to the obligation is contained in the section which provides that, when one assessment of \$2.50 shall realize an amount less than \$1,000, if the certificate be in the amount of \$1,000, the certificate holder shall receive no more than the "whole amount of said assessment." That is, until the business increases so as to include more than 400 certificate holders (the number necessary to produce \$1,000 at \$2.50 each), each certificate holder whose claim matures must be content with the product of one assessment; and the insertion of this exception is strong affirmation that the promise to pay the whole sum named in the certificate is binding in every other case. Counsel also claim that the business scheme of this corporation does not involve the representation that assessments imposed on the certificate holders shall not in the aggregate equal \$1,000. There is no foundation for such a claim. We are called upon to declare the legal meaning of a body of laws prepared for the sole purpose of attracting and building up a large business. The purpose for which such laws are framed is as truly an element in their construction as the contextual meaning of the particular language used to accomplish that purpose. In passing on the character of the business disclosed by laws so framed, we are bound to exercise that knowledge of the patent, well-established, and universally recognized elements of human nature and of business transactions which the court must be presumed to possess. In this case the business, the securing of which is the object and sole object of the laws, consists in obtaining from a large number of the public the payment to the corporation of \$2.50 from time to time, upon the promise by the corporation of paying to each contributor \$1,000 at the end of seven years. It is certain that such a business cannot exist without the belief on the part of the contributors that the assessments of seven years will be less than \$1,000. By the very fact of offering to the public, for

the purpose of obtaining business, the prospectus contained in these laws, the corporation makes the representation that \$1,000 is to be obtained in seven years by contributing in small sums less than that amount. Such representation is written into their prospectus by the fact of publication, unless it is clearly excluded by the language used. It is true the corporation might have said: "This business cannot honestly be carried on without collecting from each contributor in assessments the full amount of \$1,000." If this language had been used, no business would have been done, and the laws would not be before us for construction. Not only is no such language used, but the representation implied in the very fact of presenting this business to the public is plainly set forth in the laws of the corporation. The law providing for the payment of assessments says: "All payments shall be made in accordance with the following sections, and in no other way or manner." And, until the laws are changed, no assessment can be made, except as provided. The only provision for calling for payment of assessments is that, if the treasury requires an assessment shall be made, and that "when it is evident from the claims filed in regular form that two assessments are necessary in any one month, then it shall be the duty of the supreme accountant to make the calls for said assessments at the same time, dating the calls, one on the 1st and the other on the 15th of the month, except when those dates occur on a Sunday or legal holiday, in which case they shall be dated the preceding day." And in its official summary of the law, intended for those unable to wade through the whole mass of legislation, the corporation says: "When it is necessary to call two assessments in one month, they shall be issued from the office of the supreme accountant on the first day of such month, or as near thereto as may be expedient." Surely it needs no argument to show that these laws not only confirm the representation made in the very fact of presenting this scheme to the public, but contain the representation that not more than two assessments a month, i. e. \$420 in seven years, will be required to obtain the payment of \$1,000, and that therefore the laws make no provision for calling further assessments.

In confirmation of the view taken, attention may be called to the fact that the superior court has made a part of the record of this case conclusions of law found by the Indiana court in the proceeding which Failey sets out as the basis of his claim. These conclusions of law are:

"1. That the defendant, in the issuance of certificates of membership in the benefit fund in the finding of facts described, was engaged in doing a health, accident, life, and endowment insurance business, and the same was neither charity nor benevolence, within the meaning of the statutes and laws of Indiana.

"2. That, under the said contracts made by the defendant with persons holding certificates in the benefit fund, the defendant was bound to pay the full or gross amount severally named in said certificates at the expiration of seven years from the date thereof, if then in

force, less the payments (if any) theretofore made on such certificates on account of sickness or disability benefits.

"4. That the defendant is not a mutual company, in the sense that the certificate holders in its benefit fund are members of the [Supreme] Sitting of the Order of Iron Hall, as the certificates constitute contracts entered into by the defendant on the one part and certificate holders on the other part, of the legal tenor and effect stated in the second conclusion above."

We find, therefore, that the record and facts before us clearly establish the conclusion that the essential business carried on in this state by the corporation was the issue of certificates promising the payment of \$1,000 in seven years, upon condition that the certificate holder shall pay during that time assessments of the fixed sum of \$2.50 each, for the purpose of enabling the corporation, from the money so paid in assessments, to pay \$1,000 as each certificate matures; and that this business necessarily involved the representation that the aggregate of assessments in each case would be less than \$1,000, and further involved the representation, in fact made in the conduct of the business in this state, that the aggregates of assessments in each case would not exceed \$420. The provision for a so-called "reserve fund" does not affect the character of this business. That provision simply permits the reservation of one fifth of each assessment, one seventh of the money so reserved to be used annually in payment of matured certificates, for the purpose of reducing the amount of future assessments. The difficulty with the business consists in the impossibility of paying \$1,000 from assessments amounting to \$420, or any sum materially less than \$1,000; and this difficulty is not to be avoided by using one fifth of the inadequate assessments, at the rate of one seventh a year, for the purpose of reducing the inadequate assessments of the future. Nor is the character of the business materially affected by so-called "lapses," i. e. the possibility of a certain percentage of certificate holders forfeiting the assessments paid, by neglect to continue such payments. If the business really depends on such lapses, and its object is to pay a large profit to matured certificate holders from money obtained by means of such lapses, then the business is unsound and dishonest. But the lapses are a necessary incident, and do not materially affect the character and result of the business. The percentage of such lapses is established by insurance experience; the main portion of such lapses must be at the beginning, and not at the close, of the term the security of the certificate holder must consist in maintaining, not in diminishing, the number of those liable to assessment; and a slight mathematical process will demonstrate that such lapses cannot prevent the eventual loss to some one involved in a business based on a principle of paying \$1,000 for \$500. Such a business is clearly distinguishable from legitimate insurance. All insurance has a wagering element, and by the common law of this state wagering contracts are unlawful. In insurance, however, the wager is not the

controlling element. The object of the contract is protection,—in fire and other insurance of property, protection of the actual value of the property destroyed; in life insurance, protection of the value of a man's life to his family or his creditors. But in any such case, if the element of protection is eliminated, if there is no insurable interest, if the contract is a mere speculative bet on contingencies, if nothing but the wagering element remains, then the contract becomes obnoxious to the law which pronounces wagers illegal. In these certificate contracts there is no element of protection to property; it is purely a business speculation. The bait held out to the certificate holder is the hope of getting \$1,000 without paying for it. He risks his little stakes of \$2.50 (a small sum, purposely fixed for bringing the temptation home to a great mass of the people), in the expectation of succeeding in the scramble for \$1,000 in seven years. This business is also distinguishable from that quasi insurance business, which really partakes more of the nature of investment or savings bank business, called endowment insurance. This is a comparatively new branch of insurance business, but, in states where the standard of safety and solvency has been established by legislation, the law says that for a \$1,000 seven-year endowment insurance policy, issued at the age of thirty, the company shall charge, and the insured shall pay, \$125.74 each year until maturity; and that, after deducting the current cost of insurance each year, the whole balance must be carefully invested and compounded at the standard rate of interest. Whether this particular regulation is essential to the conduct of the business or not, it is plain that the business of issuing \$1,000 seven-year endowment policies indiscriminately to all persons between eighteen and sixty-five, on payments not exceeding \$60 a year, cannot be honestly conducted; and such impossibility cannot be altered by calling premiums "assessments." Life insurance may come to be safely conducted on the assessment plan, and possibly human ingenuity may devise a scheme for safely conducting endowment business on that plan; but it is a mathematical certainty that the so-called endowment business this corporation has attempted to conduct can only result in loss to the certificate holders. Still more clearly should this business be distinguished from that of fraternal and mutual aid societies. The latter have no element of speculation. They are purely protective, and are based upon the necessity and duty of mutual aid in time of trouble, and so act as powerful incentives in promoting that cultivation of thrift and mutual helpfulness which is essential to the prosperity and good order of society. For this reason, they are favored by the law, and entitled to its protection. But the former has no element of protection, and is purely speculative. It seeks not to help the unfortunate, but to make profits out of their misfortunes, and tends directly to discourage thrift and promote that speculative spirit which is a serious danger to society. Between these two there is an impassable gulf, and not the least of the injury resulting

from the business of this corporation is its direct tendency to discourage and weaken legitimate fraternal and mutual aid societies. This business, therefore, is nominally an insurance business, whose essential characteristics are: (1) The elimination of the protective element of insurance, so that the wagering element ceases to be incidental, and becomes the controlling element; (2) the certainty of ending in a money loss to a large number of certificate holders. Such conclusion is a mathematical certainty. If 14 men agree to pay equal assessments into a common fund, so that at the end of seven years each one may draw out \$1,000, it is evident that each will pay in the amount he draws out. Such agreement is harmless, but will never be entered into. If, however, a company issues its certificates promising to pay \$1,000 in seven years, upon the payment of such assessments as the certificates mature, and obtains fourteen certificate holders, one each year for fourteen years, and continues the business of collecting assessment and paying benefits until the last certificate matures, we have this result: The first man pays \$148 in assessments, and draws out \$1,000,—a net profit of \$857; the last man pays \$3,598 in assessments, and draws out \$1,000,—a net loss of \$1,598; the first six men make a profit of about \$3,000; the seventh and eighth pay in and draw out the same amount, and the last six lose about \$3,000; and, in any method adopted for putting in execution such a scheme, either the certificate holders draw out the same amount they pay in, or some members make a profit out of the losses of others. The subsidiary elements introduced by the defendant in its scheme may modify results, but cannot affect the principle. It is an inherent element in every such scheme that, whenever the business closes, some one must be a loser. It is also certain that practically the business cannot be carried on without a rapid increase of members. As soon as the limit of increase is reached, the business must close, and so the extent of the loss will be great in proportion to the success of the business. When to such a scheme is added the fact that the corporation which carries it on makes large gains, proportioned to the extent of its business, and induces the public to take its certificates by the representation that \$1,000 will be so gained in seven years through the payment of a much less sum, the fraudulent character of the business becomes yet more apparent and far more dangerous to the public. The facts found in the record before us strikingly illustrate the substantial fraud in which the business set forth in the pleadings must result. It appears from the statement contained in the record of the condition of this company at the time of the appointment to Falley, receiver, that the corporation has received several hundred thousand dollars, used for corporate expenses and for division among its officers, and at the time of failure was in receipt of a revenue for such purposes of upwards of \$60,000 a year; that a large number of the earlier certificate holders have received net profits averaging about \$420 each; and that the 60,000 remaining certificate holders, if all the money collected for

assessments, and not paid out on matured certificates, is divided among them, must lose about \$2,000,000. Such is the result of a few years' successful business, when conducted with all the honesty which such a business will permit. This practically illustrates, what the documents before us demonstrate, that the very essence of the business carried on in this state, and which now seeks the aid of the court of equity, is paying unearned profits to the few from the losses of the many.

I believe no case has been decided upon the precise question whether such a business is contrary to public policy, but courts have plainly characterized its nature when opportunity has been given. In Massachusetts, in reference to a corporation doing a somewhat similar business, but organized under a peculiar statute of that state, the court says: "It is not in our power to declare the business contrary to public policy, and a fraud on an unprotected part of the community, since the legislature have authorized it, but it is well to understand with what kind of business we are dealing. No one who does understand it, we think, would hesitate to agree that all legislative conditions must be complied with strictly." *Rogg v. Supreme Lodge United Order of Golden Lion*, 156 Mass. 481. In New Jersey, in holding that a similar business was not within the meaning of the New Jersey statute authorizing the formation of benevolent and charitable institutions, the court says: "How can it ever be said that the legislature ever intended to allow the learned and skillful, and financially able, to make profit, under the guise of benevolence and charity, out of the unlearned and unskilled, and those who are so unfortunate as to suffer from financial disability? After the fullest and most careful reflection, I am unable to discover any method or principle of law by which this scheme can be sustained under this act. With all due respect to the learned counsel who presented the case for the defendant, it seems to me that the scheme prescribed by the constitution and by-laws in this case has more the appearance of a lottery than of a charity." *Pelts v. Supreme Chamber Order of Financial Union*, (N. J.) 19 Atl. Rep. 671.

In Pennsylvania, a corporation organized under a general statute authorizing incorporation for the purpose of "the maintenance of a society for beneficial or protective purposes to its members from funds collected therein" attempted a somewhat similar business, and the court of common pleas, in revoking its charter, says: "The leading feature, about which all others cluster, is this vicious proposition to give a man good money for nothing. This cannot be done as a business matter, honestly and fairly." And the supreme court, in sustaining the revocation of the charter, says: "The auditor and the court below have sufficiently demonstrated that the only persons likely to be benefited by the scheme set forth in the charter are the officers themselves. It manifestly belongs to that class of associations, by far too numerous, the practical effect of whose operations is to enrich a few at the expense of confiding and

ignorant people. Such corporations are 'unlawful and injurious to the community.'" *Re National Indemnity & Endowment Co.* 142 Pa. 450. We have before us now a corporation which has carried on in this state the insurance business described, not as a system of mutual aid between the members of a mutual aid society, but independently, the society, such as it is, simply defining the field of insurance; and the question is distinctly raised, is that business contrary to our public policy? In determining this question we are embarrassed by no unfortunate legislation directly or impliedly authorizing such business. It is a fundamental principle of our law that courts will not undertake to administer justice in behalf of one whose claim is based upon a violation of law, whether that law be a statute, a legal principle, or a rule of conduct based upon accepted views of sound ethics and public interest, which has been incorporated into our system of jurisprudence by force of the well-established judicial recognition which defines our unwritten law. Courts are established to settle rights founded in law. They have no jurisdiction of violations of the law, except for the purpose of punishment. This principle is founded in the earliest records of our law, and has been enforced and illustrated in innumerable cases. That the transactions in question are in violation of law is plain. In the first place, the record finds that the corporation "has never been authorized to do insurance business in the state of Connecticut." Section 2892 of the general statutes says: "It shall not be lawful for any foreign corporation, organized for the purpose of furnishing life or accident insurance, or indemnity upon the assessment plan, to do any business in this state unless authorized by the insurance commissioner." Counsel claims that this prohibition has no application, because of a subsequent section which says it shall not be construed to apply to any "secret or fraternal society, nor to any association organized for benevolent and charitable purposes whose members are employed by one or more similar corporations," etc. I think an examination of the whole law clearly shows that the words "secret or fraternal society" include only the well-known class of associations formed for dispensing aid or benefits to their members, and that the exception does not apply to a corporation doing an assessment insurance business distinct from the benevolent operations of any secret or fraternal society. It will hardly be claimed that the mere word "secret" is efficacious to exclude from the operation of the act any corporation that may choose to call its janitor a "watchman," or its doorkeeper a "vidette." But there is no exception to section 2905; and that section provides that no foreign insurance corporation shall, directly or indirectly, transact business in this state, until it shall have first appointed, in writing, the insurance commissioner of this state its lawful attorney, on whom process may be served. The record shows that this has not been done. I do not wish, however, to seek a ground for violation of public policy in the mere failure to comply with such requirements, when the actual

transactions have been in violation of rules of conduct touching the gravest interests of society, and which are as well established law as if expressed in the form of a statute. The insurance business of this defendant cannot exist without resulting in a fraud. It cannot be conducted without untrue representations. It is essentially of a wagering nature. Its direct and necessary tendency is an unmitigated public injury. The evils resulting from mere wagering purchases of stock, and which the law condemns as absolutely illegal, are slight compared with the disaster that must follow schemes of insurance which can only be started by appeals to the gambling spirit of a whole people, and can only end in widespread loss. The rules of a public policy which condemn this business are well settled by judicial decisions, and this case really involves no new application of such rules; but if, in fact, it were a case of new application, the public injury is so great, and the violation of plain principles of law so clear, that the court should not hesitate to make the application. In *Egerton v. Brownlow*, 4 H. L. Cas. 161, Lord Lyndhurst says: "The inquiry must, in each instance where no formal precedent had occurred, have been into the tendency of the act to interfere with the general interest. The rule, then, is clear. Whether the particular case comes within the rule, it is the province of the court, in each instance acting with due caution, to determine." And Lord Chief Baron Sir Frederick Pollock, in the same case (page 149), says: "After all these authorities, am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office,—I should shrink from the discharge of my duty?" I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise." The question before us is not raised by the conflicting claims of the certificate holder and the corporation as to the validity or legal effect of a particular contract, but it is raised by the application of this corporation, through its receiver, asking the aid of a court of equity, for the purpose of settling its affairs, to put him in the possession of money due on account of business transacted in this state. The fact set out in this application, and the finding of the superior court, clearly show that the business so transacted was essentially fraudulent, and in violation of our public policy. The courts of this state cannot assist those who prosecute their business contrary to its settled policy, either in the prosecution of that business, or after its prosecution has ceased. Courts of equity will give no aid even in adjusting the accounts in a partnership formed for such purpose. *Watson v. Murray*, 23 N. J. Eq. 257; *Anderson v. Powell*, 44 Iowa, 20; *Watson v. Fletcher*, 7 Gratt. 1. And a fortiori they will give no aid to a foreign corporation in obtaining possession of property claimed to have been acquired through such violation of law. The claim of Mr. Failey must therefore be denied. There is no question raised as to the jurisdiction of the superior court to

distribute the funds now in the hands of Scofield, receiver. There appear to be no creditors, and no parties in interest, except the contributors to these funds. It is alleged and shown that the only protection against the dissipation of these funds through a multiplicity of suits lies in their distribution by order of court. It is doubtless true that, in the complications now existing, the funds can be most speedily and justly distributed

through Receiver Scofield. Possibly the view I have taken of the case may involve some modifications of the directions for distribution announced by the court, but such modifications would not be of sufficient practical importance to justify discussion, or to furnish ground for dissent. For the reasons stated, I concur in the advice given to the superior court.

LOUISIANA SUPREME COURT.

SUCCESSION OF Joseph HERNANDEZ.

(46 La. Ann.—.)

***1. The prohibition of article 161 of the Code, to the effect that, in case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded.**

2. The prohibition of the statute of New York to the effect that no second or other subsequent marriage shall be contracted by any person, during the lifetime of any former husband or wife of such

Headnotes by WATKINS, J.

person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extraterritorial effect, being a penal statute; and it cannot be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and state of New York.—the contracting parties announcing their intention to be to thereafter reside in Louisiana, and afterwards actually residing there.

(May 14, 1894.)

APPPEAL by the heirs of Joseph Hernandez, deceased, from a judgment of the Civil District Court for the Parish of Orleans in favor of one claiming to be Hernandez's widow, in a proceeding by her to obtain possession of certain of his effects, which she claimed under his will. *Modified.*

The facts are stated in the opinions.

NOTE.—*Effect of statutes forbidding remarriage of guilty party after divorce.*

There is practical unanimity among the decisions in holding that such statutes have no extraterritorial effect and the only point of difference is as to how far and in what manner the guilty person may be punished in the state where the statute exists for a violation of its provisions.

Effect in other states.

If the decree of divorce absolutely dissolves the bonds of matrimony, either party is free to marry again upon going into another jurisdiction, although the law of the place where the divorce was granted prohibits the guilty party from marrying. *Scott v. Atty-Gen. L. R. 11 Prob. Div. 128.*

The prohibition will not be enforced by other states. *Phillips v. Madrid, 13 L. H. A. 862, 83 Me. 206; Dickson v. Dickson, 1 Yerg. 110, 24 Am. Dec. 444.*

The rule that a marriage in another state may be valid was recognized in *Reed v. Hudson, 13 Ala. 570*, in which parties divorced in Georgia attempted to remarry in Alabama, and the question arose as to the validity of such second marriage, and it was held valid.

If the guilty party takes up a residence in another state a marriage may be contracted, if the laws of that state permit it, which will be recognized as valid, at least in the state where it takes place. *Fuller v. Fuller, 40 Ala. 301.*

In a case in which defendant in the divorce proceedings was not a resident in the state, and no service of process was had on her and no actual notice of the proceedings were given to her, it was held in the state of her domicile that the decree prohibiting her remarriage had no extraterritorial effect. *Van Storch v. Griffin, 71 Pa. 240.*

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The prohibition will not be recognized by the courts of the state to which the defendant migrates and in which he takes up his residence. *Wilson v. Holt, 83 Ala. 528.*

Effect in state where enacted.

In considering the effect of the statute in the state where it was enacted attention must be given to two principal dissimilarities in the circumstances under which its provisions may be disregarded. First, where the second marriage is contracted within the state of the enactment in direct violation of the statute. Second, where the second marriage occurs in another state. In the first case there is no reason why the violation of the statute should not bear whatever consequences the state may choose to provide. And the only difference between the courts is in their interpretation of the statutes and ascertainment of the penalty which has been provided.

Remarriage in state of enactment.

The tendency seems to be in case of a remarriage in the state where the prohibition exists to uphold the prohibitory statutes and give them such effect as is demanded by the end to be attained.

A statute forbidding remarriage of the guilty party with his paramour is not against public policy and will be upheld, at least to the extent of denying the alleged wife's claim to homestead in his estate. *Owen v. Brackett, 7 Lea, 448.*

An act prohibiting the guilty from remarrying is not *ex post facto*, although made to apply in cases where decrees are granted for offenses which occurred prior to the passage of the act. *Elliott v. Elliott, 38 Md. 367.*

But there is an intimation to the contrary in *Clark v. Clark, 8 Cush. 885.*

Meurs. Gilmore & Baldwin, for appellants:

Hernandez being an adulterous divorcee, and the plaintiff having committed adultery with him prior to his divorce, Hernandez's marriage to the plaintiff was, under the law of Louisiana, absolutely null and void *ab initio*.

Civil Code art. 161; Justinian, 134; Novel, chap. 12; Code Napoleon, art. 298; 5 Locre, p. 161.

The objects the French and our own law-makers had in view in prohibiting the spouse divorced for adultery from contracting marriage with any person with whom adultery had been committed, was to deter men and women from adultery and from divorce—from adultery by holding out the warning that an adulterous connection could never be any but an immoral and disreputable one, leading to misery and remorse; from divorce by removing the belief that such a union could be made respectable by securing the dissolution of the marriage tie.

This policy is undoubtedly better subserved by giving the restriction effect as to all accomplices than by confining it to some one accomplice mentioned in the divorce proceedings.

The marriage having been celebrated in New York, it becomes necessary to inquire whether, under the law of New York, the *lex loci contractus*, it was valid.

If we are to take the plain letter of the law of New York, it is clear that any person divorced for adultery, any adulterous divorcee, who marries in New York during the lifetime of his or her former spouse contracts no legal marriage.

Cropey v. Ogden, 11 N. Y. 223; *Smith v. Woodworth*, 44 Barb. 200; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Moore v. Hegeman*, 92 N. Y. 527, 44 Am. Rep. 408.

Our courts in construing a foreign statute will look alone to the decisions of the courts of the state which adopted the statute for its interpretation.

Elmendorf v. Taylor, 23 U. S. 10 Wheat. 152, 6 L. ed. 289; *Cucullu v. Louisiana Ins. Co.* 5 Mart. N. S. 464, 16 Am. Dec. 199.

The more modern opinion seems to be that both as to form and capacity a marriage valid where celebrated is valid everywhere, and a marriage invalid where celebrated is invalid everywhere, subject, however, to certain exceptions.

1 Bishop, Marriage, Divorce & Separation, § 920, p. 899.

In Louisiana, however, while the general rule that the validity of a marriage is to be determined by the *lex loci contractus* is recognized, it has been held that where parties go abroad to evade our local statutes prohibiting their marriage, the contract is null.

The mere re-enactment of the statute in a more comprehensive form will not make the new statute unlawful in its application to offenses committed prior to its enactment. *Cropey v. Ogden*, 11 N. Y. 223.

Jurisdiction of defendant must be acquired in order to render the decree binding on him.

A decree cannot be granted against a nonresident who has not appeared in the action, prohibiting him from remarrying. *Garner v. Garner*, 56 Md. 127.

In *Maguire v. Maguire*, 7 Dana, 181, in which the wife of an Alabama man had gone to Kentucky and there asked for a divorce, which was granted and the husband prohibited from remarrying, the court in passing upon the validity of the decree says: "Surely the statutory declaration that the delinquent party shall never marry again without incurring the penalties denounced for bigamous connections could not have been intended to apply to husbands who had never been either citizens or domiciled residents of Kentucky, and as to whom therefore such a denunciation would be apt to be mere *brutum fulmen*."

But if jurisdiction has been acquired and the decree passed it is given full effect.

If the statute prohibits remarriage, an attempted marriage in the state where the decree was granted will be invalid. *Cox v. Combs*, 8 B. Mon. 231.

If the statute makes the second marriage a felony, no right can be based on it which will permit a recovery by the husband's administrator of property given to the wife during the pretended marriage. *Calloway v. Bryan*, 51 N. C. 569.

The prohibition extends even to remarriage with the one who obtained the divorce. *Moore v. Moore*, 8 Abb. N. C. 171.

There can be no recovery for breach of promise of marriage made by one who has been divorced, with a prohibition against marrying again in the state where the divorce was granted. *Haviland v. Halstead*, 84 N. Y. 643.

Where the guilty person is prohibited from marrying without leave from the court, leave granted after the contracting of the alleged marriage is ineffectual. *Thompson v. Thompson*, 114 Mass. 566.

In Massachusetts the legislature has no authority to legalize by special act the second marriage. *White v. White*, 105 Mass. 325, 7 Am. Rep. 529.

But if the one with whom the second marriage is contracted knows of the disability and continues to cohabit with the divorced person after the disability has ceased, there will be an estoppel to set up the original invalidity of the marriage. *Mason v. Mason*, 101 Ind. 25.

And it has been held that if the act prohibiting the guilty party from marrying again does not pronounce the second marriage void, and the guilty party is not proceeded against during his lifetime, after his death the marriage cannot be declared void for the purpose of bastardizing the children of the second marriage. *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 841.

In Maine and Massachusetts it has been held that the prohibitions of the statute do not apply in case of divorce granted in other states. *Bullock v. Bullock*, 122 Mass. 8; *Clark v. Clark*, 8 Cush. 286; *Phillips v. Madrid*, 12 L. R. A. 862, 88 Me. 205.

But in a New York case it was held that the fact that the divorce was granted in another state is not material. The statute applies to divorces wherever granted, and forbids a second marriage by the guilty party within its territorial jurisdiction. *Smith v. Woodworth*, 44 Barb. 200.

The question what punishment the guilty person subjects himself to by the remarriage is not fully settled. There is some tendency to hold that the prohibitory statute must provide the punishment and that a violation of the statute does not constitute a common-law offense or bring the case within the general definitions of the common statutory crimes.

Thus it has been held that the guilty party is not guilty of adultery by contracting a second marriage. *Com. v. Putnam*, 1 Pick. 132.

Dupre v. Boulard, 10 La. Ann. 411; *Babin v. LeBlanc*, 13 La. Ann. 367; *Maillefer v. Sail-Jot*, 4 La. Ann. 875; *Saul v. His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 212; *Cabellero's Succession v. The Executor*, 24 La. Ann. 573; *Parsons*, Cont. 6th ed. note on p. 724, § 575.

In order that ignorance of the law should constitute the basis of the good faith necessary to establish a putative marriage, it must be actual and excusable, and the party pleading it must show that all the means that law and prudence require to learn the law have been made use of.

Buisserie's Succession, 41 La. Ann. 217; *Toullier Devezier*, pages 877, 878.

Mr. Albert Voorhies for appellant, *Charles Hernandez*.

Mr. Frank N. Butler for appellant, *Valentine Hernandez*.

Messrs. E. D. Le Breton and Henry Chiapella for appellant, *Walter Hernandez*.

Mr. Henry P. Dart, for appellee:

The law of the place where the ceremony is performed governs only as to the form. The status of the parties and the legal effect of the ceremony is regulated by the law of the domicile.

Whart. Conf. L. § 118, p. 177; see also §§ 104, 165; *Story Conf. L. note* to p. 217; *Le Breton v. Nouchet*, 3 Mart. 60, 5 Am. Dec. 736; *Ford v. Ford*, 2 Mart. N. S. 576, 14 Am. Dec. 201; *Routh v. Routh*, 9 Rob. (La.) 224, 41 Am. Dec. 326; *Fisher v. Fisher*, 2 La. Ann. 774; *Hayden v. Nutt*, 4 La. Ann. 67; *Connor v. Connor*, 10

La. Ann. 449; *Arendell v. Arendell*, Id. 566; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 182. See also *Buckner v. Watt*, 19 La. Ann. 216, 36 Am. Dec. 671; *Olivier v. Townes*, 2 Mart. N. S. 93; *Saul v. His Creditors*, 5 Mart. N. S. 597, 16 Am. Dec. 212; *Portalis Code Civil Annoté-Gilbert*, Vol. I, p. 156; *Code Napoleon*, art. 170; *Foelix, Droit Internal, Privie*, Vol. I, 180, § 88; *Brook v. Brook*, 9 H. L. Cas. 192.

A marriage contracted in good faith produces its civil effect.

Civil Code, 117, 118; *Jermann v. Tenneas*, 39 La. Ann. 1031; *Patton v. Philadelphia & New Orleans*, 1 La. Ann. 39; *Buisserie's Succession*, 41 La. Ann. 217.

Mr. Henry Denis also for appellee.

Watkins, J., delivered the opinion of the court:

Originally, this suit had, for its object, recovery by *Augusta L. Church*, the alleged surviving widow of the deceased, of the money and movable effects of which she was donee by testamentary bequest. But the legal heirs of the deceased by a former marriage incorporated other issues in their answer, and a reconventional demand; and same were made the subject of a subsequent direct attack on the claims and pretensions of the plaintiff, which she, in turn, put at issue by answer. On these pleadings and issues there was a general judgment against the heirs,

Unless the statute expressly so provides. *State v. Weatherhy*, 43 Me. 234, 60 Am. Dec. 59.

So an indictment for bigamy, charging a second marriage, with a former wife living, is not supported by proof of a second marriage after the first wife had obtained a divorce. *Com. v. Richardson*, 126 Mass. 34, 30 Am. Rep. 647.

But in *Graves v. Graves*, 2 Paige, 62, 2 L. ed. 513, the chancellor intimated an opinion that defendant would be guilty of felony if he married again.

And in a later New York case it was held that contracting a second marriage in the state where the divorce was granted renders the guilty person guilty of bigamy. *People v. Faber*, 22 N. Y. 146, 44 Am. Rep. 367.

Although the contrary doctrine had been held by the supreme court in the earlier case of *People v. Hovey*, 5 Barb. 117.

In *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641, the court said *obiter* "by marrying the second time, the wife who procured the divorce being still alive, the divorced husband subjected himself to the pains and penalties enacted against bigamy." His offense was bigamy, but not bigamy as defined in the penal code; for the marriage having been dissolved he had no wife; so that on the second marriage he had not a plurality of wives. Yet, if he had been indicted and the state had proved the first marriage and that the woman to whom he was united in marriage was still alive, and then the second marriage, a case of bigamy would have been made out against which defendant would not have been permitted to prove the decree dissolving the first marriage.

Marrying in another state and returning to state of prohibition.

The question here is one of some difficulty. In its solution a conflict of principles is encountered. On the one hand the rule is that a marriage good where contracted is good everywhere. Of course that rule has some exceptions, but they have not been regarded as sufficient to take this class of cases out of the rule. On the other hand a state ought to

have power to enforce its penal ordinances of which it could not be deprived by a mere colorable evasion of them.

A state ought to have control of the status of its subjects and many perplexing questions regarding marriage and divorce would disappear if a general rule were adopted that no state should interfere with or change the status of citizens of another state. In this particular case the rule was that the validity of the contract should be determined by the law of the state, where the parties established their residence immediately after the marriage instead of by that of the place where the contract happened to be made, most of the difficulty would vanish. There could be no more fraudulent evasion of law bringing it into contempt and scandalizing the community. No general rule can, however, be drawn from the decided cases.

There is less difficulty if the parties acquire a domicile in another state.

If, after the decree, the party prohibited from remarrying takes up his residence in another state where he contracts a second marriage, legal under its laws, such marriage will be treated as valid after his death in the state where the decree was granted, so far at least as to entitle the second wife and the issue of the marriage to a share of his estate. *Re Webb's Estate*, Tucker, 372.

The state in which the divorce decree was passed will treat the children of a marriage entered into in another state as legitimate, for the purpose of determining the place of their settlement. *West Cambridge v. Lexington*, 1 Pick. 505, 11 Am. Dec. 231.

The second marriage in another state may be so far recognized as to render the children legitimate. *Moore v. Hegeman*, 27 Hun, 68, 32 N. Y. 527, 44 Am. Rep. 408.

But when the second marriage is a mere evasion of the prohibitory laws the decisions are less satisfactory.

The fact that the guilty husband goes to another state for the purpose of evading the prohibition

and in favor of the original plaintiff and donee, and the heirs have appealed.

1. The will of the deceased is of the following tenor, viz.: "New Orleans, December 27th, 1890. This is my olographic will. I give and bequeath to my wife, Augusta L. Church, all the movable effects contained in our house, corner Bordeaux and St. Charles avenue, with the exception of the family paintings, which I give to my son Charles,—he to divide them with his brother and sister. I also give and bequeath to my wife the sum of ten thousand dollars. The balance of my estate I bequeath to my children, share and share alike. I appoint as my executors my wife and my son Charles; they to have full charge of my estate, without giving any bonds. [Signed] J. Hernandez."

The grounds on which the heirs attack the testamentary bequest in favor of the plaintiff are best stated in the language of their answer and reconventional demand, and in that of their petition attacking plaintiff's capacity to receive by will, and the legality of her title to a community half interest in the property left at the demise of the decedent. The following is an extract from their answer, viz.: "That a final judgment was rendered and signed on the 4th of October, 1891, or about that time, in the suit entitled *Joseph Hernandez v. Rosema D'Aunoy*, his wife, No. 70 of the docket of the 24th judicial district court for the parish of St. Bernard, in favor of the defendant in said suit; and, on her demand in reconvention therein, against the said plaintiff, Joseph Hernandez, decreeing a separation from bed and board,

and a final divorce *a vinculo matrimonii*, dissolving forever the bonds of matrimony existing between them, as is shown by a duly certified copy of said judgment, herewith filed, and made a part of this answer, marked 'Exhibit A.' That the aforesaid judgment was rendered, and the divorce therein granted allowed, in favor of the said Rosema D'Aunoy, wife of said Joseph Hernandez, and against her said husband, on the ground of adultery. That the petitioner herein, now styling herself as Mistress Augusta Lodoiska Church, widow in community of Joseph Hernandez, deceased, but, in times past styling herself as Mistress Ogden and as Mistress Ida Curtis, was the chief accomplice in adultery with the said Joseph Hernandez, and, at various times and places anterior to the rendition of the aforesaid judgment of divorce, had illicit sexual intercourse with the said Joseph Hernandez, viz., in 1879, 1880, and 1881, and in other years prior thereto, in the city of New York, at the St. James Hotel and elsewhere, and in the city of New Orleans, at the St. Charles Hotel and elsewhere, time and time again. That owing to the said judgment of divorce granted as aforesaid in favor of Mistress Rosema D'Aunoy, wife of said Joseph Hernandez, against her husband, and on account of said petitioner's complicity in adultery with said Joseph Hernandez, the said petitioner and the said Joseph Hernandez became, forever, legally incapable of contracting marriage with each other, and the so-called marriage relied on by petitioner, if ever contracted, which is herein specially denied, was, is, always has

against his marrying again will not make the marriage void as against an innocent person whom he marries, so as to deprive her of her rights in his estate after his decease. *Pondsford v. Johnson*, 2 Blatchf. 51. In that case the court says that the prohibition against a second marriage was merely a penalty which attached to the person of the guilty party only in the state providing it.

The marriage will be treated as valid for the purpose of determining the second wife's rights to dower, although the guilty party left the state for the express purpose of evading the effect of the prohibition. *Putnam v. Putnam*, 8 Pick. 433.

Although the parties go out of the state for the purpose of evading its laws, children of the marriage will be held legitimate by the courts of the state where the divorce was granted, if the parties return there to live. *Van Voorhis v. Brintnall*, 86 N. Y. 13, 40 Am. Rep. 505.

The guilty party does not, by marrying in another state and returning to live in the state of the divorce, become subject to indictment for lewd and lascivious behavior. *Com. v. Hunt*, 4 Cush. 49. In Massachusetts the person violating the prohibition is not guilty of bigamy, unless it is shown that the second wife was a resident of the state and that the parties went into the other state for the purpose of evading the local laws. *Com. v. Lane*, 118 Mass. 453.

The New York statute does not authorize the court to declare void a marriage in another state, although the parties went to such state to avoid the provisions of the statutes of the state of divorce. *Peugnet v. Phelps*, 43 Barb. 538.

The fact that the guilty party disobeyed the decree of divorce by marrying in another state will not prevent his maintaining an action in the courts of the state which granted the divorce to 24 L. R. A.

dissolve the second marriage. *Thorp v. Thorp*, 90 N. Y. 902, 43 Am. Rep. 189.

But in an earlier case it had been held that while the guilty party is in contempt by going into another state and there marrying, he will have no standing in the courts of the state granting the original divorce to maintain a suit against his second wife for a divorce. *Marshall v. Marshall*, 2 Hun, 238, 43 How. Pr. 57, 4 Thomp. & C. 449.

For the purpose of shielding himself from the consequences of a third marriage, one indicted for bigamy will not be permitted to insist on the invalidity of a second marriage contracted in another state after his first wife had procured a divorce which prohibited him from remarrying. *People v. Chase*, 23 Hun, 310.

If a woman goes out of the state to marry a man prohibited by the laws from marrying, for the purpose of evading such laws, she will not be granted relief from the marriage on the ground of its invalidity, for the reason that she is equally guilty for the evasion of the statutes. *Kerrison v. Kerrison*, 8 Abb. N. C. 444.

Some of the states refuse to tolerate an evasion of their laws.

If the parties go into another state for the purpose of evading the laws of the state where the divorce was granted and then return there to live, they may be convicted of lewdness. *Pennegar v. State*, 2 L. R. A. 708, 87 Tenn. 244.

A marriage contracted in another state in fraud of the laws of the state where the decree was granted will not be recognized in the latter state. *Williams v. Oates*, 27 N. C. 535.

Violation of the statute will invalidate the second marriage in the state where the divorce was granted. *Taylor's Succession*, 39 La. Ann. 825.

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been, and always will be, absolutely null and void, and without any lawful force or effect. Further answering, these respondents say that no community of acquets and gains ever existed between the said petitioner and the said Joseph Hernandez; that said petitioner never had any right, title, interest, or claim in or to any of the property, real, personal, or mixed, appertaining or belonging to the estate of the late Joseph Hernandez; that the so-called legacy of ten thousand dollars and the so-called legacy of the movable effects in the residence of the said Joseph Hernandez, at the corner of St. Charles avenue and Bordeaux street, in this city, claimed by petitioner in her aforesaid petition, were and are unlawful, and without any force or effect, and should be so decreed and held by the judgment of this honorable court. Respondents, further answering, show that immediately after the aforesaid judgment of divorce was rendered and executed the said Joseph Hernandez had held and owned not less than two hundred thousand dollars (\$200,000), real and personal property, and at the date of his death, in April, 1893, all that could then be found, and all that has since been discovered, of his entire estate, will not equal in value the sum of one hundred thousand dollars (\$100,000); that from 1881 to April, 1893, the said Joseph Hernandez was living openly with the said petitioner, Mistress Augusta Lodoiska Church, as man and wife, notwithstanding the prohibition aforesaid, which inhibited them from living in that way, and from ever contracting the marriage relationship; that during the period aforesaid—that is, since 1881—a large portion of the estate of the said Joseph Hernandez has been illegally wasted and lavished upon the aforesaid petitioner, owing to her unlawful and undue influence over the said deceased, and the diminution of said estate has been largely occasioned by petitioner's extravagant living, and by the many large and unlawful gifts and presents and transfers which the said petitioner illegally obtained from the said Joseph Hernandez; that the so-called legacy of ten thousand dollars (\$10,000), and the so-called legacy of the movables in the residence of the said deceased, claimed as aforesaid by petitioner, composes more than one third of the entire estate of said Joseph Hernandez so far discovered. That by law the said testator could not, under any circumstances, have lawfully given the said petitioner more than one tenth part of the movables of his estate, which portion, and more, the said deceased had long before disposed of, in favor of petitioner, by gift, donation, and otherwise. And these respondents, further answering, say that for the foregoing and other reasons the said petitioner is not entitled to said so-called legacies, or either of them, nor can she have possession or delivery of the same, as claimed in her petition or otherwise; that the gifts, transfers, and donations made by the said Joseph Hernandez to petitioner at various times exceeded fifty thousand dollars, and more than exhausted his ability and power to give or bequeath anything to petitioner by his last will and testament; that all the

provisions of said last will containing bequests in favor of petitioner should therefore be canceled, and decreed and held illegal, null, and void. And now reconvening, and becoming plaintiffs in reconvention, respondents pray for judgment on the original demand therein, in their favor, and against petitioner; and, upon the demand in reconvention, appearers pray for judgment in their favor, and against the said Mistress Augusta Lodoiska Church, illegally styling herself 'widow in community of the late Joseph Hernandez,' for fifty thousand dollars (\$50,000), or for so much thereof as will be shown on the trial of this cause to have been illegally given, transferred, or disposed of, in favor of said petitioner, by said Joseph Hernandez, and that all such unlawful gifts and transfers may be annulled. And reconvenors further pray for a judgment decreeing the alleged marriage between petitioner and the said Joseph Hernandez to be, and to have always been, an absolute nullity, and without any legal force or effect."

Several months subsequent to the filing this answer, the heirs filed a petition making a direct demand for the annulment of the legacy on the same averments of illegality of the marriage of the plaintiff with their father, and praying for a personal judgment against her for the sum of \$50,000, approximately. As the language of this petition is somewhat more comprehensive than the answer of the heirs, and the charges against the plaintiff are somewhat more elaborated and intensified, we will reproduce the following extracts, namely: "Petitioners further show that the said judgment granting a divorce in favor of said Rosema D'Aunoy against her said husband, Joseph Hernandez, on the ground of his adultery, and the complicity of the defendant herein in adultery with the said Joseph Hernandez as aforesaid, constituted a fixed, absolute, and perpetual barrier to any marriage between the said Joseph Hernandez and the defendant herein.

That if any marriage was ever contracted between the said Joseph Hernandez and the defendant herein, which petitioners specially deny, said so-called marriage was entered into in bad faith on part of said defendant, and in violation of prohibitory laws, and was, is, always has been and ever will be, absolutely null and void. Petitioners further show that, as there never was any legal marriage between the late Joseph Hernandez and the defendant herein, there was not, and never could have been, any community of acquets and gains between them, and said defendant has not, and never has had, any community rights nor claims whatsoever in or to any of the assets or properties, real, personal, or mixed, appertaining or belonging to the estate of the late Joseph Hernandez." In order to be explicit, we reproduce the prayer of the defendants' petition, namely: "Wherefore, petitioners pray that Mistress Augusta Lodoiska Church, illegally claiming to be widow in community of the late Joseph Hernandez, be cited to appear and answer this petition, and, after due proceedings had, judgment be rendered in favor of petitioners, and against said defendant,

decreasing said defendant never to have been the wife nor the widow, in community or otherwise, of the late Joseph Hernandez; furthermore, annulling all bequests contained in the last will and testament of the late Joseph Hernandez in favor of the said defendant, and ordering the entire estate of the late Joseph Hernandez to be distributed among his forced heirs as their interests may appear, regardless of any bequests contained in said will in favor of said defendant; furthermore, decreeing that all the movables and other properties inventoried in this estate be held and adjudged to have belonged exclusively to the said Joseph Hernandez, and to his aforesaid surviving forced heirs, and condemning the said defendant to pay back to this estate fifty thousand dollars (\$50,000), or so much thereof as will be shown on the trial of this cause to have been illegally given, transferred, or disposed of by said Joseph Hernandez to or in favor of said defendant, and that all such unlawful donations, gifts, and transfers be annulled. And, if it be shown that the contract of marriage was ever solemnized between defendant and said Joseph Hernandez, then and in that event that judgment be rendered herein decreeing said marriage to have been always an absolute nullity, and without legal force or effect."

In answer to these charges, the original plaintiff, the alleged surviving widow of Hernandez, states and "averts that she was legally married to the late Joseph Hernandez on the 29th of December, 1881, in the city of New York, by the mayor of said city, and under the laws of that state, and that no impediment of any kind existed against said marriage, either at the time of its celebration, or before; that the charges preferred by the petition of complicity in adultery with the said Joseph Hernandez are false and untrue, and no judgment to that effect was ever rendered, nor was respondent party to any proceeding in which said issue was asserted or maintained; that the petitioners have, ever since her marriage, acknowledged the validity of the same, visited the common domicile daily, and have recognized respondent as the lawful wife of said Hernandez, and they are now estopped from denying the validity of said marriage; that respondent owned, in her own name, when she married the said Joseph Hernandez, property amounting to not less than twenty-five thousand dollars, consisting of money, jewelry, paintings, carriages, furniture, table and bed linen, and household effects; that petitioners are estopped from denying the truth and reality of the acts of purchase by respondent of the two pieces of immovable property situated in the parish of St. Tammany, in this state, in which acts of purchase the said Joseph Hernandez acknowledged and declared that the price was paid with the paraphernal funds of your respondent. Wherefore, respondent prays that plaintiffs' demand be dismissed, with costs, and that there be judgment in favor of respondent, decreeing that she was lawfully married to Joseph Hernandez; that the legacy he made her in his last will is valid and legal, and

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should be paid to her; that she be recognized as entitled to half of the community property left by him; and that her paraphernal rights be recognized and decreed for such amount, and specific effects and things, as she may prove herself entitled to on the trial of this cause."

These extended extracts from the pleadings best serve to characterize the controversies in this case, and fix the mind of the court on the questions that are to be solved by testimony, much of which was received over objection.

2. The foundation of the attack of the Hernandez heirs upon the claims of the alleged surviving widow depend, primarily and mainly, upon a proper construction of article 161 of the Revised Civil Code, the text of which is as follows, viz.: "In case of divorce on the ground of adultery, the guilty party can never contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy; and under penalty of nullity of the new marriage." The contention of the heirs is that the denunciation of that article against the marriage of the guilty party with his or her accomplice in adultery is matter *in pais*, to be determined by the administration of proof on the trial of a suit that involves the validity of the marriage, while that of the plaintiff is that it is against the marriage of the guilty party named in the divorce suit as an accomplice, or *particeps criminis*, in the adultery charged as the cause of the action, whether such accomplice be made a co-respondent or not. Hence, upon the determination of the correctness of these contentions, *pro et con*, depends the admissibility of the large volume of evidence found in the record; and upon the construction of the cited article of the code mainly depends the legality of the marriage of Joseph Hernandez with plaintiff on the 29th of November, 1881.

The proofs principally relied upon by plaintiff are the following, to wit: "(1) The last will of the late Joseph Hernandez. (2) The certificate of marriage, issued from the office of the mayor of New York, certifying that the ceremony between Mr. Joseph Hernandez and Mrs. Augusta L. Odgen, of Paris, France, was performed by the mayor of New York on the 29th of December, 1881, at his office in said city. (3) Volume 3 of the Revised Statutes of New York (7th ed.) tit. 1, art. 1, par. 8, at page 2332, for the purpose of showing the mayor's authority to celebrate a marriage. (4) Her testimony to the effect that the Augusta L. Odgen named in said marriage certificate was the same person as herself."

"The fundamental facts on which the forced heirs of the late Joseph Hernandez rely to overthrow the demands of Mrs. A. L. Church for a delivery of her aforesaid legacy, and on which they have sought, and are still endeavoring, to annul the same, and to have her aforesaid marriage decreed to be without any legal force or effect, are: (1) The divorce granted Mrs. Rosema D'Aunoy, wife of Joseph Hernandez, by the district court of the parish of St. Bernard, on the 4th of

October, 1881, on the ground of adultery; and (2) complicity in adultery on the part of Augusta L. Church with said Joseph Hernandez during his marriage with Rosema D'Aunoy."

In support of the foregoing charges, defendants made the following proofs, viz.:

First. The record, and pertinent facts therewith connected, in the suit entitled *Joseph Hernandez v. His Wife*, No. 70 on the docket of the twenty-fourth judicial district court, parish of St. Bernard. (a) The aforesaid suit was directed against Rosema D'Aunoy, as the wife of plaintiff, claiming a divorce *a vinculo matrimonii* on various grounds, which it is needless to mention. The record of this suit was lost or destroyed by the fire which burned the court-house on the 2d of March, 1884, as is stated in the certificate of the clerk, which is appended to the copy of the minutes of the court,—same alone surviving the fire. (b) The testimony of the presiding judge and the lawyers engaged in the trial of the case was taken with the view of establishing the purport of the pleadings, evidence, and judgment pronounced therein. The judge states his recollection to be that the defendant charged adultery on the part of her husband, and asked judgment of divorce accordingly; that several witnesses were examined; and that the charge of adultery on the part of the husband was fully established, but with what particular person he cannot remember. But he further amplifies his statement thus: "I have stated all I remember of this case, in the above answer. I cannot state whether the pleadings set forth the name of the person or persons with whom Hernandez was charged with having committed adultery. My impression is that the evidence established that he visited houses of assignation, and committed adultery with prostitutes." The statement of the attorney who brought that suit is: That no one was named as co respondent, and no one was named or specified as the person or persons with whom the plaintiff had committed adultery, on the faith of which the defendant's reconventional demand was made. That his recollection is that the evidence was not reduced to writing. He remembers that one witness stated, substantially, that he knew of two instances wherein Mr. Hernandez had committed adultery. He states positively that "no witness specified any particular person with whom Mr. Hernandez had committed adultery, and no one stated that he had committed adultery with one Mistress Augusta L. Church, sometimes called Augusta Ogden, and sometimes called Augusta L. Curtis. To the best of his recollection, the name of Mistress Church, Mistress Ogden, or Mistress Curtis was not mentioned on the trial." That "he remembers no evidence introduced on the trial of the cause for divorce tending to show that Mr. Hernandez was guilty of adultery with his second wife, Mrs. A. L. Hernandez, nor anything in the judgment of divorce fixing the guilt of adultery upon the said Mistress A. L. Church, now the widow of Joseph Hernandez."

The testimony of a prominent lawyer who was connected with the case is best evidenced

by the following, viz.: "Q. Were you present in the district court of St. Bernard parish on the day when the cause of Hernandez against his wife for a divorce was tried? A. I was. Q. Did you see at the time, or previously, the pleadings in that case? A. I did. Q. Do you remember at this date who was the party named as the accomplice, or guilty person in the adultery there charged by the wife against the husband? A. My memory is that there was no person named. My memory of the suit is that it was a suit by Mr. Hernandez against his wife for a divorce; she reconvening, and claiming a divorce from him on the ground of adultery. Q. I believe your memory is correct. You heard the evidence administered in support of the charge of adultery? A. I did, sir. Q. Do you remember the name of the witness who was examined? A. Yes, I do, sir. Q. What is it? A. L. E. Lemarie. Q. Did he, or did he not, give any testimony implicating Mrs. Augusta L. Curtis,—the present Mrs. Hernandez? A. None in the world sir."

The witness last named was placed upon the stand as a witness in this case, and his statement is in keeping with the testimony of the witness last quoted from: "Q. Have you no recollection of having mentioned any one in your testimony that you gave on the trial of that cause? A. I don't think I have. I don't think the question was asked me."

One of the attorneys who represented the defendant in the suit examined as a witness and produced and filed in evidence, in connection with his evidence, a copy of the defendant's answer and reconventional demand, which is of the following tenor, viz.: "*Joseph Hernandez v. His Wife*, No. 70. 24th Judicial District Court, Parish of St. Bernard. The answer of defendant herein denies generally each and every allegation in the plaintiff's petition contained, except the fact of marriage and community of property; and now, assuming the character of plaintiff in reconvention, she avers that her said husband, forgetting alike his vows and marriage with petitioner, did commit adultery with certain females, at various times and places, in this city, since the 21st of April, 1880, *the full particulars and specifications whereof have been served in writing upon defendant, and same are made part hereof*; and that by reason thereof, and the law, your petitioner is entitled to a final divorce. Wherefore, she prays judgment in her favor on the demand of plaintiff, and in her favor on the reconventional demand against her husband, Joseph Hernandez, decreeing a separation from bed and board, and final divorce *a vinculo matrimonii*, forever dissolving the bonds of matrimony now existing between them; that a separation of property be decreed; and that——, notary public, be appointed to partition the community property. And she prays for all such further aid, relief, and remedy as the court is competent to give in the premises. [Signed] W. S. Benedict and E. North Cullom, Attorneys." The counsel's attention having been attracted to the phrase we have italicized, namely, "the full particulars and specifications whereof having

been served in writing upon the defendant, and made a part hereof," the following question was propounded, and answer given, viz.: "Q. In the copy of the answer that you have referred to in your testimony as having been filed in the case, mention is made of particulars and specifications served in writing upon the defendant, and made a part of that answer. Have you a copy of those specifications? A. There were none filed. Q. There were none? A. There were none filed with the answer." His remembrance of the facts detailed on the trial of that case is much the same as that of other witnesses. The exceptions filed related exclusively to the jurisdiction of the court, and same were overruled.

Notwithstanding the destruction by fire of the original records, the minutes of the court in that case were fortunately preserved; and they contain the judgment of the court, regularly signed, and which is of the following tenor, to wit: "Extract from the minutes of October 4th, 1881: The court met this day, pursuant to adjournment. Present: The Hon. A. E. Livaudais, Judge. *Joseph Hernandez v. Rosema D'Aunoy Wife*. No. 70. The expert herein appointed, Edgar H. Farrar, this day appeared in open court, and presented his report, which was ordered filed, and made a part of the record of this case; and this case, being regularly filed, came up for trial on its merits. Present: A. G. Brice, attorney for plaintiff, and W. S. Benedict and E. North Cullom, of counsel for defendant. When, after hearing pleadings, evidence, and counsel, and the report of the expert herein appointed, the court considering the law and the evidence to be in favor of defendant on the plaintiff's demand, and in favor of the defendant on her reconventional demand and against the plaintiff, it is ordered, adjudged, and decreed that there be judgment herein, on plaintiff's demand, in favor of the defendant, Rosema D'Aunoy, and against Joseph Hernandez, plaintiff, with costs. And it is further ordered, adjudged, and decreed that on the reconventional demand there be judgment herein in favor of Rosema D'Aunoy, wife of Joseph Hernandez, and against the said Joseph Hernandez, her husband, decreeing a separation from bed and board between the said parties, and a final divorce, *a vinculo matrimonii*, forever dissolving the bonds of matrimony existing between them. It is further ordered, adjudged, and decreed that the rights of the said Rosema D'Aunoy, wife of Joseph Hernandez, against her husband, Joseph Hernandez, resulting from the community of acquets and gains lately existing between them, be fixed and determined in the sum of fifty-five thousand dollars, and that, in accordance therewith, there be judgment in favor of Rosema D'Aunoy, wife of Joseph Hernandez, and against her said husband, in said sum of fifty five thousand dollars, with legal interest from date, with all costs. . . . Judgment rendered and signed in open court this 4th day of October, 1881. [Signed] A. E. Livaudais, Judge 24th Judicial District Court of Louisiana."

The foregoing résumé of the record and evidence in the divorce suit fully and con-

clusively demonstrates that the action was not grounded on any charge of adultery in which the present plaintiff was alleged or shown to have been a participant; and, on the plaintiff's theory of the law, she was not an accomplice in the adultery of which the plaintiff in that case was proven guilty,—the purport of the defendants' charge against her being, "that *owing to the judgment of divorce* granted, as aforesaid, in favor of Mrs. Rosema D'Aunoy, wife of said Joseph Hernandez, against her said husband, and on account of said petitioner's complicity in adultery with the said Joseph Hernandez, the said petitioner and the said Joseph Hernandez became forever legally incapable of contracting marriage with each other; and the so-called marriage relied on by petitioner, if ever contracted, which is herein specially denied, was, is, always has been, and always will be, absolutely null and void, and without any lawful force or effect." The italics are ours.

At this stage of the proceedings the defendants offered evidence *alimunde* to prove that the plaintiff had committed adultery with Hernandez at different times and places, for the purpose and with the object of establishing the fact that, on their theory, she was his accomplice in adultery, in the sense, and within the denunciation, of the code. To this evidence, counsel for the plaintiff objected, on the following grounds, viz.: "First, that no proof was admissible beyond the scope of the allegations, which claimed the nullity of the marriage exclusively on the ground that the judgment in the divorce suit of Rosema D'Aunoy had established the adultery of Joseph Hernandez with Augusta L. Church; and, secondly, that the prohibition of marriage between the guilty spouse and his accomplice in adultery, as provided for in article 161 of the Code, applies only to the accomplice decreed as such in a divorce suit, and on account of whose adultery with the guilty spouse the judgment of divorce is rendered." An attentive and careful consideration of the pleadings of the defendants, as a whole, does not disclose that the nullity of the marriage, exclusively, is rested on the finding of the court to the effect that Hernandez had been guilty of adultery with the plaintiff. Consequently, the first rule of exclusion urged is not good, and in this respect the ruling of the judge *a quo* was correct.

But the second ground for the exclusion of the evidence offered is serious, and requires careful consideration. What is the meaning and significance of the words of the article, "In case of divorce, on account of adultery, the guilty party can never contract marriage with his or her accomplice in adultery?" Does it mean an accomplice in the particular adultery of which the guilty party is charged, and on which the suit for divorce is predicated and decided? Or does it mean an accomplice in any adultery, with any one, antecedent to the institution of the divorce suit, regardless of whether she is the person named or contemplated in the suit, or not? The answer of plaintiff's counsel to the foregoing query is found so well stated in their brief that we extract the most perti-

ment portion, as the best mode of presenting it. It is as follows, viz.: "We see, first, that it is only in case of divorce that a subsequent marriage is prohibited between the guilty spouse and his accomplice. The prohibition does not apply if the first marriage was dissolved by death. The guilty spouse surviving could clearly marry his accomplice in adultery, inasmuch as no law forbids it, and penal statutes cannot be extended by implication. We find this well explained in 10 Merlin on *Repertoire de Jurisprudence*, p. 216, *verbo* '*Empêchement de Mariage*.' He gives there, also, the origin of this prohibition. It was taken from the Roman law by the Catholic Church. The subsequent marriage with the accomplice was only prohibited when the adultery was committed under a promise of marriage. But, says Merlin: 'The Civil Code is more severe: it provides (art. 298) that, "in the case of divorce on account of adultery, the guilty spouse can never marry his accomplice."' Thus, in order to create the prohibition, it is no more necessary that the promise of marriage should concur with the adultery. But—let us observe it well—this provision is limited to the case where the adultery has been followed by a divorce. There could be, therefore, no opposition to the marriage of a widow with a man with whom it would be pretended that she had lived in adultery during her marriage; such a proof would not be admissible." (The italics are ours.) A comparison with the text of the article 298 of the Code Napoleon proves the correctness of the foregoing quotation.

In Locre's Commentary on the French Code, title "Of Divorce," he says: "That the wife against whom the divorce has been pronounced for this cause [adultery] is incapable of contracting a new marriage." 5 Locre, p. 161. "That the husband against whom the divorce has been pronounced for cause of adultery will not be incapable of contracting a second marriage, if it is not with his concubine." Id. "The adulterous husband will never be able to marry afterwards with his accomplice. He should not be able to find, by and through the judgment which condemns him, a title and instrumentality to satisfy a guilty passion." Id. p. 811, § 38. This author is in full accord with the views of other French commentators, who hold that the reason for the prohibition is that the guilty party should not be allowed to procure a divorce for the purpose of marrying his accomplice; or, in other words, the effect of the judgment releasing him from his marriage covenant, ought not to furnish him immunity from his crime, by permitting him afterwards to contract a new marriage, with the *particeps criminis* in the adultery of which he has been convicted. 2 Laurent, p. 478, § 367; 1 Toulhier, p. 465; 2 Duranton, p. 124, § 177; 8 Demolombe, pp. 165, 167; 1 Marcadé, p. 599. By a comparison, it will appear that the language of the Code Napoleon is almost identical with that of our Civil Code. The Legislature of 1837 incorporated into the body of our law the provisions of the Code Napoleon, in the following phraseology, viz.: 24 L. R. A.

"That in cases of divorce on account of adultery, the guilty party can never contract matrimony with his or her accomplice in the adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy and under the penalty of nullity of the new marriage." Act Relative to Divorces, § 10, p. 180. This statute was reenacted in 1855 without any other change or modification than the omission of the word "the" which occurs in the original text just before the word "adultery." Act 807 of 1855, § 8. Counsel for the defendants refer to this omission from the Act of 1855—which is identical in terms with article 161 of the Code—of the article "the," as significant of legislative purpose on the question, and they employ this language, viz.: "Be that as it may, the fact that when, in 1855, the present article 161 of our Code was adopted, the word 'the' was omitted, shows, beyond all doubt, that if our legislature, in 1827, did intend to restrict the bar to marriage between the divorced spouse and his accomplice to any one accomplice, or any one set of accomplices, that it abandoned the policy, and, in its wisdom, made the law conform to the Code Napoleon, except in this: that, while the French law is only mandatory, ours renders the marriage null."

The question presented is apparently *res nova* in our jurisprudence; no pertinent decision of this court, or of the court of cassation, having been cited on either side. True it is that counsel for defendants have referred to and quoted from several cases, and notably the following, viz.: *Dupre v. Boulard*, 10 La. Ann. 411; *Minvielle's Succession*, 15 La. Ann. 342; *Summerlin v. Livingston*, Id. 520; *Caballero's Succession v. His Executor*, 24 La. Ann. 573; *Colwell's Succession*, 34 La. Ann. 266. But all of those cases treat of the nullity of marriages between white and colored persons, which was prohibited by the terms of article 95 of the Code of 1825, which was expunged from the Revised Code of 1870, which, for the first time, embodied the present article 161. Therefore, those cases bear no analogy to the question under consideration. But *Taylor's Succession*, 89 La. Ann. 825, points in a direction opposite that of defendants' view. From the statement of the case, it appears that J. C. Taylor married Miss Sarah Castleberry in 1852, and in 1865 they voluntarily separated, and thereafter lived apart. In 1866 Mrs. Sarah C. Taylor sued her husband for a divorce on the ground of adultery, but judgment went against her. In December of that year, Taylor and Widow McFarland were married in the state of Arkansas, and thereafter they lived and cohabited together. In 1867 Mrs. S. C. Taylor renewed her suit against Taylor for a divorce, grounding her demand upon the alleged adulterous life he was then leading with his pretended wife under the Arkansas marriage ceremony; and, in the month of November of that year, judgment was rendered in her favor, granting her a full divorce against Taylor. In the case under consideration, the children of the marriage of Taylor and Widow McFarland sought to obtain a share in their father's estate, and the children of the mar-

riage of Taylor with Miss Castleberry resisted their claims, invoking the nullity of the marriage, on the authority of article 161, Revised Code. Of this controversy the court said: "We conclude from the record that Mrs. McFarland's conduct in marrying Taylor, in Arkansas, in December, 1866, was not characterized by good faith, in law, and that, in cohabiting with him thereafter, she became his accomplice in adultery," and therefore their marriage was void. In that case the wife, suing for and obtaining a judgment of divorce, alleged that her husband had committed adultery with the identical person with whom he had been living, and the proof on the trial sustained the charge. Hence she was, in the sense of article 161, his accomplice in the adultery. That case appears to confirm the theory of the plaintiff, though it possesses two features which distinguish it from the instant case, and they are (1) that Taylor married Mrs. McFarland before he was divorced from his legal wife, while Hernandez was not married until after he was divorced from his first wife; and (2) that in the *Taylor Case* the accomplice was named, though in the Hernandez suit she was not. Independent of the support which that decision brings to the plaintiff's theory, the rule of our jurisprudence is that in a suit for divorce, grounded on a charge of adultery, the plaintiff must specially mention the person with whom the adultery has been committed, and full particulars of time and place must be given, so as to put the defendant on his guard, though it is not necessary that such person should be formally cited to answer as a co-respondent. As an illustration of that rule the following cases may be cited namely: *Compton v. Compton*, 9 La. Ann. 499; *Suberville v. Adams*, 46 La. Ann. 119. This precept of jurisprudence seems to have been followed in the *Taylor Case*, 89 La. Ann. 825. Not only is this theory in accord with correct rules of judicial procedure and pleading, but they comport with the principles of article 161 of the Code, which manifestly indicates the necessity of the accomplice being named and disclosed, as the means of enforcing its behests. If this were not so, grave and serious injury might result, and the rights of inheritance, the legitimacy of children, and the security of marital rights, as well as the title to property, would be imperiled by the uncertainty and insecurity of the tenure; depending as it would, upon the uncertain recollection of witnesses, long years after the occurrences had happened. Who could be an accomplice of the guilty party, other than the person with whom the adultery was committed? To constitute the defendant in a divorce suit a "guilty party," the proof must show that he has committed adultery with some one, for if the proof does not establish his guilt, the divorce cannot be granted. If, indeed, the defendant had been engaged in promiscuous sexual intercourse with sundry persons, and these facts were not disclosed by proof on the trial of the divorce suit, he could not, in respect to such transactions, be considered a guilty party, and consequently the persons with whom such undisclosed adulteries had

been committed could not possibly be deemed accomplices, in the sense of the code; for to be an accomplice necessarily presupposes a principal, whose guilt has been established, and in whose guilt she is a *particeps criminis*.

On mature reflection, and a careful examination of all the authorities bearing on the question, we have reached the conclusion that the plaintiff's second objection was well taken, and should have been sustained by the judge *a quo*, and the testimony that is covered by it rejected and excluded. The conclusion that necessarily results is that Hernandez was under no legal disability to enter into a contract of marriage with the plaintiff, resulting as a consequence of the judgment of divorce, albeit the same was grounded on a charge of adultery; that is, if the marriage ceremony had been performed in the state of Louisiana. We are therefore dispensed from making an examination of the previous divorce proceedings, and the judgment of dismissal thereof, and the resulting effect of the estoppel and *res adjudicata* pleaded, as well as of the parol proof of adultery *vel non* between the plaintiff and Hernandez prior to the institution of the last suit for divorce.

8. It remains for the court to consider the legal effect of the contract of marriage which the plaintiff entered into with Hernandez in the city and state of New York, and we are to determine whether the contracting parties thereby came under the denunciation of the New York statute which prohibits the second marriage of persons who have been divorced because of adultery during the lifetime of the former husband or wife. The following is a literal copy of the New York marriage certificate, viz.: "State of New York, City and County of New York. I, W. R. Grace, mayor of the city of New York, do hereby certify that on the 29th of December, 1881, at the mayor's office, I duly performed the marriage ceremony between Mr. Joseph Hernandez, of New Orleans, La., and Mrs. Augusta L. Ogden, of Paris, France; that the said parties were satisfactorily made known to me, and were of lawful age to contract marriage; and that, upon due inquiry by me made, there appeared no legal impediment to said marriage. I further certify that the following persons, C. H. Woodman and C. G. Crocker, were present, and became subscribing witnesses to said marriage. [Signed] W. R. Grace, Mayor. [Seal affixed]." The following is the section of the Revised Statutes of New York, the prohibition of which the defendants' counsel invoked, viz.: "Section 5 of the Revised Statutes of New York (Birdseye's ed.), p. 1401, reads as follows: 'No second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless (1) the marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person, or (2) unless such former husband and wife shall have been finally sentenced to imprisonment for life. Every marriage contracted in violation of the provisions of this section shall, except in the case provided for in the next section,

be absolutely void." On this state of facts the defendants' counsel contend that the terms of the New York statute include within its prohibition all persons divorced, whether under the law of Louisiana or that of New York, because of adultery, and render them incapacitated to enter into a contract of marriage in New York, notwithstanding they have their residence in Louisiana at the time. On the contrary, the contention of the plaintiff's counsel is to the effect that the law of New York, being a penal statute, can have no extraterritorial effect, and therefore cannot annul a contract of marriage between persons residing abroad, though solemnized in that state. The question for this court to decide is whether the plaintiff's marriage celebrated in New York was valid; Hernandez having been divorced by a judgment of a Louisiana court, because of adultery,—his divorced wife still living.

Not only does the marriage certificate show that Hernandez at the time resided in Louisiana, and Mrs. Augusta L. Ogden resided in Paris, France, but the testimony shows, that immediately after the marriage ceremony the newly married couple came to New Orleans to live, and continuously thereafter resided there, as man and wife. In the course of the argument of defendants' counsel, they employ this language, viz.: "In Louisiana, however, while the general rule that the validity of a marriage is to be determined by the *lex loci contractus* is recognized, it has been held that, where parties go abroad to evade our local statutes prohibiting their marriage, the contract is null. *Dupre v. Boulard*, 10 La. Ann. 411; *Babin v. Le Blanc*, 13 La. Ann. 367; *Maillefer v. Saillet*, 4 La. Ann. 875; *Saul v. His Creditors*, 5 Mart. N. S. 569, 16 Am. Dec. 213; *Caballero's Succession v. His Executor*, 24 La. Ann. 573; *Parsons*, Cont. 6th ed. § 575, note on page 724 commenting on *Saul v. His Creditors*." We do not understand the law of Louisiana to limit the general doctrine that the *lex loci* shall govern marriages, as to the capacity of the parties, in any other way than by declaring that this rule shall not govern its citizens when they are incapacitated by a local prohibitory law from contracting marriage. That theory may be at once accepted, but it only goes to the extent that the marriage contracted abroad is intended to defeat the prohibition of a local statute. As this case stands now, with the prohibition of article 161 of the Code eliminated from the discussion, it is not the case of a marriage contracted abroad for the purpose of defeating the prohibition of a local statute. In the present attitude of the case, the converse of that proposition is exhibited; and it is whether a marriage in New York, of persons fully capacitated to contract marriage in Louisiana, where the marriage domicile is to be established, and where the husband has theretofore resided, will be declared a nullity by a Louisiana court because of a prohibition of a New York statute. "The law considers marriage in no other view than as a civil contract." Rev. Civ. Code, arts. 86, 90. And a general provision of our Code is that "the effect of acts passed in one country, to have

effect in another country, is regulated by the laws of the country where such acts are to have effect." Id. art. 10. We have frequently applied the precept of this last article to interstate contracts, that were entered into in other states, to be executed in Louisiana; notably in *Gates v. Gaither*, 46 La. Ann. —. The principle is well settled that the matrimonial rights of the wife who marries with the intention of removing into another state must be governed by the laws of her intended domicile. *Ford v. Ford*, 2 Mart. N. S. 574, 14 Am. Dec. 201; *Le Breton v. Nouchet*, 8 Mart. 60, 5 Am. Dec. 786; *Fisher v. Fisher*, 2 La. Ann. 774. In *Hayden v. Nutt*, 4 La. Ann. 65, it was said that "it may be conceded that the defendant's counsel is correct in assuming that the marital rights of these parties must be regulated by the laws of their matrimonial domicile." In *Routh v. Routh*, 9 Rob. (La.) 234, 41 Am. Dec. 326, it was held that "where the parties contracted marriage with the bona fide intention of making Louisiana the place of their common or matrimonial domicile, and, in pursuance of such intention, did, within a reasonable time, become domiciled in this state, then the property belonging to the wife before the marriage . . . remains her separate estate." *Connor v. Connor*, 16 La. Ann. 440. In *Arendell v. Arendell*, Id. 566, the facts were that at the time of the marriage, in Alabama, the spouses intended to fix their matrimonial domicile in Mississippi, which they accordingly did; and the court held that the right of the husband to slaves owned by the wife at the time of the marriage must be determined by the laws of Mississippi, and not those of Alabama. In *Ford v. Ford*, 2 Mart. N. S. 574, 14 Am. Dec. 201, Judge Martin employed this expressive term, viz.: "The wife does not contract where she enters into matrimony but, where she, after the marriage, migrates or removes. *Mulier non agit ubi matrimonium contraxit, sed ubi ex matrimonio migravit, vel discessit, agit.*" Cujas, ad l. 65, *Exigere Dotem*, 164." Or, in other words, "the place where marriage is contracted is not so much that where the ceremony is performed as that where the parties expect to live and settle;" the general rule being "to attend to the law of the husband's domicile, rather than that of the place in which the contract was entered into." Not only is this so with respect to the wife's rights of property subsequently acquired, but it is equally so with respect to the contract of marriage itself. The rule is stated by Judge Story thus: "The general principle certainly is, as we have already seen, that, between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation." Story, Conf. L. § 118, citing Ferguson, Mar. & Div. But that author explains, in a marginal note, that "the principle is established that the validity of a marriage—the word 'marriage' being used in the sense of 'ceremony of marriage'—depends upon the law of the place where the ceremony is performed. When the question is whether it is lawful for the two persons to be united in

wedlock, there is a difference of opinion as to the law by which the validity of the marriage (the word being used to designate the union in wedlock which the ceremony is intended to effect) is to be determined." Story, Conf. L. p. 188. But the question immediately under consideration—that is, the binding force of the contract of marriage in jurisdictions different from the one in which it was celebrated—is distinctly settled conformably to the jurisprudence of this court, the language of that author being as follows, viz.: "It is no answer to this reasoning to say that every nation has a right, at its pleasure, to impose any restraints and prohibitions upon the marriages of its own subjects, whether they marry within or without its own territory. Admitting this to be true in the fullest extent to which it can justly be claimed, in virtue of national sovereignty, it must be quite as true and quite as obvious that no other nation is bound to recognize those restraints and those prohibitions as obligatory upon such subjects while they are domiciled within its own territory, or when they have contracted marriage there according to the laws thereof." That author again says: "Personal disqualifications, not arising from the law of nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries, where the like disqualifications do not exist." Id. § 104. This doctrine was announced by the supreme court in *The Antelope*, 23 U. S. 10 Wheat. 66, 6 L. ed. 268, employing this emphatic declaration, viz.: "The courts of no country execute the penal laws of another." And the New York court of appeals said in *Scoville v. Canfield*, 14 Johns. 888, 7 Am. Dec. 467, viz.: "The penal acts of one state can have no operation in another state. They are strictly local and affect nothing more than they can reach." Story, Conf. L. § 621, p. 841. There can be no question of the fact that the New York statute under consideration is a penal law, and that the attempt of the defendants is to have it enforced against the plaintiff by the courts of this state. Mr. Wharton puts the proposition thus: "I cannot but think that both the history and policy of the law require that the rule should be stated as follows: . . . Consensual marriages abroad, by domiciled citizens of states holding such marriages to be valid, will not be invalidated because the forms prescribed in the state of celebration were not adopted," etc. Whart. Conf. L. § 170, p. 237. That author again says: "A marriage abroad, it is alleged, would be a nullity, if in fraud of the home law; but valid, if not in fraud of such law." Id. § 182, p. 264. That author quotes approvingly the following extract from Parsons on Contracts, viz.: "The rights of parties, as springing from the relation of marriage, must be determined by the place where they then supposed themselves, and intended to be, domiciled," citing *Le Breton v. Nouchet*, 8 Mart. 60, 5 Am. Dec. 786; *Ford v. Ford*, *supra*; *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 558; Whart. Conf. L. § 190, p. 272. Mr. Bishop puts the proposition quite tersely, 24 L. R. A.

thus: "Statutes take effect only in the country of their enactment. They do not so much as bind citizens abroad, except by express words. Therefore, a prohibition to the guilty party in divorce, to contract a second marriage, is without effect outside of the territorial limits of the prohibiting state. And this is so even under special statutory terms." That author then illustrates by citing a Kentucky case, as follows: "A Kentucky statute declared that the divorce for which it provided shall not operate so as to release the offending party, who shall nevertheless remain subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living." Thereupon, an offending woman, whose husband procured the dissolution decree, removed to Tennessee, and there married, and the Tennessee court held the marriage to be good." 2 Bishop, Mar. & Div. § 1618; *Cox v. Combs*, 8 B. Mon. 231; *Roach v. Garrea*, 1 Ves. Sr. 157.

In construing the statute of New York prohibiting second marriages of persons convicted of adultery, the court of appeals decided that the prohibition of the statute did not invalidate a second marriage entered into in Connecticut where it was valid; the act being in the nature of a penalty, and not, in express terms, showing the legislative intent to render such marriage, entered into in another state, void. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505. In *Cropey v. Ogden*, 11 N. Y. 228, the court gave an interpretation to the legislative act as it existed previous to the revision of the statutes of the state, with reference to the second marriage that was celebrated between citizens of that state, and by an officer of that state, and said: "The incapacity of an adulterer, divorced on that ground by our own courts, to marry again in this state during the life of the injured party, was grounded upon the views entertained by our legislature in respect to the marriage relation." *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189, announces the same principle as that announced in *Van Voorhis v. Brintnall*, and affirms that decision. In *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408, a similar question is stated and discussed,—the court stating that the main question which is presented upon this appeal is whether a marriage in New Jersey was legal and valid, or illegal, as in violation of the New York statute; and, answering that proposition, the court said: "The statute and decree prohibiting the marriage of the guilty party can have no effect beyond the territorial limits of this state. Where the laws of another state do not prohibit such a marriage by a party divorced, its validity cannot be questioned in this state." In our opinion, those decisions are strictly in keeping with our own jurisprudence, and the opinions of text-writers on the subject. They distinctly hold that the prohibition of the New York law has no extraterritorial effect, and that a citizen of that state is at liberty to go into another state, and contract a new marriage there, to which legal effect will be given by the courts of New York. That is no more than the plaintiff did. Residing

in Paris, France, and Hernandez residing in the state of Louisiana, they availed themselves of the law of New York, and contracted marriage therein, intending to reside thereafter in Louisiana; and, actually residing there subsequently, it must be given the effect of a contract of marriage in Louisiana *eo nomine*, and, thus considered, it comes within the principle of the decisions of the New York court. A careful examination of authority has satisfied us that the plaintiff's contract of marriage, though celebrated in the city and state of New York, was legal and valid, and did not come within the prohibition of the New York statute. We see no reason to alter the decree of the court *a qua*.

Judgment affirmed.

An application for rehearing was subsequently filed in response to which on May 24, 1894, the following opinion was delivered:

We adhere to the principles of law announced in the opinion herein rendered, sustaining the marriage between the deceased, Joseph Hernandez, with Augusta L. Church, and recognizing Augusta L. Church to be the surviving widow in community of said Hernandez, and entitled to receive the legacies named in the last will of the deceased; but

we are of opinion now that the rights and claims of such widow in community, as well as the demands of said Augusta L. Church for the payment of her legacies under the will, should be adjusted, liquidated, and finally settled, in the mortuaria of the deceased, contradictorily between the executors and heirs, in due and orderly course of the administration of the succession, and that such should have been the judgment and decision of the judge *a quo*. It is therefore ordered and decreed that so much of our opinion and decree as recognizes the legality of the marriage between Joseph Hernandez, deceased, and Augusta L. Church, and as decrees her entitled to receive the legacies specified in the last will of Joseph Hernandez, deceased, be, and the same are, maintained, but that in all other respects our former decree is set aside, and the cause remanded for further proceedings in the court *a qua* according to law and the views herein expressed. It is further ordered and decreed that the judgment appealed from be so amended and corrected as to conform to the judgment and decree herein pronounced; the costs of appeal to be taxed against the appellee; those of the lower court to await final judgment therein.

Rehearing refused.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Mayor and Common Council of the City of
NEWARK, *Plffs. in Err.*,

v.

George WATSON *et al.*

(.....N. J.....)

1. The legislature in the exercise of its police power can lawfully prohibit the use of lands for the purposes of burial when such lands are held by a municipal corporation.
2. The plaintiffs, a municipal corporation, held lands under a grant from the proprietors of East New Jersey for burial purposes, to be appropriated for no other use or uses whatsoever. An ordinance of the municipality and an act of the legislature prohibited the use of such lands for burial purposes. *Held*, that the title to the lands thereby reverted to the proprietors.
3. Twenty years' adverse possession will establish a title against the proprietors. *Quere*, whether the first section of the Act of June 5, 1787 (Rev. p. 598), which provides that sixty years' possession, actual and uninterrupted, shall vest a complete title to lands, will defeat the title of a municipal corporation.

(June 18, 1894.)

ERROR to the Supreme Court (Essex Circuit) to review a judgment in favor of de-

*Headnotes by VAN SYCKEL, J.

NOTE.—Upon the question of the construction of a condition in a deed that the land shall be used for a specified charitable public or quasi public purpose, see note to *Greene v. O'Connor* (R. L.) 19 L. R. A. 232.

24 L. R. A.

fendants in an action brought to recover possession of certain real estate. *Affirmed.*

The action was to recover a strip of land about 28 by 40 feet in the rear of property fronting on Broad street in the city of Newark. The city of Newark was settled by adventurers from the colony of New Haven, who came to New Jersey on invitation of the proprietors, from whom they expected to purchase land. They extinguished the Indian title. In 1669, a record was made of all the land laid out in the town. On this record certain spaces were left vacant, being laid out as commons, and they were dedicated as such by a town meeting on January 25, 1669. Under the concessions of the proprietors, the settlers were entitled to a certain amount of public lands, including 200 acres of land for church purposes. No patent for public land was given to the settlers for some time. A petition was finally presented by the inhabitants to the proprietors in 1696, which succeeded in securing the lands. The petitioners asked for "streets, market place", etc. The result was an order dated April 10, 1696, commanding the surveyor general to survey the parsonage land and other public places, and such survey was made. A patent was then issued for the land, granting it to four trustees, viz., John Curtis, John Treat, Theophilus Pierson and Robert Young, *habendum* to the grantees and their heirs "to the only proper use and benefit and behoof of the old settlers of the town of Newark, aforesaid, their heirs and assigns forever in common, granted to be and remain to and for the several uses herein particularly expressed and to be appropriated for no other use or uses whatso-

ever." The patent includes what is called the "parsonage lot," which was part of the tract originally set aside as commons and a part of another tract originally dedicated to public use, and by this time used for and known as the "burial place." The parsonage lot was considered part of the 200 acres granted for church purposes under the concession. The burial place is granted by the following description: "all that small tract allotted for a burying place, taking in the pond and meeting house, being 7 ch. in length and 4 ch. in breadth, bounded west by John Treat, south by John Johnson, north and east by highways."

The first and second meeting-houses of the town were erected on the front of this burying ground tract, and the remainder of the tract was used for burying purposes. Other public buildings were afterwards erected on the tract. At that time no church society was incorporated, and the meeting house was used in common and was as much a public matter as the court-house, jail, or schools. The First Presbyterian Church of Newark was incorporated June 7, 1753. The people of the town continued in possession of the burying ground and of the parsonage meadows as late as 1761. In 1760 the trustees of the first church procured from David Young, claimed to be the eldest son and heir of the surviving trustee, a deed that, it is insisted, included the parsonage land, and also the burying ground. This deed purported to be under authority of a town meeting, but the action in reference to the parsonage lands was disapproved at a meeting of the following year, and it was then declared to be the purpose of the inhabitants that the lands granted by the proprietors patent for the parsonage should be equally divided among the three churches then existing. The deed was not recorded until 1804, and it is not shown whether or not the inhabitants knew that it purported to include the burying ground. This burying ground tract included the land in controversy in this action. That tract was used for public burials until 1830. Prior to 1784, a portion of it, which was swampy and considered unfit for burial purposes, was taken possession of by the church and filled up. This portion also included the *locus in quo*. In 1784 that portion of the burying ground was leased by the church to Jesse Baldwin for the term of twenty-one years. Other lands in the vicinity were leased by the church to various lessees between that time and 1794. At this time the public authorities were in possession of that portion of the burial ground which contained the jail and jail garden. In 1890 the church corporation sold the church building to the chosen freeholders of Essex County, and the building was subsequently used as a court-house. In 1810 the land on which it stood, together with that on which the jail and jail garden was located, was conveyed by the chosen freeholders to trustees to sell and with the proceeds erect a court-house. Various acts of the legislature were passed after that time which affected the tract in some ways not material to this controversy, under the sanction of one of which the first church conveyed to other churches certain portions of the land, and by this conveyance the *locus in quo* was conveyed to the second presbyterian church, 24 L. R. A.

under which the defendant Watson now holds as tenant. Subsequently Van Buren Ryerson conceiving that as the old burying ground was granted by the proprietors upon the condition that it should only be used as a burying ground, and the condition having been broken that the land had reverted to the proprietors, bought the proprietary right for ten acres from Archer Gifford and caused a survey to be made in 1844 of the burying ground and other public lands in Newark. The board of proprietors refused to pass the survey. In December, 1844, an information was filed in chancery by him and others in the name of the attorney-general, setting out the encroachment on the public burying ground and the fact that the city had leased it, and praying that the city be enjoined from making that use of the land and that it be devoted to public use. Soon after the Act of March 3, 1848, was passed which purports to quiet the possession of so much of the old burying ground as was then occupied, and directs the mayor and council of Newark to protect and keep in repair the burying ground and its enclosures, with the proviso that the Act shall not affect any vested rights. Thereupon the Ryerson suit appears to have been dropped. On September 16, 1862, Ryerson's right in the burying ground was sold at sheriff's sale and bought in by one Halecy, who subsequently gave a deed of extinguishment to the city of Newark and the various churches and other persons having claim to the lands included in Ryerson's survey. The deed provides that the grantee shall hold the lands independently of the Ryerson title in the same manner as if the claim or title of Ryerson did not exist. In 1896 the city was authorized to devote to other public uses the land held for burial purposes and in 1887 the common council passed a resolution that the bodies should be removed and the ground appropriated for a country market. This action was then brought to obtain possession of that portion of the ground in possession of defendant Watson as tenant of the church.

Further facts appear in the opinion.

Messrs. Joseph Coult, Howard W. Hayes, and Cortlandt Parker, for plaintiff in error:

The title to the *locus in quo* vested in the city, under the patent of December 10, 1696, by the operation of the statute of uses.

The town of Newark was incorporated at the time the patent of December 10, 1696, was given, and the capacity to receive a grant of land.

Incorporation may be proved by evidence of the existence of a charter that has been lost; by the presumption arising from long continued use of corporate powers; or from the legislature recognizing the community as a corporate body.

1 Dill. Mun. Corp. chap. 4, § 84; *Londonderry v. Andover*, 28 Vt. 416; *Robie v. Sedgwick*, 35 Barb. 819; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *People v. Farnham*, 35 Ill. 562; *New Boston v. Dubarton*, 15 N. H. 201; *Stockbridge v. West Stockbridge*, 12 Mass. 399; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489.

If the town was so incorporated, it was capable of receiving that grant.

Dill. Mun. Corp. § 562.

A grant from the crown to a body of men incorporates them to the extent necessary for the enjoyment of the grant.

Thomas v. Dakin, 22 Wend. 94; 2 Kent, Com. 276.

A patent from a colonial governor has the same effect.

McKim v. Odom, 8 Bland, Ch. 416; *Society for Propagation of Gospel v. Pawlet*, 29 U. S. 4 Pet. 430, 7 L. ed. 927; *Denton v. Jackson*, 2 Johns. Ch. 320, 1 L. ed. 894; *North Hempstead v. Hempstead*, 2 Wend. 109.

Even if Newark was not incorporated at the date of the patent, the fee under the patent would remain in abeyance and vest in the town at the time of its incorporation in 1718.

Reformed Prot. Dutch Church in Schenectady v. Veeder, 4 Wend. 494; *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. ed. 450; *Shapleigh Town Proprs. v. Pillsbury*, 1 Me. 271; *Vincennes University v. Indiana*, 55 U. S. 14 How. 268, 14 L. ed. 416; *Pawlet v. Clark*, 18 U. S. 9 Cranch, 292, 8 L. ed. 735; *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452.

It was contended at the trial that the statute of uses did not apply to a conveyance of this kind, that the municipality would be a trustee for the public, and that the effect of vesting the use in it would be only to transfer the fee from one trustee to another.

The answer to that contention is, that the first grantees are not declared by the deed to be trustees for the public.

The municipality is not a trustee for the inhabitants. It is the representative of the inhabitants, the legal entity, of which the inhabitants are the component part. In the eye of the law it is the inhabitants.

Reformed Prot. Dutch Church in Schenectady v. Veeder, *supra*; *First Parish in Melford v. Medford*, 21 Pick. 199; *Price v. Plainfield*, 40 N. J. L. 608; *Denton v. Jackson*, 2 Johns. Ch. 320, 1 L. ed. 894.

Whenever it is possible, a conveyance will always be deemed to take effect at common law and not under the statute.

2 Preston, Conveyancing, p. 483.

If the English statute of uses was not in force in the colony, at the time of this patent, or present statute of uses, which was enacted in 1714, would vest the estate in the *cestui que use*, as it applies to uses theretofore created and then existing.

If the legal title to the *locus in quo* did not vest in the town under the statute of uses, a surrender of the legal title by the trustees to the town will be presumed to have been made in 1718 at the time of its incorporation under the charter from Queen Anne.

Lade v. Holford, Bull. N. P. 110; *Doe v. Staple*, 3 T. R. 644; *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 T. R. 2; *Hillary v. Waller*, 12 Ves. Jr. 289; *Doe v. Wrights*, 2 Barn. & Ald. 710; *Emery v. Grocok*, 6 Madd. 41; *Garrard v. Tuck*, 8 C. B. 281; *Doe v. Langdon*, 13 Q. B. 710; *Sugden, Vendors & Purchasers*, 9th ed. p. 470; *Den v. Bordina*, 20 N. J. L. 894; *Hill, Trustees*, 1st Am. ed. p. 256; *Brown v. Combs*, 29 N. J. L. 86; *Somer-ville Comrs. v. Johnson*, 36 N. J. Eq. 211; *French v. Edwards*, 88 U. S. 21 Wall. 147, 22 24 L. R. A.

L. ed. 594; *Lincoln v. French*, 105 U. S. 614, 26 L. ed. 1189; *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; *Jackson v. Moore*, 18 Johns. 513, 7 Am. Dec. 898; *Moore v. Jackson*, 4 Wend. 58; *Reformed Prot. Dutch Church in Garden Street v. Mott*, 7 Paige, 77, 4 L. ed. 67, 32 Am. Dec. 613; *Mattheus v. Ward*, 10 Gill & J. 443; *Demeyer v. Legg*, 18 Barb. 14; *Aikin v. Smith*, 1 Sneed, 304; *Waggener v. Waggener*, 8 T. B. Mon. 542; *Schauber v. Jackson*, 2 Wend. 14; *Ricard v. Williams*, 20 U. S. 7 Wheat. 59, 5 L. ed. 398; *Jeffreys v. Machu*, 29 Beav. 344.

Even if the legal title is not in the city, it has such a beneficial use in, and right to possession of, the *locus in quo* that ejectment will lie.

Dummer v. Den, 20 N. J. L. 86, 40 Am. Dec. 213; *Jersey City v. Morris Canal & Bkg. Co.* 12 N. J. Eq. 547; *Hoboken M. E. Church Trustees v. Hoboken*, 33 N. J. L. 18, 97 Am. Dec. 696; *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540; *Price v. Plainfield*, 40 N. J. L. 608; *Barclay v. Howell*, 31 U. S. 6 Pet. 493, 8 L. ed. 477; *North Hempstead v. Hempstead*, 2 Wend. 109.

The deed from David Young to the trustees of the First Presbyterian Church, made March 18, 1760, did not attempt to convey the *locus in quo*.

The Act of 1804 did not affect the legal title to the premises in question.

This proviso does not have the effect of vesting the title of the land excepted by it.

Wayman v. Southard, 23 U. S. 10 Wheat. 1, 6 L. ed. 253; *Minis v. United States*, 40 U. S. 15 Pet. 423, 10 L. ed. 791; *Portland Sav. Inst. v. Makin*, 23 Me. 380; *Detroit v. Detroit & E. Pt. Road Co.* 12 Mich. 333; *Pearce v. Bank of Mobile*, 33 Ala. 693.

The Acts of 1825 and 1849 do not attempt to vest the title to this land in the church not to extinguish the city's right of possession.

If the first church did not have the title to the land under the act, no title would pass by their conveyance, notwithstanding the recital in the preamble that the title to the parsonage and part of the burying place is vested in the first church. The preamble does not attempt to vest the title. It is not part of the enacting clause and has no enacting force.

Sedgwick, Stat. & Const. L. p. 48; *Dwarris, Stat. p. 656*; *Oreapigny v. Wittenoom*, 4 T. R. 790; *Emanuel v. Constable*, 3 Russ. 436; *Rea v. DeBerenger*, 3 Maule & S. 6; *Elmondorf v. Carmichael*, 4 Litt. (Ky.) 473, 14 Am. Dec. 86; *Parmelee v. Thompson*, 7 Hill, 77; *Polini v. Gray*, L. R. 12 Ch. Div. 411.

Even if the legal title is not in the plaintiff the beneficial use in, and right to the possession of, the premises is a property right, and could not be taken away or extinguished by the legislature without the consent of the municipality. Such action of the legislature would be invalid, as (a) taking private property without compensation, and for private purposes; (b) impairing the obligations of the contract contained in the patent of December 10, 1696.

People v. O'Brien, 2 L. R. A. 255, 111 N. Y. 1; *State v. South Orange*, 55 N. J. L. 254; *Terrett v. Taylor*, 18 U. S. 9 Cranch, 43, 3 L. ed. 650; *Pawlet v. Clark*, 18 U. S. 9 Cranch,

292, 8 L. ed. 785; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *New Orleans v. United States*, 85 U. S. 10 Pet. 662, 9 L. ed. 578; *Maryland v. Baltimore & O. R. Co.* 44 U. S. 8 How. 534, 11 L. ed. 714; *East Hartford v. Hartford Bridge Co.* 51 U. S. 10 How. 511, 13 L. ed. 518; *Tippacanoe County Comrs. v. Lucas*, 93 U. S. 108, 28 L. ed. 822; *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710; *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Essex Public Road Board v. Skinkle*, 140 U. S. 384, 85 L. ed. 446; *Ellerman v. McMains*, 80 La. Ann. 190, 81 Am. Rep. 218; *New Orleans v. New Orleans, M. & C. R. Co.* 37 La. Ann. 414; *Grogan v. San Francisco*, 18 Cal. 590; *Hart v. Burnett*, 15 Cal. 580; *Payne v. Treadwell*, 16 Cal. 222; *Bailey v. New York*, 8 Hill, 581, 38 Am. Dec. 669; *Benson v. New York*, 10 Barb. 228; *People v. Vanderbilt*, 20 N. Y. 287; *People v. Kerr*, 27 N. Y. 188; *Darlington v. New York*, 81 N. Y. 164, 88 Am. Dec. 248; *New York v. Second Ave. R. Co.* 32 N. Y. 261; *Webb v. New York*, 64 How. Pr. 10; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Detroit v. Detroit & H. Pt. Road Co.* 43 Mich. 140; *New Gloucester School Fund Trustees v. Bradbury*, 11 Me. 118, 26 Am. Dec. 515; *Western Sav. Fund Soc. of Philadelphia v. Philadelphia*, 81 Pa. 175, 72 Am. Dec. 730; *Hampshire County v. Franklin County*, 16 Mass. 76; *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 93; *State v. Haben*, 23 Wis. 680; *Richland County v. Lawrence County*, 12 Ill. 1; *Armstrong v. Dearborn County Comrs.* 4 Blackf. 208; *State v. St. Louis County Ct.* 34 Mo. 546; *Louisville v. Louisville University Trustees*, 15 B. Mon. 642; *Poultney v. Wells*, 1 Aik. 180; *Montpelier v. East Montpelier*, 27 Vt. 704, 29 Vt. 12, 67 Am. Dec. 748; *Atkins v. Randolph*, 31 Vt. 226; *Daniel v. Memphis*, 11 Humph. 582; *Aberdeen v. Saunderson*, 8 Smedes & M. 663; *Aberdeen Female Academy Trustees v. Aberdeen*, 21 Miss. 645.

Neither the statute of limitations nor adverse possession can be a defense to this action.

Cross v. Morristown, 18 N. J. Eq. 305; *Tainter v. Morristown*, 19 N. J. Eq. 46; *State v. Trenton*, 36 N. J. L. 198; *Price v. Plainfield*, 40 N. J. L. 608; *Jersey City v. American Dock & Imp. Co.* 54 N. J. L. 215; *Leasing v. United N. J. R. & Canal Co.* 54 N. J. L. 576; *Hunter v. Sandy Hill*, 6 Hill, 407; *Langley v. Gallipolis*, 2 Ohio St. 108; *Com. v. Fisk*, 8 Met. 288; *State v. Atkinson*, 24 Vt. 448; *Watertown v. Cowen*, 4 Paige, 510, 3 L. ed. 536, 27 Am. Dec. 80; *State v. Cullin*, 43 Vt. 530, 28 Am. Dec. 230; *Com. v. Alburger*, 1 Whart. 469; *Com. v. Rush*, 14 Pa. 186; *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *Com. v. Gowen*, 7 Miss. 878.

The municipality is not estopped by any acts or admissions of its officers.

Mills v. Los Angeles, 90 Cal. 522; *Rossie v. Boston*, 4 Allen, 57; *St. Louis v. Gorman*, 29 Mo. 593, 77 Am. Dec. 586; *Buena Vista County v. Iowa Falls & S. C. R. Co.* 46 Iowa, 226; *Hays v. McCormick*, 83 Iowa, 89; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Seeger v. Mueller*, 183 Ill. 86; *Stimpot v. Dubuque*, 49 Iowa, 630.

Mr. Frederic W. Stevens, for defendant in error:

The defendant's legal title is as follows:

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The proprietors, by their patent of December 10, 1696, granted the "burying place" and certain other lands to four trustees and their heirs, to the use of the old settlers of the town of Newark, their heirs and assigns forever. David Young, eldest son and heir-at-law of Robert Young, the survivor of those trustees, on March 30, 1760, granted the burying place and the parsonage land to the trustees of the First Presbyterian Church in Newark, to hold on the same trust that he held. In 1804, the legislature enacted that the estate vested in the original trustees by the patent of December 10, 1696, should thereafter be vested in the inhabitants of the township of Newark, with a proviso to the effect that nothing therein contained should extend to the parsonage lands or "to such parts of the burying ground . . . as have either been leased or sold by the trustees of the First Presbyterian Church in Newark" previous to January 1, 1804.

Up to 1825 the land so leased continued subject to the use impressed upon it by the patent of 1696; but in that year the legislature authorized its conveyance to the defendant and to three other churches for a different use, viz.: "solely and forever for the support of the gospel in the said congregations . . . and for no other use or purpose." A conveyance to this use was actually made to defendant in 1827. In 1848 the legislature again interposed and declared that the occupation of such parts of the ground as were then occupied for purposes other than as a burying ground should remain undisturbed.

The use at the time it was created in 1696 was treated as a religious use, and was so regarded by the successors to the parties for more than one hundred years thereafter. If this be so, then there is not the slightest foundation for the assumption by the city that it exclusively, and not the church, was the proper conservator of it.

The governor and council, the agent and representatives of the proprietors, were not authorized by those grants and concessions to give land for a "burying place," if such gift differed in anything but name from a gift of land for a church, with its then invariable concomitant or appurtenance, a churchyard. When the grant was made the church and churchyard were there, and the grant was intended not to alter, but to confirm, the existing order of things and establish it upon legal foundations.

Gilbert v. Buzzard, 3 Phillm. 348; 2 Co. Inst. 487; Burn, Eccl. Law, title *Burial*, 253.

"At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish were vested in the parson."

1 Bl. Com. 470.

How completely the idea that the churchyard was as sacred as the church, had taken hold of the minds of men appears from its use as a sanctuary by those who fled thither from the pursuit of justice.

Burn, Eccl. Law, title *Church*, ed. 1843, 394.

In *Pew v. Cresswell*, 2 Strange, 1013, it is said, "for though interrupting the use of a churchyard, as a churchyard, is properly cognizable in the ecclesiastical court, yet the bounds of it,

which is matter of freehold, ought not to be determined there.

The old statutes speak the same language.

Stat. 13 Edw. I., chap. 6; Stat. 50 Edw. III.; Stats. 5 & 6 Edw. VI.; Burn, Justice, title *Church and Church-yard* 1, p. 864.

Such was the law of England, at the time of the settlement of Newark. The parish church-yard was the only Christian burial place.

The question of whether land is affected by a pious use does not depend upon the peculiar views of the particular congregation, but rather upon the nature of the use.

And if by the common and the statute law of England, as it existed when the province of New Jersey was settled, the church yard—in which stood the parish church—was deemed to have been devoted to a pious use, then the burial place, in the midst of which stood "the meeting house," must also be deemed to have been devoted to a similar use.

The grantees named in the patent of 1696 were a colorless body; they held some of the lands granted to pious uses, and some to municipal uses. Whether the use in the case of any given piece of land was parochial or municipal must therefore have been determined with reference to its inherent character.

Tyler, Am. Eccl. Law, § 969; *Re Brick, Presby. Church*, 8 Edw. Ch. 169, 6 L. ed. 618; *Richards v. Northwest Prot. Dutch Church*, 32 Barb. 42.

The trustees were interposed for the purpose of supporting the charitable use, which would otherwise have failed altogether, for want of a definite and competent person to take.

The land was, by the terms of the patent, "to be holder in free and common socage of us the proprietors, our heirs and assigns forever, as of the seignorie of East Greenwich, yielding and paying therefor unto us the proprietors . . . sixpence sterling monie of England, on every five and twentieth day of March, forever hereafter, in lieu and stead of all other services." Here was an active duty to be performed by tenants in socage, selected by the lords proprietors to do them service. This of itself would constitute the trust an active one, and would prevent the statute from operating, even if there were no other reason why it should not.

Paulmier v. Howland, 49 N. J. Eq. 367; *Meick v. Pidcock*, 44 N. J. Eq. 543.

It must have been at least a matter of doubt, whether a corporation, had there been one constituted, could have held, under the mortmain acts, except by special license, from the crown.

1 Greenleaf's Cruise, Digest, Real Prop. 53. If the use was, in 1696, deemed to be a religious use, and was so considered up to the year 1825, the church, having the legal title, was itself chargeable with the conservation of the public interests. The city has no superior right as against it. If the church commits a breach of trust, it can only be called to account for it in a court of equity.

Chambersburg v. Manko, 39 N. J. L. 496.

The legislature has an undoubted right to substitute for a charitable use that has become incapable of execution, another charitable use.

Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 4 L. R. A.

S. 51, 34 L. ed. 493; *Newark v. Stockton*, 44 N. J. Eq. 180.

Messrs. J. R. Emery, and Thomas N. McCarter also for defendants in error.

Van Syckel, J., delivered the opinion of the court:

The writ of error in this case brings up for review the judgment of the supreme court in an action of ejectment brought by the mayor and common council of the city of Newark against George Watson, as tenant, and the trustees of the Second Presbyterian Church of Newark, as landlords, to recover the possession of a small parcel of land in the city of Newark, which is part of a lot situate at the south-easterly corner of Broad and Market streets, in said city, and was originally designated as the "Old Burying Ground." This, with other lands, was conveyed by the proprietors of the province of East New Jersey, by deed dated December 10, 1696, to John Curtis, John Treat, Theophilus Pierson, and Robert Young to have and to hold to them, their heirs and assigns forever, to the only proper use, benefit, and behoof of the "old settlers of the town of Newark, for a burying ground, and to be appropriated for no other use or purpose whatsoever." On the 7th of June, 1753, George the Second granted a charter to the First Presbyterian Church, by which the society was incorporated under the name of the "Trustees of the First Presbyterian Church in Newark," with power to hold and convey lands. The town records of the town of Newark, under date of March 12, 1760, shows the following resolution: "Whereas, David Young, of Hanover, Morris county, is thought by some to be heir-at-law of our parsonage patents, as he is the heir of Robert Young, the oldest patentee, it is thought by some proper that this vote be put whether the trustees of the First Presbyterian Church at Newark shall apply to said David Young for a deed of conveyance to them in trust, that the said trustees may be the better enabled to be guardians for the same for said church." This vote was accordingly put, and the resolution unanimously passed. Prior to this time, a meeting house had been erected upon a part of the lands conveyed by the proprietors' deed, and Robert Young, who had survived the other trustees named in said deed, was also deceased, leaving the said David Young his oldest son and heir-at-law, surviving him. In pursuance of said resolution, David Young, on the 18th of March, 1760, executed a deed for a certain portion of said lands to the trustees of the First Presbyterian Church of Newark. The trustees of the First Presbyterian Church of Newark, by deed dated March 24, 1827, conveyed the same premises to the defendant the trustees of the Second Presbyterian Church of Newark. The plaintiffs deny that these deeds embrace the *locus in quo*. In my judgment, this contention is not well founded. The deed of March 18, 1760, describes lot 7 as "that small tract, allotted for the burying place, taking in the pond and meeting house." From this statement it appears that the meeting house was erected on the burying place, and that it was intended that the said conveyance should in-

clude the *locus in quo*. It is also clear that such was the understanding of the framer of the Act of 1825. This, however, is not material in the view which will be taken of this case. There is no doubt that the grantees in these deeds, as well as the inhabitants of the town, assumed that the title to the *locus in quo* passed by the deeds, as it is incontestably shown that from April 22, 1784, the premises in question have been occupied by tenants under leases from the First Church up to March 24, 1827, and since that date by tenants under leases from the Second Church.

On the 15th of February, 1804, the legislature passed an act entitled "An act to vest in the inhabitants of the township of Newark, in the county of Essex, a certain estate now in the hands of trustees." The first section of this act provided that the trust estate vested in the trustees named in the proprietors' deed of the 10th of December, 1696, should henceforth cease, and be void. The second section provided that the estate vested by said deed in the said trustees should be vested in the inhabitants of the township of Newark, as incorporated by law, and their successors, forever; and that they should be vested with the legal title as fully and absolutely as though they had been originally named in said deed in the place of said trustees; "provided also that nothing herein contained shall in any way extend to or affect the parsonage lands contained and particularly described and expressed in said grant; and also such parts of the burying ground mentioned and described in said grant as have either been leased or sold by the trustees of the First Presbyterian Church in Newark previous to the first day of January last; and also the ground on which the market in said town of Newark now standeth." The lot of which the *locus in quo* is part was leased by the trustees of the First Presbyterian Church to David Baldwin, April 22, 1784. By an act of the legislature passed November 4, 1825, the trustees of the first Presbyterian Church were authorized to convey said lands in fee to the trustees of the Second Presbyterian Church, and under and by virtue of that act the deed of March 24, 1827, was made to the latter church. At a town meeting held April 18, 1829, it was resolved that no more interments should be made in the old burying ground. On the 8d of March, 1848, the legislature passed an act which is of controlling importance in this case, the title of which is "An act requiring the mayor and common council of the city of Newark to protect and keep in repair the old burying ground in said city, and quieting the possession of such parts of said burying ground as are already occupied." The preamble recites as follows: "Whereas the old burying ground of the city of Newark hath for years ceased to be used as a place for burying the dead; and whereas it has so occurred by lapse of time, that a portion of the land originally allotted for the purpose of a burying ground, lying adjacent to the premises now designated by enclosures as the old burying ground, has been appropriated for other purposes, and has been improved for the most part by erecting thereon expensive buildings; and whereas it hath

been insisted that the portion of said ground appropriated and occupied otherwise than for a burying ground should be restored to the use for which it was originally set apart, and according to the trust to which it is alleged the same is subject, which would be attended with great inconvenience, and subject innocent purchasers to great pecuniary loss, and be of no public utility, inasmuch as the location of said ground renders it improper and inexpedient to make any further interment therein; and whereas it is desirable that the said burying ground, enclosed as aforesaid, should be protected, and that the occupancy of the portion occupied otherwise than for a burying ground should be quieted: Therefore, be it enacted by the senate and general assembly of New Jersey, that it shall be the duty of the mayor and common council of the city of Newark to protect and preserve the burying ground, as now enclosed as aforesaid, and the enclosures thereof; and that the occupation of such parts of said ground, originally allotted as aforesaid, as are now occupied for purposes other than as a burying ground as aforesaid, shall remain undisturbed, and that the mayor and common council of the city of Newark shall apply such proceeds and profits thereof as they may receive to the protecting and keeping in repair the burying ground aforesaid, and the enclosures thereof: provided nevertheless, that nothing in this act contained shall in any manner affect the vested rights, if any, of any person or persons in the said lands, independent of the said alleged trusts: and provided, that this act shall not confer any additional rights to any person or persons, as to the lands south of the town lot bordering on the said burying ground and which have within the last ten years been enclosed." Thus it appears that by the resolution of the town meeting in July, 1829, the *cestuis que trustent* refused to use the *locus in quo* for the only use to which it was held for them under the proprietors' deed, and the Act of the Legislature of 1848 provided that it should no longer be used for such purposes. The last mentioned act, after reciting that portions of the burying ground had been appropriated to other purposes, and improved for the most part by building thereon, and that it would be improper to make further interments therein, expressly enacts that such parts of said ground as are so occupied for other purposes shall remain undisturbed. The effect of this recital and provision was to constrain the city to abandon the only use for which it held this land. The Act of 1804 declares that the trust estate vested in the trustees by the deed of 1696 shall cease, and that the legal estate, as well as the beneficial use, shall be vested in the inhabitants of the township of Essex. This act does not purport to enlarge the uses, or to divert these lands from the uses, to which they were devoted by the deed of the proprietors; and I have found no limitation upon the power of the lawmaker to dispense with the necessity of a trustee in dealing with the rights of a public corporation. The effect of the proviso was to circumscribe the operation of the Act of 1804, so that it vested in the township the legal title to such lands

only as were not within the proviso. Under the rule for the construction of statutes, the proviso operated neither to convey lands within its terms, nor to discharge such lands from the trusts originally imposed. It was potent, however, to withdraw the premises mentioned in it from the effect of the body of the act, thereby excluding such lands from the legal estate granted by the act, and leaving the legal estate in them where it previously was, and subject to the public trusts which had been declared in the grant. But the Act of 1825 has a far wider range. It purports to authorize and validate a conveyance in fee by a municipal corporation to a religious body of lands, conveyed in trust to be used by such municipality for the sole purpose of a burying ground, not only thereby discharging the sole public use, but devoting the lands, in contravention of the owner's grant, to a wholly different and private charitable use. Whether any stable foundation can be found in the law for such legislation is very doubtful. The importance of the Acts of 1825 and 1848 is that the lands in controversy were thereby discharged from the trusts they were originally subject to. No title vested in the municipality under the original patent of 1696. That title first became vested in it by the Act of 1804. *Newark v. Stockton*, 44 N. J. Eq. 179. That act having excluded from its operation the lands now in question, the right of the township as to them was a right of possession merely, as incident and essential to the duty assumed for the protection and preservation of the dedicated premises, for the purpose of enabling the public to avail itself of the declared uses.

The questions, therefore, to be solved, are whether the legislature had the power, with the concurrence of the beneficial owners of the land, to abolish and prohibit the sole use for which such owners held it, and, if so, what consequences flow from the exercise of that power. The power of the legislature to restrain or prohibit the use even of private property in a way detrimental to the public health or safety is beyond dispute. The case of *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, shows how comprehensive and broad this power is. In that case the federal court declared that it was the province of the legislature primarily to determine whether the public health or morals required the exercise of this power, although it must be settled ultimately by the courts whether, in any given case, the legislature has exceeded its prerogative. All rights are held subject to the power of the state over the public health and morals. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 748, 28 L. ed. 585; *New Orleans Gas-Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516. It being competent for the legislature not only to change and modify political districts, but also to dissolve them at pleasure, its power to control and extinguish the uses to which property may be held by such political districts must be wider than that which pertains to the property of private persons. *Mr. Justice Depue*, in delivering 34 L. R. A.

the opinion of this court in *Hoboken Land & Imp. Co. v. Hoboken*, 85 N. J. L. 549, said that the legislature alone has the power to release the dedicated lands and discharge the public servitude when once it has attached. The rights of the legislature to forbid a municipal corporation to appropriate its lands within corporate limits to burial purposes is incontrovertible. Such enactments are not unconstitutional, either as impairing the obligation of contracts, or taking private property for public use without compensation. They are unassailable as an exercise of the police power. *Coates v. New York*, 7 Cow. 585; *Tiedeman, Pol. Powers*, 122. Whether there is any limitation upon this rule as applicable to private cemetery companies may present a different question. Where the absolute fee in lands is acquired by a municipal corporation, although with an expressed intention of using it for a special purpose, the property acquired may be applied by legislative authority to a wholly different public object; but, where the grant to the corporation is only for a specified use, the grantor retains the reversionary estate. *Heard v. Brooklyn*, 60 N. Y. 242. This is a familiar rule as applicable to lands dedicated for public highways, or taken under the power of eminent domain. In *Kent County Supra. v. Grand Rapids*, 61 Mich. 144, lands were donated to a county for county seat purposes, and the county seat was afterwards removed elsewhere. In an action of ejectment to recover possession of the lands, it was held that the county had no interest in them. In *Young v. Mahoning County Commrs.*, 51 Fed. Rep. 585, the lands were donated by the owner of the fee to a municipal body for a burying ground, and that body afterwards passed an ordinance prohibiting the further use of it for such purposes. The ordinance was declared to be a valid exercise of the police power, and also to operate as a complete abandonment of the dedicated use, by which the lands reverted to the original owner. This rule will not apply where the use can be enforced by an application to equity to compel a specific execution of the trust. The case before us is not within this exception. There is no power in a court of equity to compel an appropriation of the *locus in quo* to be made to burial purposes in contravention of the resolution of April 18, 1829, and the Act of 1848, before recited. There has been an actual and complete abandonment and prohibition of the use, and an inability on the part of equity to intervene, for more than forty years. By the absolute extinction of the sole use for which the plaintiffs held this land, the fee reverted to the original proprietors of East New Jersey; and, the title being thereby, after 1848, in the proprietors, and not in the plaintiffs, the statute of limitations began to run in favor of the defendants in ejectment in 1848. The sole use for which the trustees held the title under the proprietor's deed has long since been extinguished; and there has been no existing public right in the *locus in quo* since the passage of the Act of 1848, which impeded the running of the statute of limitations as against the proprietors, or as against the trustees and their heirs, if they

continued to hold the bare legal title, discharged of the public use. If we assume that the title did not revert to the proprietors, but that the legal title remained in the trustees, stripped of the trust, the result is not changed. The object of the proprietors' conveyance had wholly failed. The trust was barren, and its execution prohibited. There remained in the public no interest in the land to which the rule *nullum tempus* could apply. There was no public right to be saved, and nothing to hinder the running of the statute of limitations against the holders of the legal title.

My conclusion is that the defendants have acquired title by adverse possession under the seventeenth section of the Act for the limitation of actions, which provides that every action for lands shall be brought within twenty years after the right or title accrued. It also appears in the case that aside from the opera-

tion of the statute of limitations, the defendants have acquired the proprietors' title to the *locus in quo*. On the 9th of September, 1857, the proprietors granted to Van Buren Ryerson their title to the burying place. This title was sold in September, 1862, to Joseph A. Halsey, by the sheriff of Essex county, under a judgment and execution against Ryerson. Halsey, on the 1st day of July, 1865, conveyed to the trustees of the Second Presbyterian Church in Newark, the defendant in ejectment. This renders it unnecessary to discuss the important question whether the first section of the Act of June 5, 1787 (Rev. p. 598), which provides that sixty years' possession, actual and uninterrupted, shall vest a complete title to lands, will run against a municipal corporation.

The judgment below should be affirmed.

NEW YORK COURT OF APPEALS.

Sarah M. MYGATT *et al.*, *Appts.*,
v.

George S. COE, *Respnt.*

(142 N. Y. 73.)

1. An estate to which the husband's covenant of warranty can attach is transferred where he joins with his wife in a deed of land, of which neither has a valid title in fact, although she has color of title, of which he is in possession while his wife occupies the premises with him, and on their joint conveyance he delivered the possession to the grantee and shared in the purchase money,—especially where his covenant is not only with the grantee, but with her "heirs and assigns."

2. Purchasers at a foreclosure sale are in privity with the mortgagor's grantor so as to be able to maintain an action against him for breach of the covenants in his deed.

(April 10, 1904.)

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of defendant in an action brought to enforce the alleged liability of defendant upon covenants in a certain deed. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Edward M. Grout, for appellants:

If the defendant be liable at all, the plaintiffs are entitled to enforce that liability.

Christ Prot. Episcopal Church v. Mack, 93 N. Y. 488; *Mygatt v. Coe*, 11 L. R. A. 646, 124 N. Y. 212.

The facts now shown of the defendant's possession, his conveying, his receiving the purchase price, his delivering possession, and his covenants of warranty and quiet enjoyment to

the heirs and assigns of the grantee, create a privity between the parties upon which the plaintiffs can recover.

The intention of the defendant in making the covenants is of the first importance. He did not do it as an idle form. His agreement, for a consideration whose receipt he acknowledges, was to warrant, not only his grantee, but her heirs and assigns, in the possession of the premises. Can the court now say that this meant only the grantee, and that the words "heirs and assigns" are merely surplusage?

Dexter v. Beard, 180 N. Y. 549; *Clark v. Deos*, 124 N. Y. 120; *Beddos v. Wadsworth*, 21 Wend. 120.

That the defendant was in possession, assumed to convey title, and delivered the possession, is sufficient to make his covenants run with the land, and inure to the benefit of these plaintiffs.

Slater v. Rawson, 1 Met. 450; *Mygatt v. Coe*, 11 L. R. A. 646, 124 N. Y. 221; *Rawle, Covenants for Title*, 5th ed. § 233; *Wilson v. Widenham*, 51 Me. 566; *Dickson v. Denire*, 23 Mo. 151; *Fields v. Squires*, 1 Deady, 389; *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149.

"Privity" is merely successive relationships to the same rights of property.

19 Am. & Eng. Encyclop. Law, p. 156.

Mr. William J. Gaynor, with *Meers*, Charles P. Buckley and William W. Buckley, also for appellants:

Being in possession, Coe joined with his wife in the actual conveyance of the land to Mrs. Fisher.

He joined in the conveyance as an actual grantor. His act must be given its full significance. If he was a stranger to the true title, so was his wife, and that fact could help neither of them. He had as much title as she had, and he was in possession, and delivered possession.

That the covenant of seisin is that the wife was seised does not detract from the force of his covenants of warranty and quiet enjoyment.

Thompson v. Simpson, 128 N. Y. 270.

Wherever an obligation is undertaken by two or more, or a right given to two or more, it is

NOTE.—See, in connection with the above opinion, the discussion by the judges of the second division when the case was before them at a former term, 11 L. R. A. 644.

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the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but on the other hand, there should be words of severance, in order to produce a several responsibility or a several right.

Parsons, Cont. chap. 2, § 1.

The word "assigns" so used always means devisees or grantees. The words "heirs and assigns" as meaning heirs, devisees, and grantees, are of ancient use. They have been so used in conveyancing from the beginning.

8 Washb. Real Prop. 5th ed. § 2, subsec. 2, p. 6.

These covenants ran with the land because they were in terms between the parties and their respective heirs and assigns, were connected with the subject of the grant, and entered into the value thereof.

Nye v. Hoyle, 120 N. Y. 195; *Clement v. Burris*, 121 N. Y. 708.

The words "heirs and assigns" used in the making of such covenants are prospective.

They are intended to connect the covenantor by contract not merely with his immediate grantee, but with all of his successors in title; to put the covenantor by contract in privity with every successive grantee, and to allow the last grantee to directly sue the first covenantor in the chain for a breach of the covenants.

Coleman v. Bresnahan, 54 Hun. 619; *Andreus v. Appel*, 22 Hun. 429; *Ernst v. Parsons*, 54 How. Pr. 163; *Boyd v. Belmont*, 58 How. Pr. 514; *Colby v. Osgood*, 29 Barb. 389; *Preiss v. Le Poiderin*, 19 Abb. N. C. 123.

They mean that each covenant "should be construed as perpetual, and as a covenant running with the land."

Hart v. Lyon, 90 N. Y. 668; *Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91.

If the former record had shown that the covenants in express words put the last grantee in privity with the first covenantor, can one suppose that the court would have said there was no such privity? that such grantee could not sue on the covenants, but that they were owned by Mrs. Fisher, her executors or personal assigns?

Such privity is sufficient, however created. *Lawrence v. Fox*, 20 N. Y. 268; *Gifford v. Corrigan*, 6 L. R. A. 610, 117 N. Y. 257; *Van Schnick v. Third Ave. R. Co.* 38 N. Y. 346; *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 582; *Hand v. Kennedy*, 83 N. Y. 149.

If they did not so go down the chain, then after Mrs. Fisher made her conveyance, the defendant could have acquired the true title from the Howell heirs, and in the face of his said covenants with her, and her heirs and assigns, of the land, ejected the last grantee.

If one who so covenants have not the title when he covenants but afterwards acquires it, it inures to the last grantee in the chain of title under him.

Thompson v. Simpson, 128 N. Y. 270; *House v. McCormick*, 57 N. Y. 310; *Tefft v. Munson*, 63 Barb. 31; *White v. Patten*, 24 Pick. 324; *Trull v. Eastman*, 3 Met. 121, 37 Am. Dec. 126.

The sense in which we say that the covenants of warranty and quiet enjoyment in conveyances of real property become attached to and run with the land is that they attach to and run

with the title which the grantor assumes to convey, by sticking to the land as possession of it is successively delivered though in fact the grantor is a stranger to the true title.

Norman v. Wells, 17 Wend. 136; *Bally v. Wells*, 3 Wils. 25.

The cases laying down the common-law rule that as a covenant of seisin is broken, if ever, on the delivery of the deed, it therefore does not pass by subsequent conveyances, help to illustrate the rule.

Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; *Hamilton v. Wilson*, 4 Johns. 72, 4 Am. Dec. 253; *Abbott v. Allen*, 14 Johns. 248.

That such covenants after breach did not go down the chain, however, never was the common-law rule in England, and it is not the prevailing rule in this country.

Wavell, Vendors, p. 939, and note; Devlin, Deeds, § 940.

If the covenant be co-extensive with the estate demised, and respect the thing, and be made with the party and his assigns, it passes with the land.

Norman v. Wells, supra; 2 Washb. Real Prop. 5th ed. § 1, subsec. 16, p. 298; *Nye v. Hoyle*, 120 N. Y. 195; *Hart v. Lyon*, 90 N. Y. 668; 1 Rev. Stat. § 2, p. 748.

Mr. William S. Cogswell, with *Mr. Lyman B. Bunnell*, for respondent:

The subject-matter of this action is *res judicata*.

Mygatt v. Coe, 11 L. R. A. 646, 124 N. Y. 212.

Unless the decision of the court of appeals is to be disregarded, the judgment must be affirmed, because the case now presented for review is the same that was passed upon by that court.

McCracken v. Flanagan, 141 N. Y. 174.

Any married female may take and hold to her sole and separate use, and convey and devise real and personal property with the like effect as if she were unmarried.

Laws 1849, chap. 375.

Since the passage of that act, the husband is as much a stranger to the title of his wife's property as any third person would be.

Ganley v. Troy City Nat. Bank, 93 N. Y. 487; *Martin v. Rector*, 101 N. Y. 77; *Parker v. Collins*, 127 N. Y. 185; *Kavanagh v. Barber*, 15 L. R. A. 689, 181 N. Y. 211.

If the covenants of the respondent ran with the land and passed to Nancy Fisher's grantees by her conveyance, the appellants never acquired any right to them.

Tiedeman, Real Prop. § 860; *Willard*, Real Estate, p. 414.

Finch, J., delivered the opinion of the court:

It is our duty to follow and abide by the decision of the second division of this court made in the case at bar when it was before them on appeal, so far as the facts found, and the questions determined, are identical. *Williamsburgh Sav. Bank v. Solon*, 136 N. Y. 465; *Cluff v. Day*, 141 N. Y. 690. Reserving freedom of thought and action when the case becomes a precedent, only, we must here and now, in the same action between the same parties, accept without criticism what has been decided. It is claimed, however, the

upon the last trial new evidence and new findings have totally changed the situation, and introduced questions not previously considered or decided, and that the plaintiffs may now succeed without in the least impugning or contradicting the prior determination. It is to such inquiry that our attention should be principally directed, and it may usefully be preceded by an examination of the points which must be deemed to have been involved in the prior decision.

Our brethren of the second division disagreed among themselves (*Mygatt v. Coe*, 124 N. Y. 212, 11 L. R. A. 646), as was not strange, in view of the fact that the question brought to their judgment a judicial quarrel almost as venerable as the common law itself, and open yet to vigorous dispute, Rawle, *Covenants*, [5th ed.] § 208, *note 2*. The majority of the court held that privity of estate is essential to carry covenants of warranty to subsequent grantees so as to support a right of action by them against the original covenantor whenever evicted by a title paramount to his; that a covenant of warranty made by one having neither title nor possession, and so no estate in the land, will not run with it into the hands of subsequent grantees, but will stop where the privity of contract ends, and so at the first or original covenantee; and that the covenant of Coe, the husband, upon which this action is founded, was that of a stranger to the title,—an independent and collateral warrantor,—having and transferring no estate in the land, and so in no sense or degree a privy in estate with the subsequent grantees. The point of the decision is emphasized, and made clear, by the dissent of the minority. They advocated the doctrine that privity of estate is not always essential to carry the covenant down the line of successive grantees, and that one who conveyed nothing, but covenanted much, like the prior of the covenant who promised perpetual song to the manor chapel, might find his covenant attached to the land, and running with it into the hands, and for the benefit, of successive owners. But, while holding and defending this doctrine Judge Bradley, who wrote the dissenting opinion, did not press the point, or rely upon it as the ground of ultimate decision, but insisted that Coe, the covenantor, was not a stranger to the title, because he joined with his wife as a grantor, and assumed to unite with her in transferring to Mrs. Fisher the estate which actually passed. The precise point of disagreement was thus over the attitude and position of the husband in making the conveyance; and the decisive question became whether he did or did not transfer an estate,—some estate,—to which his covenant could attach, and run with it down the line of transfer. The facts which dictated the conclusion of the majority are carefully stated in the opinion of Judge Pollett who expressed their views. He adverted to the circumstances that the deed from Coe and his wife was not spread upon the record, and might contain something not fully or accurately described in the findings. These, however, showed that the land was conveyed to Mrs. Coe by a deed from an assumed

owner, running to her severally, and in her own individual right, and that while her husband did join with her in the conveyance to Mrs. Fisher, their covenant of seisin was, not that he was seised or that they were seised, but that she was seised of a full estate in the land. While the joint grant indicated title in the two, and some estate in each, as the minority claimed, the form of the joint covenant asserted seisin in the wife alone, which the majority took for the truth. To such last inference the prevailing opinion awarded a predominant force, for several expressed reasons. One was that the proof and the findings failed to show any possession in Coe, beyond a mere occupancy by the sufferance of his wife, or any transfer of possession by him to Mrs. Fisher. The words of the opinion are these: "The defendant having no estate, title, or interest in, or possession of, the land conveyed, there could be no privity of estate between him and Nancy Fisher." A second reason was that it did not appear that Coe received any part of the consideration paid by the grantee. The language of the opinion in this respect, is: "And it was conceded on the argument in this court that it does not appear whether the defendant received the whole or any part of the consideration of the deed." It is thus obvious that the inference of neither title nor possession in Coe, the husband, drawn from the form of the covenant of seisin, was allowed to prevail because no other fact in the record necessarily contradicted it.

But now three such facts make their appearance in the findings, and force from us a different inference. Referring to the deed from Coe and his wife to Mrs. Fisher, the tenth finding of fact is as follows: "That, when the said conveyance was so made and delivered, the defendant was in possession of the said real property, consisting of a plot of land with a dwelling house thereon, being there domiciled and residing with his family." And the eleventh finding is: "That, upon the execution and delivery of the said conveyance, the defendant moved out of the said premises, and surrendered the same to the said grantee, who thereupon went into possession of the same." We do not and cannot know upon what proof or upon what facts these findings were based, for none of the evidence given is contained in the record. We are obliged to assume that sufficient and competent proof produced them, and that they are, in all respects, strictly true. Nor can we narrow or modify them by recurring to the form of the covenant and of the deed running to Mrs. Coe alone. At best, these only raised certain presumptions, but presumptions existing from the absence of any contrary facts. Coe's covenant that his wife was seised justified the presumption that he had no possession, and the maxim that "possession follows the deed" is expressive only of the presumption which the law raises when there is no proof of the actual facts. *Pratt v. Ireland*, 66 Barb. 389. But these presumptions give way before the proven truth. They fall when the facts themselves are shown, and we cannot indulge a presumption that Coe was not in possession, in the face of a finding

that he was, or that he did not transfer the possession to Mrs. Fisher, when the explicit finding is that he did. I tried for a time, in my reflections, to think that the learned trial judge may have used the word "possession" in the improper but harmless sense of occupation, but swiftly saw that I had no warrant to change his words, and that there could be no doubt that he used them carefully, and in their full legal significance, for the circumstances strongly point to that as the truth. The case had been before the second division. Both opinions pointed out the vital importance of the inquiry whether Coe had possession, or transferred it to Mrs. Fisher; and the action was retried, and the present findings made, in the full light of those opinions. It is not conceivable, under such circumstances, that the learned trial judge carelessly or inaccurately found as a fact that Coe was in possession, or failed to appreciate the full force of the finding; and that is made more obvious by the fact that in the second finding the wife is said to have entered into the "occupancy" of said premises, and continued "in such occupancy" until her conveyance. When the learned trial judge, with his attention fully drawn to the significance of his words, has found that the husband was in possession, and the wife an occupant, merely, by what right shall I, or any of us, reverse his finding into one that the wife was in possession, and the husband only an occupant? We are bound by the finding, and must give it the full and lawful force which belongs to it. If, on a third trial, the fact is found the other way, and should compel a different decision at our hands, it will not be the first time that contradictory findings of fact have enabled ignorance, supposing itself to be wisdom, to charge upon us a seeming inconsistency; but the circumstance will not alter our duty in the least.

A second fact now appears, the absence of which was noted in the prior decision. The answer of the defendant alleges that no consideration was paid to or received by him for "uniting with his wife" in the deed to Mrs. Fisher. But he did not prove that allegation on the trial, for there is no finding of that fact, and not even a request to find it. On the contrary, the deed which he executed is now transcribed in the findings, and it contains the explicit admission that the consideration of \$18,500 was "to them in hand paid;" that is, to the two parties,—to the husband and wife both.

At this stage of the case the facts stand thus: That, at the date of the conveyance to Mrs. Fisher neither Coe nor his wife had a valid title to the land; that he was in possession, and his wife occupied the premises with him; that she had color of title, but he not even that; that the two assumed, as joint grantors, to convey the land to Mrs. Fisher; that Coe delivered the possession to her, which was the only estate which either grantor had, or which they could convey; and that Coe shared in the purchase money paid for the grant. On that state of facts, I do not see how it is possible to say that Coe was a stranger to the title, or transferred no estate

to which his covenant of warranty could attach. But, before pausing upon that proposition, I should bring into the discussion the third new fact, which makes its appearance for the first time; that is, that, in and by the deed, Coe explicitly, and in terms, covenanted, not only with Mrs. Fisher, but with her "heirs and assigns." In other words, he meant and intended his covenant to protect, not only her, but also those who should come after her by succession to the ownership of the same land. The significance of those words will better appear if we refer back to the early history of these covenants: Originally, the common law did not permit the assignment of things in action, and it followed that a covenant, regarded from the direction of a contract, could not pass beyond the covenantee. But the old warranty seems to have been viewed rather as an incident of, and as belonging to, the estate conveyed, and so attached to that estate as to go with it when transmitted. It could not pass to assigns, as an independent contract, but, by its connection with an estate in land, became transmissible with it. Out of that peculiarity sprang the necessity of privity of estate to enable the subsequent assignee to vouch, or call on his predecessor for protection; but it was an element of the doctrine that neither the heir nor the assign of the grantee could take advantage of the warranty, unless expressly named. Rawle, Covenants for Title, § 208. As was said, if one "warrant land to a man and his heirs without naming assigns, his assignee shall not vouch." Co. Litt. 84b. That rule was not applied when the warrantor, instead of substituting other lands, became bound only to respond in damages; but, while the necessity has disappeared, the actual use of the words continues to indicate the purpose and intent of the warrantor that his covenant shall not stop with the covenantee, but operate for the benefit of his grantees; and though the use of the words, possibly, may not dispense with some privity of estate, they show that the warrantor regarded himself as making, and intending to make, a covenant running with the land, and that, in holding him to that responsibility, we do not put upon him a liability which he did not contemplate. The force belonging to such words is indicated in many recent cases (*Nye v. Hoyle*, 120 N. Y. 208; *Coleman v. Bresnahan*, 54 Hun, 622; *Hart v. Lyon*, 90 N. Y. 663); and while they are more important, and bear more heavily upon the theory that a covenantor having no estate may, by his own special and intended contract, attach his covenant of warranty to the estate of another, so as to run with that estate, yet they are entitled to weight and consideration, also, upon the narrower inquiry whether the defendant here is or is not to be deemed an entire stranger to the title, and they yield an inference which balances somewhat that drawn from the covenant of seisin.

And thus it is apparent that the facts in the present record differ, in material and essential respects, from those presented on the previous appeal. It is certainly the law of this state that one in possession of land, merely, without other actual title, has an

estate in the land which he may transfer to a grantee, and which is sufficient to carry with it his covenant of warranty down the line of succession. That was explicitly held in *Beddoe v. Wadsworth*, 21 Wend. 124; and I have found no case in this state to the contrary, and no reason to doubt the soundness of the doctrine. We have here, then, a situation in which the defendant was in possession of land, and so had an estate in it; where he assumed to transfer it as grantor by deed; where he transferred his possession to the grantee; where he received in exchange some part or the whole of the consideration of the grant; where his wife, who joined in the deed, had no better title than his, whatever he may have thought about it; where he meant and intended that his warranty should run to assigns, and expressed that intention on the face of his covenant. It is impossible, on such a state of facts, to deem him a stranger to the title, and merely an independent covenantor. We must hold that he had and transferred an estate to which his covenant of warranty could and did attach, and in so holding we contravene nothing which was decided on the previous appeal.

Mrs. Fisher, in December of 1869, mortgaged the premises conveyed to her by Coe and wife to the trustees of Sarah M. Mygatt, and in 1871 conveyed the property to Fuller, who in turn conveyed it to Clara B. Leavitt by deed dated in 1874. In November of 1878 the true owners, in an action of ejectment, evicted Mrs. Leavitt, and went into possession. In the following December, suit was brought on the Mygatt mortgage for a foreclosure; and on the sale in 1879 the mortgagees became purchasers, and received the referee's deed. Since the covenants ran with the land, and those of them which were prospective were not broken, and turned into mere rights of action, until after the delivery of the mortgage to the Mygatt trustees, and the deed of the equity of redemption to Fuller and Mrs. Leavitt, it becomes necessary to determine to whom the covenants ran, as between the mortgagees, on the one hand, and the grantees of the mortgagor, on the other. That has been sometimes a difficult and troublesome question, and logically is so yet, although I deem it substantially settled. Under the old system, which regarded the mortgage as transferring to the mortgagee the entire legal estate, leaving in the mortgagor only an equity which courts of law could not recognize, it was necessary to say, and was said, that the covenants running with the

land followed the legal estate into the hands of the mortgagee, where it remained entire and complete; and the grantees of the equity, having no legal estate, could have no right to the covenants, which already belonged to another. It was so held in *Carlisle v. Blamire*, 8 East, 487, but the injustice of the doctrine drew upon the ingenuity of equity to supply a remedy; and where the grantee holding covenants had executed a mortgage, and thereafter, having been evicted from the premises by a paramount title, his grantor and covenantor settled with the mortgagee by paying the mortgage, in full discharge of the covenants, and so assuming to cancel them, the grantee was allowed by a decree in equity to sue the covenantor at law, and the latter was restrained from setting up as a defense, in any manner, the deed or deeds of mortgage which had diverted the covenants from the main line of succession. *Thornton v. Court*, 3 De G. M. & G. 293. By this circuitous route the just result was reached of dividing the benefit of the covenants between mortgagee and owner of the equity of redemption according to their respective rights, and the same just distribution is effected under our system by a different process. We regard the mortgagor as retaining the legal estate, and the mortgagee as having a lien upon it for his security. The covenants therefore run to both mortgagee and grantee of mortgagor in proportion to their respective rights, and the covenant is divisible accordingly. A very clear exposition of this doctrine will be found in *White v. Whitney*, 3 Met. 87, and it has been asserted in this state in *Town v. Needham*, 8 Paige, 546, 8 L. ed. 269, 24 Am. Dec. 246, and *Andrews v. Wolcott*, 16 Barb. 25.

By the foreclosure of the mortgage the purchasers at the sale have become, alone, entitled to sue upon the prospective covenants contained in the deed given by Coe, and, on the facts now before us, can successfully maintain the action upon the ground that there does exist between them and the covenantor a privity of estate. Whether, without that, the covenantor would still be bound, upon the theory that by his contract he consciously and intentionally attached his covenants to the land of his wife, and privity of estate with the original covenantee alone is sufficient, it is not necessary, at present, to decide. The judgment should be reversed, and a new trial granted; costs to abide the event.

Judgment affirmed.

All concur, except *Gray, J.*, not voting.

KANSAS SUPREME COURT.

Alfred BLAKER, Exr., etc., *Plff. in Err.*,

HOOD & KINCAIDS *et al.*

(.....Kan.....)

*1. The provisions of the constitution

*Headnotes by JOHNSTON, J.

NOTE.—As to the constitutionality of statutes prohibiting private banking, see *State v. Scougal* (S. Dak.) 15 L. R. A. 477, and *nota*.

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authorizing the organization and control of banks of circulation do not limit the legislative power nor operate to prohibit the enactment of laws imposing reasonable regulations upon banks of deposit and discount.

2. The act providing for the organization and regulation of banks (Laws 1891, chap. 43) is held to be within the scope of the police power of the state, and not an unconstitutional infringement of private rights.

3. The act does not contravene the

constitutional provision which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title."

(June 9, 1894.)

ERROR to the District Court for Linn County to review orders dissolving an attachment which had been issued against the property of the banking firm of Hood & Kincaids and overruling motions to discharge the receiver which had been appointed for its property. *Affirmed.*

The facts are stated in the opinion.

Messrs. James D. Snoddy, R. W. Blue, and J. T. Pringle, for plaintiffs in error:

The Act (Sess. Laws 1891, chap. 48) is broader than the title and contains more than one subject.

State v. Barrett, 27 Kan. 218; *Weyand v. Storer*, 85 Kan. 551; *Oherokee County Comrs. v. State*, 86 Kan. 339; *Cooley, Const. Lim.* 176, 178.

The constitution of the state of Kansas gives to the legislature no power to regulate or control banks of discount and deposit.

Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183.

Article 13 of the Constitution is the expression of the ultimate sovereignty of the state upon the subject of banking. The people by the grant of the power expressed in that article, reserved all other power upon that subject to themselves. Without the grant of such power, no power to regulate or control such banks is possessed by the legislature, except they be corporations, organized under a general law providing for such organizations.

Bill of Rights, § 20; *Leavenworth County Comrs. v. Miller*, 7 Kan. 489, 12 Am. Rep. 425; *State v. Nemaha County*, 7 Kan. 554.

The business of banking is not a franchise, nor does it fall within the police powers of the state.

State v. Seougl (S. Dak.) 15 L. R. A. 477, and cases cited in opinion and in briefs for defendant: *Morse, Banks & Banking*, § 13; *Cooley, Const. Lim.* 4th ed. 746; *Tiedeman, Pol. Powers*, § 102; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 595, 10 L. ed. 811; *Curtis v. Leavitt*, 15 N. Y. 60; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Civil Rights Cases*, 109 U. S. 8, 27 L. ed. 835; *People v. Gillson*, 109 N. Y. 898; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *Slaughter House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *People v. Otis*, 90 N. Y. 52; *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 179, and cases cited in opinion and notes to case; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

The right to carry on the business of banking, at common law, belonged to the individual as a right, and might be carried on by an individual or a partnership, in all its various relations, even to the extent of issuing notes as a circulating medium to be used as money, as any other trade, or occupation, or business.

New York Firemen's Ins. Co. v. Ely, 2 Cow. 678; *Curtis v. Leavitt*, 15 N. Y. 9; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519-595, 10 L. ed. 274, 311; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 377, 1 L. ed. 412, 416; *Morse*, 24 L. R. A.

Banks & Banking, p. 1; *People v. Doty*, 80 N. Y. 235.

Mr. J. D. McCleverty, for defendants in error:

The Constitution of the United States contains no limitation, nor does our state constitution, except as to banks of issue.

Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183.

Hence the legislature had full power to enact any law which would not infringe upon any natural personal right, and especially could it enact any law which embodied a proper exercise of the police power.

New York has had a bank act regulating the banking business for a great many years, which from *People v. Doty*, 80 N. Y. 230, and *Leavitt v. Blutchford*, 17 N. Y. 506, and cases cited, has been repeatedly sustained, and this in part because the individual had accepted the law and voluntarily acted under it, as was true of Hood & Kincaids in this case.

See also *Bissell v. Heath*, 98 Mich. 472.

In *Ryan v. Ray*, 105 Ind. 101, it is held that the remedy provided by the banking law can alone be applied.

North Dakota law prohibits private individuals from doing a banking business, and confines that privilege to corporations organized under that act.

In *State v. Woodmanse*, 11 L. R. A. 420, 1 N. Dak. 246, the court says: "We have been unable to find an authority, and we have searched diligently, which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain, and govern the business of banking."

This law has been assented to, and hence binds the parties.

See also *State v. Commercial State Bank*, 28 Neb. 677; *Stone v. Dodge*, 21 L. R. A. 280, 96 Mich. 514.

Johnston, J., delivered the opinion of the court:

The firm of Hood & Kincaids engaged in the general banking business at Pleasanton in 1883, and continued in that business, without state regulation, until September, 1891, when, in pursuance of the Banking Law of 1891, the firm transmitted to the bank commissioners the verified statement and report required by that act. The commissioner, finding that the bank had complied with the provisions of law, issued a certificate to Hood & Kincaids, authorizing them to do a banking business at Pleasanton, and they continued to transact business under the supervision of the commissioner until July, 1893, when the bank commissioner, upon examination, found the bank to be insolvent. He at once took possession of the property, assets, and books of the bank, and, on July 19th, the attorney-general began an action in the district court, and secured the appointment of O. E. Morse as receiver. The firm of Hood & Kincaids appeared and admitted the insolvency as alleged, and consented to the appointment. Soon after the appointment of the receiver, a number of the creditors of the firm of Hood & Kincaids caused attachments to be levied upon the property in the hands of the receiver. *Morse*

tions to discharge the attachments were made by the receiver, and the attaching creditors also filed motions asking that the order appointing the receiver be set aside, the receiver discharged, and the property in his hands turned over to the sheriff, to be held by him under the attachments. The motions to discharge the attachments were sustained, and those made to set aside the order appointing the receiver were overruled. The attaching creditors complain of these rulings, and bring them here for review.

The validity of the Banking Law of 1891, in pursuance of which the receiver was placed in charge of the insolvent bank, is the principal question to be settled here. It is contended that the act is objectionable on several constitutional grounds, but the main one is that it authorizes an undue interference with private business. It provides for the organization of corporate banks, and for the regulation of all banking business, except that which is done by national banks, whether conducted by corporations, partnerships, or individuals. It creates the office of bank commissioner, and provides that all those engaged in the banking business shall make reports to him of their resources and liabilities, requires them to submit to inspection and investigation in order to ascertain their financial condition, and prescribes methods of business intended to protect the depositors and patrons of such banks. Laws 1891, chap. 48. An examination of the provisions of this act shows that no one is prohibited from engaging in the business of banking. No special privileges or immunities are conferred, and no distinction is made between corporate, partnership, or individual banks. All are permitted to engage in the business, and all are subject to the same control, and to like penalties for violation of its provisions. There is no room for the contention that article 18 of the Constitution withholds from the legislature power to regulate and control banks of discount and deposit. It was held in *Pape v. Capitol Bank of Topeka*, 20 Kan. 440, 27 Am. Rep. 183, that this article of the constitution applies only to banks of issue, and does not prohibit the legislature from creating banks of deposit and discount. The provision of the constitution authorizing the organization and control of banks of circulation is not the end of the legislative power. Its power is supreme, except where it is restrained by the fundamental law, and the constitutional limitations as to banks of issue do not operate to prohibit the legislature from organizing and regulating banks of deposit and discount, and providing for the safe-keeping or loaning of money by such banks. The right to organize and control corporate banks is conceded, but it is contended that the banking business is not a franchise, but belongs to all individual citizens as a common right, the exercise of which cannot be denied or subjected to police regulation. The argument and authorities cited by counsel for plaintiff in error are mainly directed to the contention that the legislature cannot withhold from individuals the right to engage in banking, and confer the privilege alone upon

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incorporated companies. This contention is not a matter of concern at this time, as our statute does not pretend to limit the business to incorporated companies nor to discriminate between corporations and individuals. The question with us is whether the banking business is of such a character as to warrant the legislature, in the exercise of the state's police power, to impose reasonable regulations upon the means and methods by which it is conducted. There are many occupations and lines of private business which the legislature, in the exercise of the internal police power, may rightfully regulate. Tiedeman, in his work on Limitations of Police Power (page 194), says: "It will probably not be disputed that every one has a right to pursue in a lawful manner any lawful calling which he may select. The state can neither compel him to pursue any particular calling nor prohibit him from engaging in any lawful business, provided he does so in a lawful manner. It is equally recognized as beyond dispute that the state, in the exercise of its police power, is, as a general proposition, authorized to subject all occupations to a reasonable regulation wherever regulation is required for the protection of public interest or for the public welfare." We have frequent instances of the exercise of the police power to prevent imposition and extortion, and of the regulation of employments, and also of business, of a quasi public nature. By virtue of the police power, regulations have been imposed on the practice of law, medicine, and dentistry, as well as upon bakers, millers, and wharfingers, and it has been accepted as a proper exercise of the police power to regulate pawnbrokers, junk shops, and loan offices. Inspection laws, and those regulating the weighing of commodities offered for sale, are generally regarded as suitable and valid regulations of police. 18 Am. & Eng. Encyclop. Law, 747-759. The right to regulate and control the business of insurance, as well as that conducted by mills and warehouses, is no longer doubted. Enactments controlling the loaning of money, and regulating the rate of interest upon the same, have been sanctioned from the earliest times, and the nature of the business done by banks in dealing in money, receiving deposits for safe-keeping, discounting paper, and loaning money, is such, and is so affected with a public interest, as to justify reasonable regulation for the protection of the people. The confidential and trust relations which exist between the bank and its patrons, and the difficulty that depositors and those dealing with the bank necessarily encounter in detecting irregular practices and in ascertaining the real financial conditions of banks, are sufficient to justify inspection and control. Those engaged in the business invite all in the community to deposit their funds with them, which, when obtained, is largely used for their profit. The numerous instances where the earnings and funds of people so deposited are dissipated and lost shows the necessity for measures to protect the people from imposition, extortion, and fraud. For this reason, most of the states have enacted

laws recognizing banking as a quasi public business, and regulating the same to a greater or less extent. A well-known author, in his treatise on Banking, uses the following language: "At common law, the right of banking pertains equally to every member of the community. Its very exercise can be restricted only by legislative enactment, but that it legally can be thus restricted has never been questioned." 1 Morse, Banks & Banking, § 13. The same subject was considered in the recent case of *State v. Woodmanse*, 1 N. Dak. 246, 11 L. R. A. 420, where it was said that "the business of banking, by reason of its very intimate relations to the fiscal affairs of the people and the revenues of the state, is and has ever been considered a proper subject of control, and strictly within the domain of the internal police power of every state. As a matter of fact, we have been unable to find an authority—and we have searched diligently—which has ever questioned the right of the legislature, in the exercise of police power, to regulate, restrain, and govern the business of banking." See also, *People v. Utica Ins. Co.* 15 Johns. 858, 8 Am. Dec. 243; *People v. Bartow*, 6 Cow. 290; *Curtis v. Leavitt*, 15 N. Y. 9; *State v. Williams*, 8 Tex. 265; *Nance v. Hemphill*, 1 Ala. 551; *People v. Brewster*, 4 Wend. 498.

The authority principally relied upon by counsel for the plaintiff in error is *State v. Scougal*, (8. Dak.) 15 L. R. A. 477. The latter case is in conflict with *State v. Woodmanse*, *supra*, in holding that the legislature may prohibit private banking, and may inaugurate a system for the state in which the business is made an exclusively corporate franchise, to be carried on only by those who become incorporated, and are willing to subject their business to the restraints and safeguards deemed to be necessary. In *State v. Scougal* it was decided that the business of banking was not a franchise at common law, and was not made such by the constitution, and, further, that it belonged to the citizens of the country generally by common right; and the legislature could not, under the police power of the state, prohibit an individual from engaging in the business nor confer the privilege exclusively upon corporations. As no exclusive franchise has

been conferred and no discrimination made against individuals or private banks in our statutes, we are not required to determine which of the conflicting theories should prevail. Even in the *Scougal Case*, which holds strictly against any discrimination in favor of corporate banks, it is held that, where the law applies to individuals and corporations alike, reasonable regulations may be imposed. In the course of the decision, the court remarked: "But, assuming that the business of banking we are now considering is clothed with such a public use that it may be controlled by the state,—and we think it is so affected with a public interest,—still it does not follow that the citizen may be deprived of the right to carry on the business. This like any other business may be subjected to reasonable regulations, which shall alike apply to all citizens and corporations." We readily conclude that the regulation of the banking business is clearly within the legislative power, and that the act passed cannot be regarded as an unconstitutional interference with individual rights.

Another objection is that the title of the act contains more than one subject, and contravenes section 16 article 2, of the State Constitution. The title is, "An act providing for the organization and regulation of banks, and prescribing penalties for violations of the provisions of this act." In a broad sense, it is an enactment concerning the business of banking, and all of the provisions are fairly comprehended within this general subject. As has been held, this constitutional provision is not to be construed in any narrow or technical sense, but liberally on one side, so as to guard against the abuse intended to be prevented by it, and liberally on the other side, so as not to embarrass or restrict needed legislation. *State v. Barrett*, 27 Kan. 213; *State v. Curtis*, 29 Kan. 884; *Cherokee County Comrs. v. State*, 86 Kan. 337; *State v. Haskell County Comrs.* 40 Kan. 65; *State v. Sanders*, 42 Kan. 228; *State v. Kansas City*, 50 Kan. 521.

Having determined that the act is valid, it follows that the rulings of the court sustaining the motions to discharge the attachment and overruling the motions to discharge the receiver will be affirmed.

All the Justices concur.

WISCONSIN SUPREME COURT.

STATE of Wisconsin

v.

Andrew JUNEAU.

(.....Wis.....)

1. The competency as a witness of a child over four years of age is a question addressed to the discretion of the trial court.
2. The fact that a child is of tender years will not prevent its testimony,

NOTE.—As to the competency of children as witnesses, see note to *State v. Michael* (W. Va.) 19 L. R. A. 605.

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if competent, from being sufficient to support a conviction of an indecent assault, when all the corroborative testimony has been given that is practically procurable.

3. Gross lewdness is "open" within the meaning of Rev. Stat., § 4679, if committed in the presence of another person, even if that is a child of tender years, too innocent to be offended by it.

(May 25, 1894.)

REPORT by the Circuit Court for Langlade County for the Opinion of the Supreme Court of certain questions which arose

during a trial which resulted in the conviction of defendant of open and gross lewdness and lascivious behavior. *Answers returned adverse to defendant.*

Statement by **Newman, J.:**

Reported by the circuit court for Langlade county, under section 4721, Rev. Stat. The report is as follows:

"At the September term, 1893, of the above court, the above-named defendant, Andrew Juneau, was convicted of 'open and gross lewdness and lascivious behavior,' under the provisions of section 4579, Rev. Stat. The offense was alleged to have been committed on the 14th day of December, 1892, in a building occupied by the defendant; no one being present at the time except the defendant and a little girl named Clara Brown, who was at that time about four years and nine months old, and who was about five years and five months old at the time of the trial. The alleged offense consisted of the indecent exposure of defendant's person to said child, and the commission of an indecent assault upon her. The defendant was convicted upon the testimony of said child, corroborated by that of her mother, and a physician who was called to examine her a short time after the alleged assault. Certain questions of law having arisen during the trial, which, in the opinion of the presiding judge, are so important and doubtful as to require the decision of the supreme court, now, therefore, I John Goodland, judge of the tenth judicial circuit, do hereby certify to the supreme court of the state of Wisconsin (said defendant consenting thereto) the said questions for decision, as follows: First question: Did the circuit court err in permitting the child, Clara Brown, to testify in this case? Second question: Can a conviction for criminal offense be sustained upon the testimony (with some corroboration) of a child who was under the age of five years at the time the offense is alleged to have been committed? Third question: Is an act of gross lewdness 'open,' within the meaning of section 4579, Rev. Stat., when committed in a private place, and when no one is present except the defendant and the person upon whom the act is alleged to have been committed? A copy of the testimony taken and the proceedings had upon said trial is hereunto annexed."

Messrs. J. L. O'Connor, Atty-Gen., and J. M. Clancey, Asst. Atty-Gen., for the State:

If the child appears to have sufficient natural intelligence and to have been so instructed as to comprehend the nature and effect of an oath, he is permitted to testify whatever his age may be. The question is: Is the court satisfied the child was sufficiently conscious of the duty to speak the truth, to permit the reception of his evidence?

Washburn v. People, 10 Mich. 372; 1 Greenl. Ev. § 387; *McGuire v. People*, 44 Mich. 2nd 8, 85 Am. Rep. 265; *McGuff v. State*, 63 Ala. 150.

In 1 East, P. C. 441, it is said: "Indeed," adds *Mr. Justice Blackstone* [4 Bl. Com. 214], "it seems now to be settled that in these cases (offenses against chastity) infants of any

age are to be heard, and if they have an idea of an oath,—to be also sworn."

King v. Brazier, 1 Leach, C. C. 199; *Brazier's Case*, 1 East, P. C. 448.

We must presume in favor of action of the trial court for the reason that the court had the proposed witness in its presence, and was therefore enabled to estimate to some extent her capacity from her appearance, and the manner of her replies in her examination.

Blackwell v. State, 11 Ind. 196; *Vincent v. State*, 3 Heisk. 120; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Draper v. Draper*, 68 Ill. 17; *Darickson v. State*, 89 Tex. 129; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272, Roscoe Crim. Ev. 94.

The conduct was "open" within the meaning of the term as used in section 4579, Revised Statutes.

Com. v. Wardell, 128 Mass. 54, 35 Am. Rep. 357; *Com. v. Lambert*, 12 Allen, 177; *Com. v. Parker*, 4 Allen, 313; *Fowler v. State*, 5 Day, 81; *State v. Millard*, 18 Vt. 574, 46 Am. Dec. 170.

Mr. S. S. Hamilton, for defendant:

Secret and private illicit intercourse is not sufficient under this statute.

18 Am. & Eng. Encyclop. Law, p. 278, par. 4; *Id.* p. 279, note 1; *Com. v. Catlin*, 1 Mass. 8.

Secret and private lewdness and lascivious behavior are not sufficient under the statute.

18 Am. & Eng. Encyclop. Law, p. 772, note 6; *Com. v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357.

Newman, J., delivered the opinion of the court:

It seems to be the settled law that, after four years of age, a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence, which is to be determined by the trial court, by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of the abuse of its discretion. "It may be regarded as well settled that whenever there is intelligence enough to observe and to narrate, there, a child (a due sense of the obligation of an oath being shown) can be admitted to testify." *Whart. Ev.* 3d ed. § 398. "Age, at least after four years are past, does not touch competency; and the question is one of intelligence, which, whenever a doubt arises, the court will determine to its own satisfaction, by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties for perjury." *Id.* § 399. "It will require a strong case to sustain a reversal of the ruling of the court examining such a witness." *Id.* § 400. See cases cited in the brief of the attorney-general; also, *State v. Morea*, 2 Ala. 275; *Wade v. State*, 50 Ala. 164; *Blackwell v. State*, 11 Ind. 196; *State v. Denis*, 19 La. Ann. 119; *People v. Bernal*, 10 Cal. 66; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 242; *State v. Le Blanc*, 3 Brev. 339; *State v. Jackson*, 9 Or. 457. Whether the trial court determined rightly

the questions of the competency of the witness is not presented here. That is a question of fact. Only questions of law are to be reported, under the statute, or considered by this court. *State v. Gross*, 62 Wis. 41; *State v. Cornhauser*, 74 Wis. 42. The court, being satisfied of the competency of the witness, did not err in permitting her to testify in the case.

2. Ordinarily, the testimony of one competent witness is sufficient to sustain a conviction. There are crimes for which it is not competent to convict upon the uncorroborated testimony of one witness. These are exceptions from the general rule, created either by statute, or some established rule of the common law. Except in these excepted cases, the testimony of one witness answers at law. Even the testimony of an accomplice is sufficient (*Black v. State*, 59 Wis. 471), and that even in a capital case *United States v. Neversen*, 1 Mackey, 152; *United States v. Dickler*, Id. 341. The weight of the evidence is for the jury. If they are satisfied by it, beyond a reasonable doubt, it is legally sufficient. Even in cases of rape, there is no inflexible rule which requires corroboration of the complainant's testimony. Such corroboration is expected, and its absence seriously impairs the case of the prosecution. But the law itself is satisfied with such corroboration as is practically procurable; else, many crimes could be perpetrated with impunity. Whart. Crim. L. 9th ed. 565. It is, to a great extent, in the discretion of the trial court, in most cases, whether corroboration shall be required, and how much. *Ingralls v. State*, 48 Wis. 649; *Black v. State*, *supra*. Under the direction of the court, an intelligent jury are not likely to err in giving undue credit and force to the testimony. If that should happen, it is always within the power of the court to correct such a mis-

take by a new trial. It appears by the report that there was some corroboration of the principal witness. Whether the whole evidence supports the conviction cannot be answered here. *State v. Gross*, *supra*. The court being satisfied by its examination that the witness was competent to testify, and that practically all the corroborative testimony which was practically procurable had been produced, and being satisfied of the truth of the verdict, the conviction is lawful, and should be sustained.

8. The act alleged against the defendant is an act of "open and gross lewdness," within the meaning of the statute. The statute punishes, not public, but open, lewdness. The phrase "open and gross lewdness" is not equivalent to the phrase "gross lewdness in an open place." The word "open" has no reference to place at all, nor to number of people. It is used simply to define a quality of the act of lewdness. It is "open lewdness" as opposed to "secret" lewdness. It defines the same act, regardless whether it is committed in presence of one or of many. The offense may be committed by the intentional act of exposing one's person indecently in the presence of one person, to whom it is offensive, as well as in the presence of many persons. It could not change the quality of the act that it was committed in the presence of a child of tender years,—too innocent to be offended by it. The benignity of the law would neither presume nor permit the consent of such a child to such an act. *Knobler v. State*, 5 Day, 81; *Grisham v. State*, 2 Yerg. 589; *State v. Millard*, 18 Vt. 574, 46 Am. Dec. 170; *Com. v. Wardell*, 128 Mass. 52, 85 Am. Rep. 357.

The first question is answered in the negative. The second and third questions are answered in the affirmative. It will be so certified to the circuit court.

MICHIGAN SUPREME COURT.

C. Sumner BURROUGHS

v.

William H. EASTMAN, *Plff. in Err.*

(....Mich.....)

1. An arrest without a warrant may be authorized by the legislature for other misdemeanors committed in presence of an officer as well as for breach of the peace.
2. The constitutional requirement of due process of law is not violated by a statute extending the right to arrest without warrant for crime committed in presence of an officer to offenses for which such arrest was not authorized when the constitution was adopted.
3. Constitutional provisions against issuing a warrant without probable cause, supported by oath or affirmation, do not apply to an arrest without a warrant.
4. One who directed an arrest and is found

guilty of false imprisonment cannot complain that the one who actually made the arrest was found not guilty.

(July 10, 1894.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged false imprisonment. *Reversed.*

The facts are stated in the opinions.

Mr. Edwin F. Uhl, for plaintiff in error:

In *Mayo v. Wilson*, 1 N. H. 53, the court said: "By the 15th article of the Bill of Rights prefixed to the constitution, it is declared that no subject shall be arrested, imprisoned, . . . exiled, or deprived of his liberty or estate but by the judgment of his peers or by the law of the land. Therefore, all warrants . . . to arrest a person for examination or trial in prosecution for criminal matters are contrary to this right if the cause or foundation of them be not previously supported by oath or affirmation."

Coke says the words "*per legem terra*" in

NOTE.—As to the right to arrest without warrant, see note to *State v. Hunter* (N. C.) 8 L. R. A. 529. 34 L. R. A.

Magna Charta, and the words "due process of law" in the Statute of 87 Edw. III., chap. 8, mean the same thing.

2 Co. Inst. 50.

An arrest without writ and without warrant, if authorized by the common or statute law of the land, is an arrest by due process of law, and an arrest by the law of the land, within the meaning of the constitution, as much as an arrest made by virtue of a warrant from a magistrate.

If a statute make use of a word, the meaning of which is well known to the common law, the word shall be understood in the statute in the same sense it was understood at the common law.

Smith v. Harmon, 6 Mod. 148.

The clause in our constitution now under consideration happens to be a literal translation from Magna Charta, chap. 20.

2 Co. Inst. 45.

Sullivan, in his lectures, 402, has a commentary on this part of Magna Charta. He says that a process of law for the purpose of an arrest is two-fold, either by the king's writ or by what is called a warrant in law. He then says that a warrant in law is two fold, viz., (1) a warrant in deed by authority of a legal magistrate, or (2) that which each private person is invested with and may exercise. He then enumerated the cases where the law warrants a private person to arrest and imprison another. 1. If a man is present when another commits treason, felony, or notorious breach of the peace, he has a right instantly to arrest and commit him lest he should escape. 2. If an affray be made to the breach of the peace any person may, during the continuance of the affray by warrant in law restrain any of the offenders; but if the affray be over, there must an express warrant. 3. If one man dangerously wound another, any person may arrest him, that he be safely kept till it be known whether the person shall die or not. 4. Suspicion, also, when it is violent and strong, is in many cases a good cause of imprisonment, but he who arrests on suspicion must take care that his cause of suspicion be such as will bear the test, for otherwise he may be punishable for false imprisonment. 5. A watchman may arrest a night walker at unseasonable hours, by the common law. But with respect to persons arrested by private authority, there must be an information on oath before a magistrate, and a commitment thereon in a reasonable time, which is esteemed twenty-four hours, otherwise the person is to be no longer detained. Coke in his commentary upon Magna Charta, gives the same explanation.

2 Co. Inst. 52. See also Hawk. P. C. 115; Comyns, Dig. *Imprisonment*, H. 4; 2 Roll. 559.

An arrest, if authorized by the statute or common law, though without writ or warrant in deed, has always been considered in England as warranted *per legem terra*.

Murray v. Hoboken Land & Imp. Co. 59 U. S. 18 How. 272, 15 L. ed. 872; *Ellis v. United States*, 143 U. S. 651, 35 L. ed. 1148.

Plaintiff was engaged in the actual violation of an ordinance of the common council of the city in the presence of the defendants, and therefore they had authority in law to arrest 24 L. R. A.

him without a warrant, and to take him before the police court to be dealt with according to law.

Com. v. Hastings, 9 Met. 259; *Main v. McCarty*, 15 Ill. 442; *White v. Kent*, 11 Ohio St. 550; *Mitchell v. Lemon*, 34 Md. 176; *Scircle v. Neeces*, 47 Ind. 289; *Roddy v. Finnegan*, 43 Md. 490; *Smith v. Donnelly*, 66 Ill. 464; *State v. Cantiengy*, 84 Minn. 1; *Veneman v. Jones*, 118 Ind. 41.

An arrest without process is justified by common-law principles in cases of misdemeanor.

Rez v. Bootie, 2 Burr. 864.

The decisions of the supreme court of this state do not hold a contrary doctrine.

Drennan v. People, 10 Mich. 169; *Quinn v. Heisel*, 40 Mich. 576; *Re Way*, 41 Mich. 299; *People v. Barts*, 53 Mich. 493; *Davis v. Burgess*, 54 Mich. 514, 53 Am. Rep. 828; *Robison v. Miner*, 68 Mich. 549; *Pinkerton v. Verberg*, 7 L. R. A. 507, 78 Mich. 573.

Mr. James E. McBride, for defendant in error:

There are many loose general expressions made by the courts, which would indicate that arrest without warrant might be made in all cases of misdemeanor committed in view of the officer, but these cases were, invariably, cases of breaches of the peace, and referring to them as misdemeanors the courts had in view only the facts of the cases considered.

Cook v. Nehercoote, 6 Car. & P. 741; *Fox v. Gaunt*, 8 Barn. & Ad. 798; *Hovell v. Jackson*, 6 Car. & P. 728; *Rez v. Bright*, 4 Car. & P. 287; *Levy v. Edwards*, 1 Car. & P. 40; *Timothy v. Simpson*, 5 Tyrw. 244; *Baynes v. Brewster*, 2 Q. B. 875; *Reg. v. Walker*, 28 L. J. M. C. 123; *Reg. v. Light*, 8 Jur. N. S. 1180; *Derecourt v. Corbishley*, 5 El. & Bl. 188; *Bowditch v. Balchin*, 5 Exch. 878; *Coupey v. Henley*, 2 Esp. 540; *Osborne v. Veitch*, 1 Fost. & F. 817.

From the above cases it will clearly appear that the right to arrest without warrant is confined to such cases as breach of the peace committed in view, and felonies or suspicion of felony.

By "peace" as used in the law in this connection is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members.

It is the natural right of all persons in political society, and any intentional violation of that right is a "breach of the peace."

Davis v. Burgess, 54 Mich. 517, 53 Am. Rep. 828.

It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in view of the officer.

Re Way, 41 Mich. 804; *Quinn v. Heisel*, 40 Mich. 576; *State v. Brown*, 5 Harr. (Del.) 507; *Robison v. Miner*, 68 Mich. 559; *Wright v. Court*, 4 Barn. & C. 596; *Drennan v. People*, 10 Mich. 169; *People v. Barts*, 53 Mich. 495; *Ware v. Loveridge*, 75 Mich. 489; *People v. Johnson*, 18 L. R. A. 168, 86 Mich. 177.

Montgomery, J., delivered the opinion of the court:

This is an action for false imprisonment. The plaintiff was, by defendant's directions, arrested while engaged in giving a performance at a theater in the city of Grand Rapids on Sunday evening. There existed an ordinance of the city of Grand Rapids relative to shows which prohibited a person or company giving theatrical exhibitions on the first day of the week. The charter of the city provides that police officers, in addition to the power and authority possessed by them at common law and under the laws of the state in matters of a criminal nature, shall have the power to arrest without process all persons who shall, in the presence of the arresting officer, be engaged in the violation of the ordinances of the common council of the city, and that the police officer may detain such persons in custody until complaint shall be made and process issued for their arrest and trial. It will be seen, therefore, that, so far as the legislative power can go, it has been exercised to authorize an arrest without warrant for an offense against the ordinance of the city which is committed in the presence of the officer. It is insisted, however, that the act which attempts to clothe the officer with this power is unconstitutional. This court has repeatedly held that, in the absence of any statutory power or authority, an officer cannot arrest except on suspicion of felony, or in case of an actual breach of peace committed in the presence of the arresting officer. See *Way's Case*, 41 Mich. 304, 52 Am. Rep. 828; *Davis v. Burgess*, 54 Mich. 514; *Quinn v. Heisel*, 40 Mich. 576; *Peonle v. Johnson*, 86 Mich. 176, 13 L. R. A. 168. But whether the legislature may extend the right to the officer to arrest for other misdemeanors, not amounting to a breach of the peace, has not been directly passed upon, unless it be in the case of *Robison v. Miner*, 68 Mich. 549. In *People v. Johnson*, 86 Mich. 179, 13 L. R. A. 168, the subject is referred to, but as the record was not in shape to present the question, it was left undecided. In *Quinn v. Heisel*, 40 Mich. 578, Mr. Justice Marton said: "We are not at present prepared to say that an ordinance of the city of Grand Rapids could authorize arrests without process in cases not justified by common-law principles." But this statement in this case was mere dictum, and, if the quere suggested had been answered in the negative, it would not necessarily follow that the legislature of the state might not confer a power which the common council of the city, under the charter then in force, could not have conferred. In *Robison v. Miner*, it must be conceded, language is employed which might be construed as prohibiting the power of arrest. The statute under consideration was Act No. 318 of the Laws of 1887, which contained the peculiar provision that "any person found in the act of violating any of the provisions of this section shall be deemed guilty of a breach of the peace and punished accordingly; and the arrest therefor may be without process, and this punishment shall be taken to be in excess of all other manner of punishment in this act provided for violations of the provisions of this section. All officers authorized to make arrests for a breach of the peace shall have like power to make arrests under the provisions of this section as in other cases of a breach of the peace." These

provisions are peculiar and incongruous. It seemed to have been an attempt on the part of the legislature to confer the power of arrest by a process of first declaring that to be a breach of the peace which is not such in fact, and by further providing that a party might be punished for such breach of the peace in addition to and beyond the punishment provided by the same statute. The conclusion that these provisions could not be maintained, in view of the constitutional provisions that no person shall be twice put in jeopardy for the same offense, was undoubtedly correct. As was well said by Mr. Justice Campbell, in rendering the opinion of the court, "This statute is practically, if carried out, a general warrant itself, directing all officers to visit houses and business places without other authority, and make searches and arrests and close up places of business on their own well or ill founded notion that the law has been violated." But, in the course of this opinion, Justice Campbell used language which seems to favor the contention of plaintiff here, as follows: "The constitution prohibits interference with persons or property without due process of law. The proceedings under this statute are all highly penal and treated expressly as criminal proceedings. The constitution expressly prohibits the issue of warrants of search or seizure of persons or property except on a sworn showing, which, it has always been held, must be of facts, on personal knowledge, such as would establish the legal probability of the cause of complaint. If the legislature could evade this by providing for seizures and searches without legal warrant, the provision would be useless."

As to the first provision of the constitution referred to in the discussion, it means no more than that a person shall not be deprived of liberty except by the law of the land. As to the latter provision, namely, section 26 of article 6, which provides that "no warrant to search any place or to seize any person or things shall issue without describing them nor without probable cause supported by oath or affirmation," we are constrained to say that this section is not susceptible of the construction which, by implication, is placed upon it in the opinion of Mr. Justice Campbell. The same provision was considered by the supreme court of Alabama in the case of *Williams v. State*, 44 Ala. 43, and a contention that such provision prohibited an arrest without warrant was concisely disposed of as follows: "The federal and state constitutions both provide that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation. As a warrant is the process upon which arrests are usually made, and it cannot be issued without oath, the corollary has been drawn that there can be no arrest without a warrant. The popular error on the subject is our excuse for the assertion of the truism that it is the issue of the warrant, without oath or affirmation, which is forbidden, and not the arrest without a warrant." The statute under consideration in that case authorized an arrest by a policeman without a warrant, on any day and at any time, for any public offense committed, or a breach of the peace threatened, in his presence. It may further be

said that, if the constitutional provision last quoted is to be construed as might be implied from the language employed by *Mr. Justice Campbell*, it would exclude all arrests without warrant. The right which existed at common law to arrest for offenses committed in the presence of the officer has been too often recognized since the adoption of our constitution to be open to question. *Mr. Justice Campbell* uses the further language: "So far as arrests are concerned, a similar principle applies. Under our system we have repeatedly decided, in accordance with constitutional principles as construed everywhere, that no arrest can be made without warrant, except in cases of felony, or in cases of breaches of the peace committed in the presence of the arresting officer. This exception in cases of breaches of the peace has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence, and it was confined, even in such cases, to instances where the violence was committed in the presence of the officer." This language embodies a correct statement of the rule of common law, but, if it is sought to extend its application to a case where the legislature has authorized the arrest without warrant for offenses other than breaches of the peace committed in the view of the arresting officer, we do not find the contention supported by authority. In *Bishop's Criminal Procedure* (sec. 184) it is said: "The right of arrest by officers of the peace is more or less enlarged by statutory regulations in the several states, as well as, of late, in England; or, if not enlarged, defined. A statute enlarging the right,—that is, in restraint of personal liberty,—is to be strictly construed. But statutes of this sort are generally held to be constitutional." In *Roberts v. State*, 14 Mo. 183, 55 Am. Dec. 97, the power of the municipality to provide by ordinance for the arrest of vagrants without warrant was sustained. The same ruling was made in the case of *Bryan v. Bates*, 15 Ill. 87, and *Main v. McCarty*, Id. 441. In Massachusetts the legislature has from time to time provided by statute for the arrest of persons guilty of a particular offense, including the offense of selling liquor contrary to law, and the offense of drunkenness, and the power of arrest without warrant for the commission of the offense has been repeatedly sustained. See *Jon's v. Root*, 6 Gray, 435; *Mason v. Lathrop*, 7 Gray, 354; *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448. See also, *Davis v. American Soc. for Prevention of Cruelty to Animals*, 75 N. Y. 862. In *White v. Kent*, 11 Ohio St. 550, a statutory provision which conferred the right upon police officers to arrest without process for violations of the city charter not amounting to breaches of the peace was upheld. It was said: "It is evident that many ordinances necessary for good order and general convenience, as well as for the preservation of morals and decency, would be almost nugatory if offenders could only be arrested upon warrant." In *Davis v. American Soc. for Prevention of Cruelty to Animals*, *supra*, it was held that a statute authorizing an arrest, without process, of one guilty of cruelty to animals, was valid. In *O'Connor v. Bucklin*, 59 N. H. 589, a statute authorizing an officer, upon view of any crime or breach of peace or

offense against the police of towns, to arrest without warrant, was sustained. In *St. v. Cantieng*, 34 Minn. 1, a statute of the state authorizing any peace officer to arrest without warrant for a "public offense committed or attempted in his presence" was construed and upheld, and it was held that an arrest without warrant for such public offense was authorized, even if the offense did not amount to a breach of the peace. See *Wahl v. Walton*, 30 Minn. 508. See also, *Berille v. State*, 16 Tex. App. 70; *Wiltse v. Holt*, 95 Ind. 469; *Traffe v. Slein*, 11 Mo. App. 507; *Smith v. Donely*, 66 Ill. 465; *Scirde v. Neeces*, 47 Ind. 239; *Jacobs v. State*, 28 Tex. App. 79; *Butolph v. Blust*, 41 How. Pr. 431; *Billard v. State*, 43 Ohio St. 840; 1 Dill. Mun. Corp. §§ 210, 211, 214, and cases cited in notes.

It will be seen that the question has arisen in many of our sister states, and the power to authorize arrest on view for offenses not amounting to breaches of the peace has been affirmed. Our attention has been called to no case, nor have we in our research found one, in which the contrary doctrine has been asserted. We think that, while the language in *Robison v. Miner* may furnish justification for the contention which is made by the plaintiff here, the language which we have referred to, bearing that construction, was not necessary to a determination of the question there involved, and should not be followed. The right to arrest without warrant applies as well to felonies made so by statute after the adoption of the constitution as to offenses which are felonies at the common law, and this without express legislation providing for such arrest. *Firestone v. Rice*, 71 Mich. 877. This holding is wholly inconsistent with the claim that what is due process of law must be determined by what arrest without warrant was permissible at the time of the adoption of the constitution. It is illogical to say that the legislature may, by defining a particular offense as a felony, or providing for its punishment as such, authorize an arrest without warrant for such offense not committed in the presence of the officer, and yet it may not by statute authorize arrest for a misdemeanor committed in the presence of the officer. The necessity may be as great in the one case as in the other, and the case of *Firestone v. Rice* illustrates that the rule is not irrevocably or inflexibly fixed by the state of the law as it existed prior to the adoption of the constitution. The same provision of the constitution which protects the person protects the property from invasion without due process of law, and yet statutes which have prescribed what use of property shall constitute a nuisance, and authorized its summary destruction when so used, have been upheld by the courts (*Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Meeker v. Van Rensselaer*, 15 Wend. 397; *American Print Works v. Lawrence*, 21 N. J. L. 248), and fully approved by the Federal Supreme Court in the recent case of *Lawton v. Steele*, 152 U. S. 134, 38 L. ed. 385. See also *People v. Brooks* (decided at the present term, (Mich.) 59 N. W. Rep. 444.

2. Appellant also contends that the verdict of the jury finding the defendant guilty should not be allowed to stand because of the inconsistency in the verdict rendered. The actual

arrest, which was made by the direction of the defendant Eastman, was made by one Hurley, lieutenant of police. Hurley was joined with defendant Eastman, and upon the trial Eastman was found guilty, and Hurley not guilty. It does not appear whether the plaintiff has rested content with the verdict in favor of Hurley, but, while it may be that the jury rendered an inconsistent verdict, it does not follow that defendant Eastman can take advantage of it. The plaintiff could have *nolle prosequi* the case as against Hurley at any stage, and have proceeded to try the issue as against Eastman. The plaintiff might, after verdict, have moved for a new trial as against defendant Hurley, and a different result might be reached on another trial. We think the point should be overruled.

The circuit judge, however, erred in instructing the jury that the legislature has not the power to authorize an arrest for an offense not amounting to a breach of the peace, without warrant, if committed in view of the officer. For this reason, *the judgment will be reversed*, with costs; and a new trial ordered.

Grant and Hooker, JJ., concurred with **Montgomery, J.**

McGrath, Ch. J., dissenting:

I am not prepared to overrule the doctrine of *Roberts v. Miner*, 68 Mich. 549. The statute under consideration in that case, as in the present case, empowered officers to arrest without process, and it was with reference to that provision that the language of *Mr. Justice Campbell*, referred to by my Brother *Montgomery*, was used, and there is no room for saying that that language was unnecessary to a determination of the question there involved. The evident intent of the legislature in the provision under consideration was to bring the offense aimed at within the category of breaches of the peace, in order to subject it to the incidents of offenses of that class. In *Allor v. Wayne County Auditors*, 43 Mich. 76-97, *Mr. Justice Campbell* says: "The constitution has also provided that no one shall be deprived of liberty without due process of law, and has provided that no warrant shall issue except upon oath or affirmation establishing probable cause. It has been settled for centuries, and the doctrine has been recognized here, that except in cases of reasonable belief of treason or felony, or breach of the peace committed in presence of an officer, there is no due process of law without a warrant issued by a court or magistrate upon a proper showing or finding." As was said by *Mr. Justice Cooley* in *Weimer v. Bunbury*, 30 Mich. 201-218: "The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings, we do not ascertain from the constitution what is lawful process, but we test their action by principles which were before the constitution, and the benefit of which we assume that the constitution was intended to perpetuate. . . . The bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments, rather than reform-

atory, and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation. We are, therefore, of necessity, driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the constitution employs the term."

It may well be asked what principle was perpetuated or secured against abrogation or violation, if what constitutes due process of law is made to depend upon the will of the legislature as expressed in any one of our many and varied municipal charters. If this constitutional provision be not regarded as a limitation of the power of the legislature, then the statute is in each instance the test of authority, and the constitutional provision is without office or force. That provision is not necessary to support or protect the statute. The latter is to be construed in subordination to the constitution, and is to be tested by that instrument. The term "due process of law" had a well-settled meaning when the constitution was adopted, of which the framers of that instrument must be presumed to have had knowledge, and with reference to which it must be presumed that they acted. Subsequent legislation cannot change the meaning or effect of a constitutional provision. A statute may provide for a removal from office, or for the taxation or taking of property without notice or hearing, but, although such would be a process provided by law, it will not be contended that a removal or a taking thereunder would not be a plain violation of the constitution. Such statutory process, when tested by principles which were before the constitution, would be found to lack essential requisites of due process. The constitution nowhere in express terms speaks of notice or a day in court, but, notwithstanding, these are universally recognized as essential incidents of due process. In *Weimer v. Bunbury*, *supra*, *Mr. Justice Cooley* subjected the process under consideration in that case to the test of settled rules which antedated the constitution. Any other test would violate a cardinal rule of constitutional interpretation, subject provisions designed for the protection of persons and property to legislative modification, and make the meaning of a term employed in the fundamental law, which term had, at the time of the adoption of the constitution, a well-known signification, depend upon the language used in a municipal charter or ordinance.

The facts in many of the cases cited by my Brother *Montgomery* bring the cases clearly within rules as laid down by this court. In *State v. Cantieny*, 34 Minn. 1, respondent and his companions were intoxicated, noisy, and disorderly in the night-time, in a public street. An officer undertook to disperse them, and a scuffle ensued, during which an attempt was made to take away from the officer his baton. He undertook to arrest one of them, and was shot. Not only were the parties guilty of a disturbance of public tranquillity, but of a breach of peace against the officer. In *Beville v. State*, 16 Tex. App. 70, the party was intoxicated in a public place, and in the act of committing a

breach of the peace. In *Willie v. Holt*, 95 Ind. 469, the officer, having knowledge that appellee had previously threatened the life of one Bogart, and hearing the disturbance in Bogart's office, and seeing the appellee emerge from the office in an intoxicated condition, wild with excitement and anger, arrested him. In *Bryan v. Bates*, 15 Ill. 97, it was held that the powers of cities and their ministerial officers were not changed by the new constitution. The arrest was of a person who was drunk, and was disturbing the peace by violent, tumultuous language, calculated to provoke a breach of the peace. In *Scirale v. Neeves*, 47 Ind. 289, the party arrested was in the public streets in a state of gross intoxication, unable to walk or stand without support, and when found was prostrated upon the sidewalk, and was of course an actual obstruction to travel, a disgusting and offensive spectacle, and the situation was calculated to attract a curious crowd. *Com. v. Cheney*, 141 Mass. 102, was a case of like character. In *O'Connor v. Bucklin*, 59 N. H. 589, the arrest was made under a statute providing that any officer, upon view of any crime or breach of the peace, or offense against the police, might arrest without warrant, but it does not appear just what the offense charged was. In *Willie v. Holt*, *supra*; *Wahl v. Walton*, 80 Minn. 506, and *Taaffe v. Slevin*, 11 Mo. App. 607, there had been an actual breach of the peace. Bouvier defines a breach of the peace as a violation of public order; an act of public indecorum. In *People v. Johnson*, 86 Mich. 175, 18 L. R. A. 163, a breach of the peace was defined as a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace; and it was held that to be intoxicated and yelling on the public streets, in such a manner as to disturb the good order and tranquillity of the village, is an act of open violence and a breach of the peace, which, if committed in the presence of an officer, will justify an arrest without warrant. In *Davis v. Burgess*, 54 Mich. 514, 52 Am. Rep. 828, held, that the use of grossly indecent and profane language towards another upon the public street, and in the presence of others, is a breach of the peace. In *White v. Kent*, 11 Ohio St. 550, the ordinance prohibited sales at auction in the public streets. The court held that the care, supervision, and control of the

streets was committed to the municipality; that it was the duty of the city to secure to the public the unobstructed use of the streets, and thus promote the order, comfort, and convenience of the inhabitants, and that whatever unnecessarily and unreasonably interfered with the primary and appropriate use of the street was a nuisance. The cases of *Jones v. Root*, 6 Gray, 485, and *Mason v. Lothrop*, 7 Gray, 854, involve the precise question which was disposed of by this court in *Robison v. Miner*, *supra*. *Roberts v. State*, 14 Mo. 138, 58 Am. Dec. 97, was an arrest for vagrancy, as defined by a municipal ordinance. But that case is clearly opposed to *Way's Case*, 41 Mich. 299. In that case, vagrancy was distinguished from disorderly conduct and breaches of the peace, and it was held that its statutory definition could not be enlarged by municipal ordinance.

And, with respect to the main question, *Mr Justice Campbell* says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer. *Quinn v. Heisel*, 40 Mich. 576; *Drennan v. People*, 10 Mich. 169. It could not have been contemplated—inasmuch as we are bound to suppose the legislature intended to respect constitutional safeguards—that the station-house sessions would have occasion to deal with many cases of misdemeanors, nor with any when an arrest could be safely postponed. The occasions which would justify arrest without process must be very rare indeed in cases of vagrancy; and, in a city no larger than Detroit, persons charged with disorderly conduct can very generally be dealt with more legally and justly in the regular way, inasmuch as very much of it involves no immediate danger to public or private security." It seems to me that what is meant by the term "due process of law," as employed in the constitution, is not only well settled by this court, but that its signification has been arrived at by the proper recognition of a well-recognized rule of constitutional interpretation.

Long, J., concurred with *McGrath, C. J.*

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1898, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS: PERSONAL CAPACITY.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The claim that a statute is unconstitutional because against the spirit of government and the general principles of law and reason is denied validity in a Texas case. (Tex.) 504.

A statute is held not to violate a constitutional provision that justice shall be administered freely and without purchase because it authorizes officers to collect reasonable fees to create a fund out of which their salaries are to be paid. (Ind.) 469.

A statute allowing punitive damages in a cause of action already existing is declared to be *ex post facto* as well as retrospective, within the meaning of constitutional prohibitions. (Colo.) 887.

Taking gravel from private lands for necessary repairs to highways is held constitutional, although no notice is given to the owner, where he is allowed to present a claim for compensation to the county court and have it allowed, with opportunity to be heard unquestioned. (Or.) 355.

Appropriations.

A constitutional prohibition against incurring state indebtedness without first making an appropriation is held inapplicable to a contract by the legislature for current administration of state affairs. (S. Dak.) 734.

A statute creating an office and fixing a salary to be paid is held to constitute a continuing appropriation, making an annual appropriation therefor unnecessary. (Wyo.) 266.

Regulation of business.

The constitutionality of statutes relating to contracts of employment is again discussed in a case which holds an eight hour law, except for farm and domestic labor, with a requirement that for every additional hour the pay shall be double that of the hour preceding, unconstitutional. (Neb.) 703.

The right to practice Christian science on the ground that it is an act of worship or of duty, and therefore not within the statute prohibiting unauthorized practice of medicine, is denied in a case where compensation was expected for the treatment. (Neb.) 68.

The Illinois statute restricting the sale of railroad and steamboat tickets to agents having

a certificate of authority is held constitutional. (Ill.) 153.

A similar statute is held constitutional in Minnesota. (Minn.) 498.

The regulation and supervision of banking business is held within the power of the legislature in a Kansas case, which did not, however, prohibit any one from engaging in that business. (Kan.) 854.

An ordinance prohibiting public laundries except in two designated blocks without a license conditioned on the consent of neighboring owners is held an unconstitutional interference with personal and property rights. (Cal.) 195.

The constitutionality of a statute authorizing railroad commissioners to fix maximum rates presents several questions decided in an Illinois case. (Ill.) 141.

A statute compelling all regular passenger trains to stop at county seats is held to be not unreasonable, nor an interference with interstate commerce or with the United States mails. (Minn.) 503.

A horse railway is held not to be a railroad within the Tennessee act as to stopping railroad trains before crossing another railroad. (O. C. App. 6th C.) 693.

Jurisdiction.

The jurisdiction of a state court to punish manslaughter committed in the state is upheld in a New York case, although the same act was an offense under federal laws, punishable in a United States court. (N. Y.) 117.

An important discussion of the jurisdiction of decedent's estates is found in a case respecting Alabama claims, in which it is held among other things that such a claim is property in the District of Columbia for the purpose of administration there. (Vt.) 684.

See also *infra*, IV.

Officers.

The right of a *de jure* officer to recover from a *de facto* officer the fees or salary received by the latter is decided to be a common-law right, which is recognized in Illinois. (Ill.) 59.

An important case as to the power of the legislature to establish an additional qualification of officers such as the ownership of a

freehold estate, upholds the power. (W. Va.) 343.

That a citizen may be compelled to accept an office is decided in an Illinois case, in which *mandamus* is upheld. (Ill.) 492.

Forbidding the removal of officers for political reasons, in a charter authorizing the governor to make such removals for cause to be stated in writing, is held to constitute a restraint only by operation on the conscience of the executive, and to give the courts no power to review his action on the ground that a removal is for political reasons, contrary to his written declaration. (Colo.) 201.

Directors of the poor are held in a Pennsylvania case to be indictable at common law for negligence in allowing the ill-treatment of a pauper boy apprenticed to an unfit master. (Pa.) 552.

Attorneys.

In a remarkably full review of the authorities on the subject of the nature of the vocation of an attorney in respect to the exercise of a public office, the New Hampshire court concludes that women may practice law, although excluded from voting or holding office. (N. H.) 740.

Municipal corporations.

The liability of a municipal corporation for failure to supply water to a private person according to contract with him is upheld in a Massachusetts case. (Mass.) 287.

The rule that a city is not liable for negligence in respect to a public duty is applied in respect to the breaking of a pole used for wires of a fire signal system of the city, whereby a lineman working for the city is injured. (Mass.) 426.

The liability of a city for damages caused by fireworks is denied in an Arizona case, distinguishing the New York case in 21 L. R. A. 641. (Ariz.) 430.

A city is held not liable for the death of a person caused by a mob, under a statute making a city liable for destruction of property by such a mob. (C. C. E. D. La.) 592.

The restriction of municipal indebtedness is involved in a case which holds that securities of the city paid by it and placed in its sinking fund are not to be counted as part of its indebtedness. (Pa.) 781.

The right to include rural land in a municipal corporation against the owner's consent is a question on which there has been some difference of opinion, but which the supreme court of Washington upholds. (Wash.) 795.

The interesting question as to the power of city authorities over trees in streets is decided in North Carolina in favor of the city and against a review of the discretion of city authorities by the courts. (N. C.) 671.

An ordinance prohibiting the use of blinds, screens, stained glass, or anything to obstruct the view of the interior of a saloon is held unreasonable and invalid, under the general power to license and regulate saloons. (Ind.) 768.

The claim that a license fee of \$2,000 for the sale of liquors is prohibitory was denied on the 24 L. R. A.

facts shown, in a city of 4,000 inhabitants (Ala.) 774.

Highways.

An extensive discussion of the property rights of abutters in respect to access to their property from a highway, and to light and air, is found in a Utah case which holds that the modern doctrine makes no distinction between cases in which the fee is owned by the abutters and those in which it is held by the city in trust for the public. (Utah) 610.

The right of an abutting owner, whose access to his property from the street is practically cut off by a structure in the street, to recover for damages sustained, which is a question presenting much conflict, is decided in the affirmative in Colorado, although the constitutional provision in that state requiring compensation for property damaged is limited by the courts to extraordinary uses. (Colo.) 392.

On the other hand in Maryland a similar structure is held not to constitute a taking of any property of an abutting owner, although he is given by the statute a right of action for damages for the consequential injuries. (Md.) 396.

Although the Missouri courts have held that a city could allow a railroad in a street without compensation to abutting owners, this doctrine is denied extension to give a practical monopoly of a street to a railroad. (Mo.) 516.

The erection of telegraph poles in a highway is held in Michigan a proper street use which does not constitute an additional servitude upon the fee. (Mich.) 721.

Tanks in a street for sprinkling erected under license from a city are held not to constitute a nuisance and not to be removable without compensation to the owner. (Or.) 787.

An ordinance imposing a tax of \$2 on each telegraph pole in a city for use of streets is upheld, although the telegraph company is a post-road under act of congress. (Md.) 161.

Public alley.

An ordinance closing a public alley for private use is held an illegal destruction of the easement of abutting owners. (Md.) 403.

An abutting owner's rights in an abutting alley are also protected against an over-head structure or bridge between his property and the entrance, by which his light and air are obstructed. (Ill.) 406.

Assessment for improvements.

Street sprinkling is held in an Illinois case not to constitute a public improvement, the expense of which can be charged on abutting property. (Ill.) 412.

Markets.

Market restrictions are held valid against a claim that they are unconstitutional in a Louisiana case. (La.) 584.

Normal school.

The removal of a teacher in a normal school at the pleasure of the board of regents is held not reviewable under the Wisconsin statutes, and it is also held that this power of removal is one which the board cannot waive or surrender by contract. (Wis.) 836.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The tendency of courts to construe a contract with an implied condition, when that is necessary to justice, is illustrated by a decision that a guaranty of dividends of a corporation implied its continued existence. (N. Y.) 118.

The contract for services is reluctantly held, following the weight of authority, to be not subject to apportionment so as to allow any recovery for part performance by one who has broken his contract. (Miss.) 281.

That a bank passbook is not a contract which excludes oral evidence is decided in a Kansas case, citing authorities. (Kan.) 787.

The negotiability of certificates of deposit is considered in a case which holds a certificate negotiable against several different objections. (Neb.) 444.

Option.

Under a writing giving one an agency to sell land and also an option on it, his transfer of the writing to a third person is held not to make a sale or give the transferee any right without accepting the option within a reasonable time. (W. Va.) 839.

Statute of frauds.

Several interesting questions as to the effect of possession and part performance under a parol contract for lands, are decided in a Nebraska case relating to a unilateral agreement for the sale of land to a tenant, and want of mutuality is no defense to the enforcement of the contract. (Neb.) 255.

Carriers.

The relation of passenger is held not to be established in case of one having a ticket who is struck while running from a street across railroad premises to catch a train. (Mass.) 521.

The right to ride on the platform of a car is held to exist in case of a passenger with an excursion ticket, who, on the return trip, cannot get inside the car and is not informed that he can go on another train. (Cal.) 710.

Definiteness.

Indefiniteness is held fatal to a contract for the sale of portions of the bed of a street "at the market price." (Md.) 168.

Another indefinite contract was for mining ore "as long as we can make it pay." This was held insufficient to allow prospective profits on terminating the contract. (Mich.) 357.

Validity.

Public policy which will defeat a contract is considered in an Indiana case holding void a contract by a justice of the peace to arrest a person charged before him with larceny, where the compensation was dependent in amount on

the recovery of property from the criminal. (Ind.) 208.

The validity of contracts stipulating against liability for negligence is a question raised in an Iowa case, respecting a provision as to the negligent destruction of buildings on the railroad right of way. (Iowa) 647.

An association of brewers to prevent competition is held illegal, although its operation was limited to the county of Philadelphia, Pa., and that of Camden, N. J. (Pa.) 247.

The anti-trust law of congress is very extensively discussed in a case which holds that the incidental restriction of competition is not necessarily a violation of the act, and that an association of railroad companies, which leaves them competitors of each other, but binds them to the rates fixed, except on ten days' notice to the contrary, is not unlawful. (C. C. App. 8th C.) 78.

The validity of an agreement between brothers and sisters holding land in common to own it as joint tenants until the death of the last survivor, when it should by descent or devise pass to the child of one of them who is then in being is upheld against the claim of unlawful suspension of alienation. Sufficient part performance to take the agreement out of the statute of frauds is shown by keeping the agreement until the last survivor has obtained the land and has received all the benefits thereof. (N. Y.) 123.

Interest.

The legal rate of interest which begins to run by force of statute on a county warrant after an indorsement by the treasurer is held to constitute a part of the contract and to be not subject to change by a subsequent change in the legal rate of interest. (Wash.) 359.

Usury.

The distinction between usury which makes the debt void and those which do not is raised in a case which holds that a statute providing for a forfeiture of the entire interest avoids a note given solely for usury even in the hands of a bona fide holder. (N. C.) 280.

Appeal bond.

Denying the doctrine of the Missouri supreme court in 19 L. R. A. 182, it is held in Texas that an appeal bond remains effective on a transfer by statute of the jurisdiction of the appellate court to another court, and that such change does not impair the obligation of the contract. (Tex.) 642.

Warranty.

The warranty of a horse to be sound and kind is held not to extend to a warranty that he will not be frightened at a trolley car. (N. J.) 575.

III. CORPORATIONS AND ASSOCIATIONS.

The powers of a national bank are held, following a decision of the United States Supreme Court, to extend to a guaratee of commercial paper sold by it. (Neb.) 268.

The power of the president of a bank to employ counsel and manage its litigation is upheld in a Kansas case, in the absence of any

order of the board of directors to the contrary. (Kan.) 719.

The provisions of the New York banking law applicable to savings and loan societies are construed to authorize advances, payment of dues, and the issue of prepaid and income stock with limited cash dividends. (N. Y.) 57.

(DOMESTIC RELATIONS; PERSONAL CAPACITY—TORTS; NEGLIGENCE; INJURIES; NUISANCES.)

Liability on a subscription to stock is considered in a case in which the subscription was for stock in a corporation to be organized, and it is held that the subscription contemplates a *de jure* corporation. (Neb.) 259.

Mandamus to compel the repair of a railroad track partly torn up is refused in a case where the road had been abandoned and could not be operated except at great loss, while no attempt was made to compel its operation. (Kan.) 564.

An association in which the members insure each other against loss by fire and agree to be assessed for losses is not authorized under the Ohio statutes to do business on the joint-stock plan, or the contingent-liability plan, and cannot receive nonresidents as members. (Ohio) 252.

The migration of a corporation was alleged as a ground of forfeiture in an Illinois case but was not established. (Ill.) 463.

Foreign corporations.

The right of a foreign corporation to bring a suit is expressly decided in a South Carolina case, and the failure of the complaint to allege its charter power is held not fatal. (S. C.) 289.

The free, broad, and liberal policy of the state of New York toward foreign corporations is fully developed by a decision which declares that such corporations may do anything that a nonresident natural person may do, including the purchase and sale of real property in the state. (N. Y.) 822.

The validity of contracts by unauthorized foreign corporations, on which there is conflict

of decisions, is upheld in Colorado and Washington. (Colo.) (Wash.) 811, 315.

An unincorporated association of another state known as a guaranty and accident Lloyds is held in Ohio to be acting as a corporation and subject to ouster under provisions excluding foreign corporations. (Ohio) 298.

The statutes giving special privileges as to interest to building and loan associations is held in an Alabama case not to extend to foreign corporations. (Ala.) 174.

An attempt to invoke the jurisdiction of a court to dissolve a foreign corporation was unsuccessful in a federal case respecting an English corporation. The court denied the power, unless expressly conferred by statute. (C. C. App. 8th C.) 776.

A foreign corporation is held not to be included in the provisions of the New York statute against assignments by insolvent corporations, and preferences by a foreign corporation are therefore held legal. (N. Y.) 548.

Religious society.

The power of a general conference of a church to change the constitution and confession of faith is extensively discussed in a Michigan case which holds a new constitution of the church of the United Brethren in Christ to be invalid contrary to the decisions in Indiana and Pennsylvania, but in harmony with the decision of the supreme court of Oregon and of the United States circuit court of Ohio. (Mich.) 615.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

The jurisdiction of a suit for alimony by a wife domiciled in the state is held unaffected by a provision requiring two years residence before a suit for divorce. (Fla.) 187.

And a suit as to jurisdictional effect of residence does not defeat the power to give temporary alimony. *Id.*

The power of the court to punish as a contempt the refusal to pay installments of alimony is upheld in Wisconsin on the ground that an execution could not be issued to enforce collection, and inability to pay, which is brought about by the defendant himself, is held insufficient to purge him of the contempt. (Wis.) 433.

The competency of a married woman to charge herself for legal services in attempting to secure a divorce, when the suit is discontinued, is upheld in Michigan. (Mich.) 629.

The effect of statutory prohibition against remarriage of a person for whose guilt a divorce is granted is held not extraterritorial, and such statute is held not to apply to a marriage of nonresidents, from one of whom a divorce had been obtained in another state. (La.) 831.

Insanity.

The presumption of insanity from the fact of suicide is presented in a case which denies the presumption, at least so far as to affect a will made six weeks before. (La.) 577.

V. FIDUCIARIES AND REPRESENTATIVES.

The constructive notice of an attorney arising from the knowledge of his partner is presented in an interesting case which holds that such notice does not extend to transactions for

her clients after dissolution of the firm. (Cal.) 197.

See also *Receivers*, under VIII.

VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

Trover.

A demand by a constable by virtue of a chattel mortgage after condition broken is not such that a carrier will be liable for conversion if it refuses to surrender them. (S. C.) 100.

Selling dangerous thing.

The liability of one who sells an article known to be dangerous is considered in the 24 L. R. A.

novel case of alleged liability on the part of the seller of a horse having glanders for the death of a person who contracted the disease from the horse. The court regarded the complaint as insufficient in failing to allege that the disease was one which would be contracted as the natural and probable consequence of contact with the horse, but considered the li-

bility to exist under a statute relating to death by wrongful act if the disease was of that character. (Md.) 679.

Blasting.

A very important case,—especially in any cities where rock must be blasted for foundations and where high buildings exist,—as to the lawfulness of blasting, by which adjoining buildings are injured through concussion merely, is decided in New York to the effect that such injury creates no liability, in the absence of negligence, if the blasting was the only proper mode of doing the work. (N. Y.) 105.

Liability of charity.

The law as to exemption of charitable institutions from liability for wrongful acts of agents is illustrated in an Iowa case, which applies it to a state agricultural society. (Iowa) 655.

Act of contractor.

The liability for the acts of an independent contractor is discussed in a case which holds that one who employs an independent contractor to excavate is not liable for his trespass to shore up an adjoining building when his contract requires him to do so "as required by law" (N. Y.) 103.

Master's liability.

A somewhat peculiar case of injury by the negligence of a baggageman in throwing from a train certain iron drills, which were carried merely by way of accommodation, holds that the carrier is not liable. (Mo.) 863.

The fact that a janitor and ticket taker at a theater is also a special policeman is held not to relieve his employers from liability for an assault made by him on a person who has engaged in a dispute with the ticket seller in respect to his change. (Ind.) 483.

Railroad cases.

Liability of a railroad company for running over a person walking on its track in plain sight of the engineer is denied in a West Virginia case. (W. Va.) 226.

The doctrine as to duty to trespassers or mere licensee is applied to a person standing on land of a railroad company merely to witness the catch of a mail pouch by a passing train and he is held to assume all the risks. (W. Va.) 215.

Contributory negligence.

The effect of contributory negligence to defeat a recovery, with discussion of the proximate cause, with other questions, is presented in a West Virginia case of injury to a passenger. (W. Va.) 50.

Orders are held sufficient to prevent the defense of contributory negligence by an employee except in extreme cases (Va.) 717.

A person struck by tools thrown from another person by a collision with a railroad train is held entitled to recover from the railroad company, although the other person was guilty of negligence in getting in the way of the train, if the railroad company was also negligent in failing to give signals and this fact co-operated in producing the injury. (N. J.) 531.

The effect of a statute providing that it shall be necessary to prove only neglect or refusal to comply with it in order to recover damages for resulting injuries is held not to bar a defense of contributory negligence, although it shifts the burden of proof. (Iowa) 657.

Pollution of stream.

The pollution of a stream by washing ore is held actionable on a review of several important and somewhat contradictory cases, where the pollution might have been avoided. (Ala.) 64.

Nuisance.

The law of nuisance caused by lawful business has an illustration in a case in which an injunction is granted against allowing filth from a creamery to flow to adjoining premises by percolation or otherwise. (Wis.) 838.

A nuisance to the public by congregation of solicitors of business in front of a railroad station is held not to be a nuisance as to the railroad company. (Ill.) 156.

VII. PROPERTY RIGHTS; LIENS; GIFTS.

Vested right.

No vested right is held to exist in a privilege given to a certain class of persons to acquire tide lands, but subsequent statutes may take it away. (Wash.) 606.

Covenant.

The necessity of an estate in the grantor to make his covenants attach to the land is an interesting question not decided in a recent New York case, which holds that mere possession of the grantor, who joins with his wife in a deed of land of which she had color of title, is sufficient,—especially where he received part of the purchase money and expressly extended his covenant to the heirs and assigns of the grantee (N. Y.) 850.

Acceptance of deed of trust.

The question whether or not a deed of trust or mortgage will take effect before acceptance by the creditor is presented in an extreme case, which decides that it does not take effect as against an attachment levy after the trustee 24 L. R. A.

had accepted the trust and taken possession of the property, or before the creditors whose claims were secured thereby had knowledge of the deed. (Tex.) 869.

Shelley's Case.

The rule in Shelley's Case is held in Indiana, overruling an earlier decision, not to apply to a deed giving a life estate with remainder to the issue of the body of the life tenant. (Ind.) 489.

Descent.

Descent through alien ancestors to collateral relatives, such as cousins, is allowed in Connecticut, where the common-law rule of exclusion of those tracing descent through uninheritable blood was never in force. (Conn.) 667.

Reversion.

The abandonment and prohibition of the use of land for burial purposes, when held by a municipal corporation under a grant for those purposes only, is held to cause a reversion

to the grantor, but immediately to set the statute of limitations in force against the reversioner in favor of persons in possession. (N. J.) 843.

Courtesy.

The effect of a divorce is held in a Rhode Island case to destroy an inchoate right of courtesy, unless preserved by statute. (R. I.) 798.

Insurance.

A widow is held entitled to share in the proceeds of insurance payable to "heirs at law," where by statute she is a distributee. (Conn.) 664.

Minerals in street.

A right to minerals under the surface of a street reserved in a deed of the street is held not to be an appurtenance to the abutting lots or to pass with them, under the rule that lots bounded on the street extend to the center. (Mo.) 507.

Stock dividends.

The question whether stock dividends constitute capital or income is presented in a somewhat unusual case, where long overdue dividends on preferred stock were compromised by the issue of increased stock, and it is held that these belong to the remainderman and not to the life tenant. (Conn.) 536.

Adverse possession.

Dispossession under a judgment in ejectment, which is afterwards reversed and the possession restored, is held to interrupt an adverse possession. (Fla.) 130.

Artesian wells.

Allowing waters from an artesian well in which patients of a sanitarium have been bathed to flow into a stream which forms the natural outlet for the discharge of such waters is held not to constitute a wrong to lower proprietors,

if due care is taken to prevent injury. (Ind.) 568.

Name on records.

The effect of a mistake in the initial of a middle name upon notice by records is discussed in a case which holds it immaterial, if there is nothing to show that there is more than one person of the name. (Ark.) 543.

Trees.

The right of a telegraph company to cut trees or branches of trees in a highway which belongs to an abutting owner is denied in Ohio. (Ohio) 724.

Emblements.

The right of the owner of land which is sold on execution to enjoy the use of it until final confirmation of the sale is illustrated by a decision holding that grass severed before confirmation does not pass to the purchaser. (Neb.) 440.

Mortgage notes.

The priority of notes secured by a mortgage according to their respective dates of maturity, in a state where such priority is allowed, is not affected by the fact that all the notes are made due by default in payment of the first note. (Ind.) 800.

Liens.

The effect of a statute giving a lien on personal property of a tenant for rent, under a constitutional exemption of the debtor's property, is considered in a case which upholds the exemption and denies that mere entering into the lease is a waiver thereof. (Fla.) 812.

Charity.

The uncertainty which will defeat a charitable gift is held not to exist in case of a gift for the benefit of poor churches of a city and vicinity. (Mass.) 158.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Preference to creditor.

The right to prefer creditors when no general assignment is made is upheld in a South Dakota case overruling prior authority, where the statute denies preference in such general assignment. (S. Dak.) 524.

Homestead.

A judgment for a tort is regarded as a "debt contracted" within a constitutional exemption of homestead. (Mich.) 789.

Unauthorized appearance.

The proper remedy in case of a judgment rendered on an unauthorized appearance after jurisdiction of the person of the defendant had been obtained is held to be the opening of the judgment for trial on the merits and not by collateral attack, seeking an injunction and a decree that it is a nullity. (Ind.) 46.

Trust deed.

A change in the statute as to the remedy for enforcing a trust deed is held inapplicable to a prior trust deed which expressly provided the remedy. (Tex.) 284.

Fraud.

Purchasers of goods from one who fraudulently obtained them are held in a federal case chargeable by the circumstances with knowledge. 24 L. R. A.

edge of his fraud, and the original seller of the goods was allowed to recover them. (C. C. App. 7th C.) 417.

Specific performance.

The right to specific performance of a contract to purchase lands from one whose wife did not sign the contract and refuses to sign the deed, is denied with a refusal to compel the husband to convey with a deduction of the value of the wife's dower interest. (D. C.) 763.

Estoppel.

The claim that the plaintiff in an action on a life policy is estopped to deny that death was caused by suicide, when proofs of loss had been made to that effect, was made in a Louisiana case, but denied by the court. (La.) 569.

Discovery.

Bills for discovery are held to be abolished in the Texas practice combining law and equity and providing for interrogatories in pending suits, and also for the deposition of adverse parties. (Tex.) 188.

Sheriff's bond.

The United States is held a party aggrieved so as to be entitled to sue on a sheriff's bond

For the escape of a federal prisoner. (C. C. App. 6th C.) 170.

Recovery for death.

The recovery in an action for death under the Texas statutes being for the pecuniary loss only is held to be defeated or reduced by sharing in the estate of the deceased. (Tex.) 637.

Newspaper notice.

A legal newspaper containing some matters of interest to the general public is held to be a "newspaper" within the Michigan statute as to publication of legal notices. (Mich.) 793.

Receivers.

The exercise of comity in respect to foreign receivers is illustrated in a case which denies a claim of such a receiver to funds in the hands of a domestic receiver of local branches of the iron hall. (Conn.) 815.

The receivership of a railroad extending across a state boundary is properly extended over a small portion of the road in one of the states, where a receiver has been appointed for

the greater part of the road in another state. (Ga.) 730.

Jury.

The unanimity of a jury is required by a constitutional provision for a jury of twelve to ascertain damages in an eminent domain case. (Fla.) 272.

The constitutional right of trial by jury is held not violated by a territorial statute allowing a verdict by three fourths of the jury in a civil case. (Utah) 277.

The right to trial by jury on an information in the nature of quo warranto presenting issues of fact is held to exist at common law. (Fla.) 806.

Evidence.

The law as to opinions of witnesses in respect to matters difficult to describe is illustrated by the decision allowing an opinion as to personal appearance and apparent health. (Cal.) 715.

See also *Evidence* in IX.

IX. CRIMINAL LAW AND PRACTICE.

That intoxication is not an excuse for crime but may be important in determining the degree of homicide is decided in a Kansas case, which repudiates the doctrine of uncontrollable impulse. (Kan.) 555.

Arrest.

A statute authorizing an arrest without warrant for an offense committed in presence of an officer is held not unconstitutional as a deprivation of due process of law, although it is applied to cases in which such an arrest was not authorized at the time when the constitution was adopted. (Mich.) 859.

Anti-trust law.

The act of congress against unlawful restraint on commerce is held inapplicable to a combination for the control of manufacturing and selling sugar in the United States. (C. C. App. 3d C.) 428.

Killing dog.

The killing of a dog is held to be not within the Georgia code, making it indictable to injure or destroy property, on the ground that this was intended to refer to inanimate property only. (Ga.) 732.

Prize fight.

The question whether or not a glove contest is what is commonly known as a prize fight is considered in a Louisiana case, in which it is held that a contest with five-ounce gloves, under the Marquis of Queensbury rules, is not a prize fight. (La.) 452.

Intoxicating liquors.

The contention that a purchaser of intoxicating liquors illegally sold is a participant in the

crime, subject to punishment, is made in a Kansas case, but not upheld. (Kan.) 212.

The arrival of intoxicating liquors within the state under the Wilson bill is held to mean the crossing of the state line, although the transportation is not complete. (Iowa) 245.

The Iowa law against transporting intoxicating liquors without a certificate that the consignee has a right to sell them is held applicable to a mere removal from the platform to a freight room of a depot. (Iowa) 245.

Forgery.

The invalidity of a writing if genuine is held not to prevent it from being the subject of forgery when it might injure another if genuine. (Cal.) 33.

Obscenity.

The question what constitutes obscene literature is answered in a New York case, excluding from the charge of obscenity a list of standard works. (N. Y.) 110.

Evidence.

A case of unusual importance in respect to evidence is one which holds evidence of declarations of a person admissible to show intent, although they did not constitute part of the *res gesta*. (Mass.) 235.

A somewhat extreme instance of the youth of a witness is that of a Wisconsin case in which the witness was a child five years and five months old at the time of the trial, and but four years and nine months old at the time of the transaction in question. (Wis.) 857.

An untutored deaf mute is held competent to testify by signs through an interpreter, although the latter is not an expert. (S. C.) 126.

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GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACTION OR SUIT.

1. The United States may sue as the party aggrieved, upon the bond of a sheriff from whom a federal prisoner lawfully in his custody has escaped, where the state statute authorizes suit on the bond by any party aggrieved. *State, United States, v. Hill* (C. C. App. 6th C.) 170

2. An entire contract for services cannot be apportioned so as to permit a recovery for part performance by one who is guilty of a breach of the contract. *Timberlake v. Thayer* (Mass.) 231

3. An agreement by brothers and sisters to whom land has descended in common, to hold the same as joint tenants, and that it shall pass to the survivor and from the latter by descent or devise to a child of one of the brothers, is enforceable by such child, although he was not a party thereto. *Murphy v. Whitney* (N. Y.) 123

4. Acts of a railroad or other private corporation in the execution of charter or statutory powers are not within the rule that legislative authority for acts causing consequential injury to private property is a bar to a claim for indemnity. *Booth v. Rome, W. & O. T. R. Co.* (N. Y.) 105

5. A defense to a guaranty of corporate dividends, that the corporation has been dissolved, cannot be defeated on the ground that the dissolution was caused by defendant's own misconduct, where it was adjudged on the application of the plaintiff for technical breaches of corporate duty, for some of which he was as much responsible as the defendant. *Lorillard v. Clyde* (N. Y.) 118

6. An ejectment suit may be revived in the name of the heirs on the death of the plaintiff, although the provision in McClell. (Fla.) Dig. p. 829, § 74, is for revival in the name of the "legal representative," since the heir is the real representative of the ancestor, and by the Supreme Court Rule 95 any person in interest, other than the executor and administrator, may be made a party by direction of the court. *Gould v. Carr* (Fla.) 180

ADVERSE POSSESSION.

1. Adverse possession begins against the reversioner immediately upon a reversion of title by abandonment and prohibition of the use for which alone the land was granted, whether the legal title has passed to the rever-

sioner or still remains in a trustee discharged of the public use. *Newark v. Watson* (N. J. Err. & App.) 843

2. The continuity of adverse possession is interrupted by dispossession under a judgment in ejectment, although this is reversed on appeal and the possession restored. *Gould v. Carr* (Fla.) 180

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AGRICULTURAL SOCIETY. See CHARITIES, 8; MASTER AND SERVANT, 9.

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ALIENS. See DESCENT AND DISTRIBUTION, 2, NOTES AND BRIEFS.

ALIMONY. See CONTEMPT, HUSBAND AND WIFE, 2, 3, NOTES AND BRIEFS.

ALLEY.

1. Special damages are caused to an abutting owner by an overhead bridge across a public alley or street, when the light and air passing to his property over such alley will be seriously diminished by the structure. *Field v. Barling* (Ill.) 406

2. The right of an abutting owner who has bought with reference to a dedicated public alley or street, to have it forever kept open, includes the enjoyment of light and air from the space above extending unobstructed to the sky. *Id.*

3. The right to make a bridge or overhead crossing over a public alley for private use cannot be granted by city authorities, although the fee of the alley belongs to the city. *Id.*

4. The easement of an abutting owner in a public alley laid out by the original grantor of the land, who conveyed it with reference to the alley as a boundary, cannot be taken away for private use by an ordinance closing the alley. *Van Witsen v. Gutman* (Md.) 408

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Building bridge over as injury to abutting owner. 406

ANIMALS.

The willful and malicious killing of a dog is not an indictable offense under Ga. Code, § 4627, as the "injuring or destroying . . . public or private property," even if dogs are regarded as property, since this statutory provision is intended to apply exclusively to inanimate property. *Patton v. State* (Ga.) 732

ANTI-TRUST LAW. See CONSPIRACY, NOTES AND BRIEFS; STATUTES, 10.

APPEAL AND ERROR.

1. An allegation by an appellant that he is "aggrieved both as an heir at law and next of kin" is a mere averment of a legal conclusion, and not sufficient to show a right to appeal, where the facts set up show that his claim is without foundation. *Campbell's Appeal* (Conn.) 667

2. An assignment of error embracing three distinct propositions, without particularly specifying the error complained of, is insufficient. *Union C. L. Ins. Co. v. Chouning* (Tex.) 504

3. Refusal to permit defendant's counsel to ask a juror on his *voir dire* to what extent he had read about the case in the newspapers, after the statutory questions had been exhausted, is not an abuse of discretion requiring reversal, if there is nothing to show what counsel had any reasonable expectation of proving. *Com. v. Trefethen* (Mass.) 235

4. The vacation of a judgment by default at the term during which it was rendered will not be reversed unless there is a clear abuse of discretion; and a stronger showing of abuse must be made than in cases where a trial on the merits is denied. *Bigler v. Baker* (Neb.) 255

5. The relieving of a plaintiff from a stipulation submitting the case on a motion for nonsuit, and allowing him to file an amended complaint, is discretionary, and not reviewable on appeal. *Robinson v. Exempt Fire Co.* (Cal.) 715

6. An objection to evidence is not available on appeal unless saved by bill of exceptions, although noted on certificate of evidence. *Poling v. Ohio River R. Co.* (W. Va.) 215

7. An express statement that the report and verdict are concurred in by ten of the jurors defeats any presumption that all of the jurors concurred, as required by law, although all signed the report. *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 273

8. The answer to particular questions of fact is waived by allowing the jury to find a general verdict without asking the court to have them answered. *Carrico v. West Virginia C. & P. R. Co.* (W. Va.) 50

9. One who directed an arrest and is found guilty of false imprisonment cannot complain that the one who actually made the arrest was found not guilty. *Burroughs v. Eastman* (Mich.) 859

10. Direct evidence of suicide is not necessary to require the consideration of the correctness of the exclusion of evidence of intention 24 L. R. A.

to commit it, since that theory must be considered by the jury if the circumstances of the case afford evidence to support it. *Com. v. Trefethen* (Mass.) 235

11. A motion to direct a verdict for the defendant is waived when he proceeds with his evidence. *Poling v. Ohio River R. Co.* (W. Va.) 215

12. One whose demurrer has been sustained cannot, for the purpose of sustaining the judgment, challenge the truthfulness of the statements in the pleadings demurred to. *Barnard v. Shirley* (Ind.) 568

13. Findings of fact in a chancery case are conclusive in the appellate court, unless they are so manifestly erroneous as to demonstrate some oversight or mistake. *Block v. Salt Lake Rapid Transit Co.* (Utah) 610

14. A general finding by a referee that a party was duly appointed administrator of the estate of a person referred to as "deceased" throughout the report is sufficient to sustain the administration, where nothing further appears in the record to enable the appellate court to judge of its legality. *Manning v. Leighton* (Vt.) 684

15. An instruction assuming as true facts proved beyond controversy is not ground for reversal because of such assumption. *Carrico v. West Virginia C. & P. R. Co.* (W. Va.) 50

16. It is not prejudicial error to admit against one on trial for murder the whole of a conversation in which some of his replies had a tendency to show guilt, while others were explicit denials of guilt. *Com. v. Trefethen* (Mass.) 235

17. Failure to pass upon a demurrer to a defense, and entering judgment for plaintiff on the pleadings, is not prejudicial to defendant when the defense was insufficient and the defect such that it could not have been cured by amendment. *Kindel v. Beck & P. Lithographing Co.* (Colo.) 311

18. A statute forbidding reversal of a judgment when it shall appear that the merits of the case have been fairly tried and determined cannot be applied in case of the erroneous sustaining of a demurrer to the affirmative matter in a paragraph of the answer, when the effect was to exclude evidence of the matters therein alleged, so that it is impossible to determine from the record how far defendant was prejudiced by the ruling. *Barnard v. Shirley* (Ind.) 568

19. An appellant cannot insist on having clerical errors in the judgment corrected by the appellate rather than by the trial court, although the correction by the trial court deprives him of his ground for appeal. *Kindel v. Beck & P. Lithographing Co.* (Colo.) 311

20. The trial court may correct a clerical error in the amount of the judgment entered, after the record has been removed to a higher court by appeal. *Id.*

21. An appeal bond executed in accordance with the law in force at the time does not become inoperative by a transfer of the appellate jurisdiction to a different court. *Mexican Nat. R. Co. v. Mussette* (Tex.) 643

APPRENTICE.

Directors of the poor who apprentice a pauper boy, with knowledge of the unfit character of the master, and who, with knowledge that the child is being abused by such master, refuse to take any measures to rescue him from the cruelty to which he is subjected, are criminally liable at common law as for a willful neglect or refusal to discharge their duties. *Com. v. Coyle* (Pa.) 552

APPROPRIATIONS.

A continuing appropriation of the amount of the salary, which omission of annual appropriation will not affect, is made by a statute creating an office and fixing the salary in obedience to a constitutional mandate, and requiring it to be paid by the treasurer in the same manner as other salaries of state officers are paid, where the constitution provides that an officer's salary shall not be diminished during his term, although it also provides that no money shall be paid out of the treasury except on appropriations made by the legislature. *State, Henderson, v. Burdick* (Wyo.) 266

ARREST. See also CONSTITUTIONAL LAW, 18.

1. Constitutional provisions against issuing a warrant without probable cause supported by oath or affirmation do not apply to an arrest without a warrant. *Burroughs v. Eastman* (Mich.) 859

2. An arrest without warrant may be authorized by the legislature for other misdemeanors committed in the presence of an officer, as well as for breach of the peace. *Id.*

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NOTES AND BRIEFS.

The necessity of acceptance of an assignment or deed of trust for creditors:—(I.) assent and presumption; general doctrine; (II.) assent presumed; (a) in general; (b) statutory presumption; (III.) extent of presumption; (IV.) rebuttal of presumption; (a) in general; (b) conditions imposing a release; (c) other conditions; (d) assignments hindering, delaying, or defrauding creditors; (e) assignment direct to creditors; (V.) express assent; (VI.) sufficiency of assent; (VII.) time of assent; (VIII.) effect of assent; (a) in general; (b) after attack; (IX.) effect of assignment; (X.) the Massachusetts doctrine; (a) principles of; (b) time of assent; (c) comity; (XI.) English decisions. 369

ATTACHMENT. See MORTGAGE, 1.

ATTORNEYS. See also EXECUTORS and ADMINISTRATORS, 5; JUDGMENT, 8; NOTICE, 2, 8.

1. An attorney at law is not an officer of the government, such that the right of admission to the bar will depend on eligibility to public office. *Re Ricker* (N. H.) 740
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2. Women are not excluded from admission as attorneys at law by the common-law rule which denies them the right to vote or hold public office. *Id.*

3. The provisions of the Act of Congress of June 5, 1882, re-establishing the Court of Alabama Claims, and authorizing the rendition of judgments in the mode and subject to the conditions, limitations, and provisions of the Act of 1874 originally establishing such court, revive the provision that the court shall on motion allow the compensation of attorneys and enter it as part of its judgment, and that all other liens upon the judgment shall be of no effect. *Manning v. Leighton* (Vt.) 684

4. Claims under the Act of Congress of June 5, 1882, for damage on the high seas by Confederate cruisers and for premiums charged for war risks after the sailing of any Confederate cruiser, although to be satisfied out of a particular fund without further responsibility on the part of the United States, are, since the money had been covered into the treasury and the right to it was to be established by legal proceedings, within the provisions of U. S. Rev. Stat. § 3477, making void all transfers and assignments of any claim upon the United States before the allowance of the claim and the issuing of the warrant, so as to prevent a lien in favor of an attorney under an agreement for a conditional fee for their prosecution. *Id.*

5. An attorney who has rendered services in the recovery of a claim from the United States, which has finally been recovered by the administrator of the beneficiary through another attorney, cannot impose a lien upon the funds, where such administrator had no further notice of the lien than the mere knowledge that such attorney had rendered services in connection with the claims; nor can he hold him personally liable although he has paid over the fund to the persons entitled. *Id.*

6. The right of an attorney to assert a lien upon a recovery on a claim against the United States, under an agreement for a conditional fee, is inconsistent with U. S. Rev. Stat. § 3477, providing that all transfers and assignments of any claim upon the United States, or of any interest therein, shall be absolutely null and void unless made with certain formalities and after the allowance of the claim and the issuing of a warrant therefor. *Id.*

7. An attorney's lien is either a retaining or a charging lien. The former is based upon the possession of money or papers, and expires when the possession ends. The latter is the right to make the claim for compensation a charge upon the judgment, and is not perfected until notice is given the defendant. *Id.*

ATTORNEYS' FEES.

An attorneys' fee for the foreclosure of a mortgage, expressly provided for in the instrument, is collectible on foreclosure. *Falls v. United States Sav. Loan & Bldg. Co.* (Ala.) 174.

AUCTIONEER. See FRAUD, 2.

BANKS.

1. Constitutional provisions authorizing the organization and control of banks of cir-

ulation do not prohibit the enactment of laws imposing reasonable regulations upon banks of deposit and discount. *Blaker v. Hood* (Kan.) 864

2. A national bank may guarantee the payment of commercial paper as incidental to the exercise of its power to buy and sell the same. *Thomas v. City Nat. Bank* (Neb.) 268

3. The president of a national bank is conclusively presumed to have authority to guarantee commercial paper on a sale thereof, in the absence of notice to the contrary. *Id.*

4. The retention and enjoyment by a national bank of the proceeds of a guaranty of payment of commercial paper sold by its president ratifies his act. *Id.*

5. The president of a banking corporation has the power to employ counsel and manage the litigation of the bank, in the absence of any order of the board of directors depriving him of such power. *Citizens' Nat. Bank v. Berry* (Kan.) 719

6. A certificate of deposit issued by a bank and made payable to order or bearer, and payable on return of the certificate properly indorsed, is a negotiable instrument. *Kirkwood v. Hastings First Nat. Bank* (Neb.) 444

7. A provision for interest if left for six months, but no interest after six months, does not destroy the negotiability of a certificate of deposit. *Id.*

8. The provision that a certificate of deposit is payable in current funds does not prevent it from being negotiable. *Id.*

9. A certificate of deposit becomes overdue after the expiration of six months, and not until then, when it provides that it is not subject to check, and that it shall bear interest at 6 per cent if left six months, but no interest after six months. *Id.*

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Banks; constitutionality of regulation and restriction. 864

Entries in bank book as contracts. 787

BENEFIT SOCIETIES. See INSURANCE.

BILLS AND NOTES.

1. The suspension, even for a day, of a right of action on a promissory note against the maker by an arrangement with him, irrevocably discharges an indorser, although the maker may break his contract by which the right of action against him was suspended. *Timberlake v. Thayer* (Miss.) 281

2. A note given solely for usury is void, even in the hands of a bona fide holder, under a statute which provides that the taking of "usury" shall be deemed a forfeiture of the entire interest, but which does not avoid the debt as to the principal. *Ward v. Sugg* (N. C.) 280

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BLASTING. See also NUISANCES, 1.

Injury to another's house by a mere concussion, without throwing rock or other material on the premises, occasioned by blasting on one's own premises in order to adapt them to a lawful use, when that mode is the only proper one and the work is transacted with due care and diligence,—creates no liability. *Booth v. Rome, W. & O. T. R. Co.* (N. Y.) 105

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BONDS.

On Appeal, see APPEAL AND ERROR, 21; CONFRACTS, 24, 25.

See also ACTION OR SUIT, 1.

BOUNDARIES.

The rule that a city lot bounded on a street extends to the middle of the street may be applied to carry title to minerals under the surface of the street, which had been expressly reserved on a prior conveyance of the surface of the street. *Snoddy v. Bolen* (Mo.) 507

BUILDING AND LOAN ASSOCIATIONS. See also CONFLICT OF LAWS, 3.

1. The steps taken to become a member of a building and loan association must be regulated by the law of its domicile, and the fees allowed by that law will be held valid everywhere. *Falls v. United States Sav. L. & Bldg. Co.* (Ala.) 174

2. A statute giving special advantages to building and loan associations, as to the rate of interest they may receive on loans, will, unless a contrary intention appears, be confined in its operation to domestic corporations. *Id.*

3. Persons compelled to take stock in a loan association to secure a loan, but for whom the scheme of the concern provides no dividends or other share in the profits, cannot be regarded as members and their payments as made upon stock calls for the purpose of taking them out of the usury law. *Id.*

4. Income stock on which 60 per cent shall be paid in advance, with cash dividends limited to 8 per cent as the only profit to the stockholders, while any dividends beyond these shall go to holders of other kinds of stock, is not illegal under the New York law applicable to savings and loan societies. *People, Fairchild, v. Preston* (N. Y.) 57

5. Prepaid stock on which 60 per cent of the amount of the shares shall be paid in, and on which dividends at the rate of 6 per cent per annum on the amount paid in may be drawn out, with any further dividends to be credited and payable with the stock at its maturity, is not illegal under N. Y. Laws 1893, chap. 689. *Id.*

6. Dues may be paid in advance with the assent of the directors in a savings and loan society, under the New York banking law (N. Y. Laws 1892, chap. 689), and a rebate or discount on such payments allowed at such rate per annum as the directors from time to time prescribe. *Id.*

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Trover against, see TROVER.

See also COMMERCE, 1, 2; CONSPIRACY, 2-4; CONSTITUTIONAL LAW, 5, 8, 9, 16, 17; NOTICE, 1.

1. The right to stand and ride upon the platform of a car exists where, on the return of an excursion, a passenger with an excursion ticket is unable to get room inside the car, and is not informed that he can be carried on another train. *Lynn v. Southern P. Co.* (Cal.) 710

2. A railroad company which undertakes to transport all the passengers on board a train, although some are upon platforms, must exercise all additional care commensurate with the perils and dangers surrounding the passengers in such situation. *Id.*

3. A railroad company is liable for injury to a passenger thrown from the platform of a car on which he is lawfully riding, when the accident is due to the excessive speed of the train, considering the curves and condition of the track, which occasions a severe jar or jolt. *Id.*

4. A person does not become a passenger because he has previously obtained a ticket, and is on the premises of a railroad company designed for the use of passengers, and is about to take a train, where he is running from the direction of a public street, across the premises, outside the station, to catch a train about to start, and is struck while crossing a track by an incoming train. *Webster v. Fitchburg R. Co.* (Mass.) 521

5. The word "owner," in the Minnesota statute requiring the owner of a railroad or steamboat to redeem unused tickets, includes all those who operate a railroad or steamboat in the transportation of passengers,—as, for example, lessees, receivers, and the like. *State v. Corbett* (Minn.) 498

6. That an obstruction causing an accident on a railroad was the result of work done on the road by an independent contractor is no defense to the carrier. *Carrico v. West Virginia O. & P. R. Co.* (W. Va.) 50

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CASE.

Case, and not trespass, is the proper form of action for applying a running stream to such uses as to render it impure and fill it with a sediment which is deposited on the land of a lower proprietor, thereby preventing him from putting the water to the ordinary uses, and damaging his land. *Drake v. Lady Ensley Coal, I. & R. Co.* (Ala.) 64

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The very question of law is not certified, within the meaning of Tex. Act May 2, 1898, by presenting a petition of plaintiff covering a number of pages, with exceptions thereto. *Union O. L. Ins. Co. v. Chowning* (Tex.) 504

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CEMETERIES.

1. The legislature in the exercise of its police power can lawfully prohibit the use of lands for the purpose of burial, when such lands are held by a municipal corporation. *Newark v. Watson* (N. J. Err. & App.) 848

2. The title of a municipal corporation to lands granted solely for burial purposes reverts when by statute and ordinance the use of the lands for such purposes is prohibited. *Id.*

CERTIFICATE OF DEPOSIT. See BANKS, 6-9.

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1. A gift for the benefit of poor churches of a city and vicinity is charitable within the exception to the rule of law against perpetuities. *McAlister v. Burgess* (Mass.) 158

2. There is no uncertainty which will defeat a gift for the benefit of poor churches of a city and vicinity. *Id.*

3. A state agricultural society, which is one of the agencies of the state, and not a corporation for pecuniary profit, cannot be held liable for the willful and illegal acts of its agents, as in case of willful arrests and assaults. *A'Hern v. Iowa State Agri. Soc.* (Iowa) 655

CHRISTIAN SCIENCE. See PHYSICIANS.

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COMMERCE.

Conspiracy against, see CONSPIRACY.

1. The regulation of the sale of tickets on railroads and steamboats, which makes such sale unlawful without a certificate of authority from the carrier, is not a regulation of commerce beyond the power of a state legislature, but is a mere police regulation of a public

employment. *Burdick v. People* (Ill.) 152;
State v. Corbett (Minn.) 498

2. Only transportation within the state, or that which is not a part of any continuous transportation without the state, is within the provisions of Ill. Act May 2, 1873, §§ 1, 7, 8, 11; and these do not, therefore, affect interstate commerce. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

8. A consignment of intoxicating liquors "arrives" in the state within the meaning of the Wilson Bill, which makes such liquors subject "upon arrival in such state" to the laws of the state, as soon as it crosses the state boundary and enters the state, although the contract of carriage is not then completed. *State v. Rhodes* (Iowa) 245

4. A statute compelling railroad companies to stop all regular passenger trains at county seats is not an interference with interstate commerce. *State v. Gladson* (Minn.) 502

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CONFLICT OF LAWS. See also BUILDING AND LOAN ASSOCIATIONS, 1.

1. The question of the validity of the attempted transfer of title to an assignee for creditors by a corporation organized in one state and doing business in another is for the state in which the property is situated. *Vanderpool v. Gorman* (N.Y.) 548

2. Assignments of personal property valid by the law of the domicile of the assignor are generally recognized as valid by the law of the state where the property is situated, unless they violate its statutory law or its known and settled public policy. *Id.*

3. The words "heirs at law," in a benefit certificate made in Massachusetts by inhabitants of that state, must be construed in another state as they would be in Massachusetts. *Mullen v. Reed* (Conn.) 664

4. Charter privileges as to the rate of interest a corporation may receive on its loans are not available to it in a foreign state, in contravention of the usury laws. *Falls v. United States Sav. L. & Bldg. Co.* (Ala.) 174

5. The borrowing of money from the local agent of a foreign loan association which maintains a place of business within the state, and giving the association a mortgage as security through him, is a local contract, although the papers are to be approved and the money paid at the domicile of the association, and the papers expressly state that the contract is to be governed by the law of the domicile. *Id.*

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CONSPIRACY.

1. Control of the business of refining and selling sugar in the United States does not involve a monopoly or restraint of foreign or interstate commerce, under the Act of Congress of July 2, 1890, as this Act does not include the regulation of manufactures or productive industries of any sort, even if their product is a subject of commerce. *United States v. E. C. Knight Co.* (C. C. App. 3d C.) 428

2. A contract between competing railroad companies is not necessarily "in restraint of trade" and illegal, within the meaning of the Anti-trust Act of Congress, because it in some manner imposes a restriction upon competition. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 73

3. An association of railroad companies cannot be held to create a monopoly, within the meaning of the Anti-trust Act of Congress, where it is not intended to have any trade of its own, but to be a mere adviser of its members, who are competitors of each other. *Id.*

4. An association of railroad companies for mutual protection by establishing and maintaining reasonable rates, rules, and regulations, is not illegal as a restraint of trade, under the Anti-trust Act of Congress, merely because it incidentally tends to restrict competition in some degree, where each member of the association must still compete with other members for business, and, while regular monthly meetings are provided for at which action may be taken, five days' notice of any proposed reduction of rates or change of rules must be given, and members are bound by the decision of the association unless they give written notice in ten days thereafter to the contrary, and any member may withdraw on thirty days' notice. *Id.*

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CONSTITUTIONAL LAW.

As to Bank, see BANKER, 1.

See also ARREST; LICENSE; MUNICIPAL CORPORATIONS, 1, 3.

1. A statute providing penalties for breach of contract cannot be held unconstitutional merely on the ground that it is against the genius, nature, and spirit of the government and general principles of law and reason. *Union C. L. Ins. Co. v. Chouveney* (Tex.) 504

2. A statute allowing punitive or exemplary damages in a case in which the right thereto did not previously exist is, so far as it applies to existing causes of action, a violation of constitutional prohibitions of *ex post facto* laws and retrospective legislation. *French v. Deane* (Colo.) 387

3. There is no unconstitutional delegation

of power to railroad commissioners by a statute authorizing them to fix reasonable maximum rates of charges for freight and passenger traffic, where their schedule is not final, but is made merely *prima facie* evidence of the reasonableness of the rates established. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

4. The constitutional right to contract with reference to compensation for services is violated by a statute limiting a legal day's work to eight hours, and requiring for every hour's work in excess of that number double the pay of the preceding hour. *Low v. Rees Printing Co.* (Neb.) 702

5. The police power of the state to grant licenses to engage in a business does not apply to a statute allowing tickets of carriers to be sold only by agents appointed in a particular manner. *State v. Corbett* (Minn.) 498

6. The constitutional provision that "justice shall be administered freely and without purchase" is not violated by a statute authorizing officers to tax and collect reasonable fees for services, to create a fund out of which their salaries are to be paid. *Henderson v. State, Stout* (Ind.) 489

7. Requiring an insurance company to pay a penalty and attorneys' fees if compelled to pay a loss which it fails to pay within the time specified in the contract does not tend to prevent a resort to the courts, in contravention of a constitutional requirement that all courts shall be open. *Union C. L. Ins. Co. v. Chowning* (Tex.) 504

Equality.

8. A statute allowing the sale of carriers' tickets only by agents appointed in a particular manner, and providing for the redemption of unused tickets, is not unconstitutional as class legislation granting special privileges to carriers. *State v. Corbett* (Minn.) 498

9. The privileges or immunities of citizens under the Federal Constitution, or under the Constitution of Illinois, which provides that the General Assembly shall not pass special laws granting any special or exclusive privilege, immunity, or franchise, are not infringed by a statute prohibiting the sale of railroad or steamboat tickets without a certificate of authority from the carrier, except when one who has bought a ticket from such agent with the *bona fide* intention of traveling upon it makes the sale. *Burdick v. People* (Ill.) 152

10. A constitutional guaranty of equal rights and privileges to all free men does not apply to corporations. *Union C. L. Ins. Co. v. Chowning* (Tex.) 504

11. A statute making an insurance company liable for damages and attorneys' fees in case of failure to pay a loss within the time specified in the policy does not deny such companies the equal protection of the laws. *Id.*

12. An exception of farm and domestic labor from a statute limiting a legal day's work to eight hours, and making the pay for every additional hour double that of the hour preceding, is unconstitutional as class legislation. *Low v. Rees Printing Co.* (Neb.) 702

Due process of law.

13. A law constitutionally enacted, which 24 L. R. A.

affords a hearing before it condemns, and provides for judgment after trial, does not deprive of property, privileges, or immunities without due course of the law of the land. *Union C. L. Ins. Co. v. Chowning* (Tex.) 504

14. A statute authorizing gravel to be taken from private lands for necessary repairs on highways is not unconstitutional because notice is not required to be given to the owner, or any participation allowed him in the selection or formation of the tribunal to assess his damages, where he is given an opportunity to present a claim for compensation to the county court by written complaint, and have his damages assessed and paid, with opportunity to be heard on that question. *Branson v. Gee* (Or.) 855

15. A statute prohibiting more than fair and reasonable rates by a railroad corporation, being merely declaratory of a common-law rule, although penal, does not deprive the company of its property without due process of law because the statute does not fix any limit to the rates,—especially where a provision is made in the same statute for the fixing of rates by commissioners. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

16. A person is not deprived of his property in a carrier's ticket without due process of law by prohibiting the sale thereof,—at least where he purchased the ticket while the Act was in force. *State v. Corbett* (Minn.) 498

17. A statute making it unlawful for any person to sell a railroad or steamboat ticket, or any part thereof, without a certificate from the carrier, except in case of the sale of part of a ticket by a person who has bought it with the bona fide intention of traveling upon it, does not violate the constitutional provision against deprivation of life, liberty, or property without due process of law. *Burdick v. People* (Ill.) 152

18. The constitutional requirement of due process of law is not violated by a statute extending the right to arrest without warrant for crime committed in presence of an officer, to offenses for which such arrest was not authorized when the constitution was adopted. *Burroughs v. Eastman* (Mich.) 859

NOTES AND BRIEFS.

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CONTAGIOUS DISEASE. See DEATH,

1.

CONTEMPT.

1. Contempt proceedings will lie to compel payment of installments of alimony ordered to be paid in the future by a final judgment of divorce, where an execution cannot be issued, since there is no provision of law

for collecting such judgment. *Staples v. Staples* (Wis.) 488

2. Inability to pay installments of alimony, brought about by the party himself with intention to avoid payment, will not prevent his refusal to pay from being contumacious and punishable as a contempt of court. *Id.*

NOTES AND BRIEFS.

Contempt; proceedings in, to compel payment of alimony:—(I.) doctrine of contempt; (II.) constitutionality of contempt; (III.) when contempt proceedings may be resorted to; (IV.) evidence in support of; (V.) necessity of service of order; (VI.) necessity of demand of payment; (VII.) necessity of notice of application; (VIII.) right of defendant to be heard; (IX.) excuses for nonpayment; inability to pay; (X.) commitment refused; (XI.) application for relief; (XII.) power of court to inquire into; (XIII.) state statutes and decisions thereunder; (XIV.) English decisions. 438

CONTRACTS. See also ACTION OR SUIT, 1-3; GUARANTY; INTEREST, 2.

1. In unilateral contracts called options, the time fixed for acceptance is of the essence of the contract. *Dyer v. Duffy* (W. Va.) 839

2. A mere proposal to sell land does not become a sale until accepted and notice of acceptance given the proposer. *Id.*

3. Want of mutuality is no defense, even in an action for specific performance of a unilateral contract for the sale of land, where the party not bound thereby has performed all the conditions of the contract and brought himself clearly within its terms. *Bigler v. Baker* (Neb.) 255

4. The deed of an agent executed in the presence and under the personal direction of his principal is not within a statute of frauds providing that an agent may subscribe a deed when authorized by writing. *Id.*

5. Possession of one who entered as a tenant must be clearly shown to result from the contract, and not from the lease, in order to take a verbal contract of purchase out of the Statute of Frauds. *Id.*

6. Lasting and valuable improvements upon premises, made by one in possession under a parol agreement of purchase, constitute sufficient part performance, notwithstanding default of payment, to defeat an action of ejectment. *Id.*

7. An agreement between brothers and sisters to whom land has descended in common, that the same shall be held by them as joint tenants and pass to the survivor by devise or descent, and at the death of the last survivor shall pass by devise or descent to the child of the only married one of them, is sufficiently performed to be taken out of the operation of the statute of frauds by its substantial keeping by all the parties thereto until the land has become vested in the survivor, who has received all the fruits thereof which are to come to her, and to make it enforceable by such child. *Murphy v. Whitney* (N. Y.) 123

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Validity.

8. Equity will not aid a person in an action, if he requires the aid of an illegal transaction to establish his case. *Nester v. Continental Brew. Co.* (Pa.) 247

9. The provision that carriers cannot exempt themselves from liability by contract, found in Iowa Code, § 1808, does not apply to a contract as to buildings on the railroad right of way, although built for the promotion of the carrier's business. *Grinbold v. Illinois C. R. Co.* (Iowa) 647

10. The public has no interest in the question whether a railroad company or a lessee who erects buildings on the right of way shall bear the loss resulting from negligence of the railroad company's servants, so as to raise any question of policy in respect to a contract exempting the company from such liability. *Id.*

11. A stipulation against liability for damage by fire communicated by railroad trains, either accidentally or negligently, is not against public policy when made in a lease at a nominal rent of a portion of the railroad right of way for an elevator, warehouse, and other buildings for use in connection with and for the promotion of the railroad company's business; and a statute making the railroad company absolutely liable for all damages caused by negligent fires does not change this rule. *Id.*

12. Contracts between carriers are not necessarily invalid because they incidentally restrict competition, but this depends upon their reasonableness. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 73

13. The true test of the illegality of a combination to restrict business is its effect upon the public interests. *Nester v. Continental Brew. Co.* (Pa.) 247

14. A combination of brewers to silence and stifle competition among them within the city and county of Philadelphia and the county of Camden, New Jersey, fixing a minimum price at which any of them shall sell beer to the customer of another or to new trade,—is void as against public policy. *Id.*

15. Imposing a penalty on the officers, agents, and stockholders of a foreign corporation for doing business in the state without filing a certificate, does not render void a contract by the corporation to manufacture articles at its domicile and deliver them to the purchaser in the state imposing the penalty. *Kindel v. Beck & P. Lithographing Co.* (Colo.) 311

16. A provision of a statute imposing a penalty "for every day that business is done by a foreign corporation, without registering," as required by law, does not of itself make void contracts made by such corporation while unregistered. *Edison General Electric Co. v. Canadian P. Nav. Co.* (Wash.) 315

17. A contract by a justice of the peace to make an arrest for a pecuniary consideration contingent on the amount of property that may be recovered of a person who is charged with larceny by an affidavit filed with such justice is void on grounds of public policy, even if the proceeding before the justice can be merely a

preliminary examination. *Brown v. Columbus First Nat. Bank* (Ind.) 206

18. The fact that a justice of the peace has in reality no jurisdiction of the case will not prevent a contract by him to secure the arrest of a person against whom a prosecution has been instituted before him from being against public policy, where the extent of his compensation is contingent on the recovery of property from the defendant. *Id.*

Construction and effect.

19. A contract to mine ore in a certain pit at a certain price per ton "as long as we can make it pay" is too indefinite to entitle the contracting parties to an allowance for prospective profits in case their work is stopped by the other party to the contract. *Danie v. Lumberman's Min. Co.* (Mich.) 357

20. Every contract by a teacher for employment, made with the board of regents of normal schools in Wisconsin, includes as part of it the statutory provision for removal at pleasure of the board. *Gillan v. Board of Regents* (Wis.) 336

21. A contract to pay for the services of one expert in putting in an electrical equipment will not authorize a recovery at contract rates for the services of two. *Edison General Electric Co. v. Canadian P. Nav. Co.* (Wash.) 315

22. Retaining and making use of materials, and neglecting to return or offer to return them, will not authorize a recovery for their price, under a contract providing for payment when the work is "in good working order." *Id.*

23. That the light complies with the contract at the moment the equipment is completed will not entitle the seller to the price under a contract to furnish an electric-light equipment of certain power, which provides for payment when the work is "found to be in good working order," if a practical test within a reasonable time thereafter demonstrates that the required power has not been attained. *Id.*

Impairing obligation.

24. Holding an appeal bond executed as security for an appeal to the appellate court, which then had jurisdiction in such cases, to be valid after the transfer by statute of such jurisdiction to another court, does not impair the obligation of a contract, as the bond is made in view of the known power to change the jurisdiction. *Mexican Nat. R. Co. v. Mussette* (Tex.) 643

25. Obligations of sureties on appeal bonds are not contracts within the constitutional protection against impairment of obligations, as they are not based on consent of adverse litigants, but are assumed by the makers of such bonds, which are permitted, and thereby the right to appeal secured under the provisions of p. sive law. *Id.*

26. The power of railroad commissioners to make a schedule of reasonable maximum rates does not impair the obligation of the contract of a railroad company, under the Illinois act of 1863, which authorizes its board of directors to establish rates of toll from time to time, but also provides that the company's by-laws shall not be repugnant to the constitution

and laws of the state. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

27. The obligation of contracts is not impaired as to tickets thereafter issued, by a statute restricting the sale thereof without a certificate of authority from the carrier. *Burdick v. People* (Ill.) 153

28. A provision for notice of sale under a deed of trust, which is included in the contract, cannot be changed by a subsequent statute providing for different notice in all such cases. *International Bldg. & L. Assn. v. Hardy* (Tex.) 284

NOTES AND BRIEFS.

See also BANKS.

Contracts; effect of part performance of contract for services:—discharge for cause; discharge without cause; (a) damages; (b) wages; (c) common count; (d) quantum meruit; (e) assumpsit; accord and satisfaction, and consent; forfeiture; infants; time for payment; slaves; abandonment by employe without cause. 281

Validity of contracts made by foreign corporations which have not complied with statutory conditions of the right to do business in a state:—where a penalty is imposed; mere prohibition of business; contracts expressly declared void; effect of foreclosure; estoppel. 315

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CORPORATIONS.

Prohibited contracts of, see CONTRACTS, 15, 16.

See also ACTION OR SUIT, 5; BANKS, 3-5; BUILDING AND LOAN ASSOCIATIONS; CONFLICT OF LAWS, 1, 4; CONSTITUTIONAL LAW, 10, 11; ESTOPPEL, 2, 8; EVIDENCE, 9; LIFE TENANTS; QUO WARRANTO, 1.

1. Failure to file the articles of incorporation, as required by statute in order to authorize a company to commence business, prevents it from becoming a corporation *de jure*. *Capps v. Hastings Prospecting Co.* (Neb.) 259

2. A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. *Id.*

3. An agreement to subscribe and pay for stock within thirty days from the organization of a corporation means stock of a corporation *de jure*, and not *de facto*, and therefore is not binding until the corporation is lawfully organized so as to be authorized to do business. *Id.*

4. Persons who are not members of an assessment fire association cannot lawfully fill the office of director thereof. *State, Richards, v. Manufacturers' Mut. Fire Assn.* (Ohio) 252

Control; winding-up.

5. A stockholder in a corporation cannot successfully invoke the power of a chancery court to control its officers or board of managers or to wrest the corporate property from their charge, through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or *ultra vires* acts, and so long as they keep within the limits of by-laws which have been prescribed for their governance. *Republican Mountain Silver Mines v. Brown* (C. C. App. 8th C.) 776

6. A court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business. *Id.*

7. Equity had at common law no power to decree a surrender or forfeiture of corporate franchises at the suit of an individual. *Id.*

8. Statutory provisions as to the notice to be given of a meeting to consider the question of liquidating a corporation must prevail over provisions in the by-laws. *Id.*

9. The motives of the stockholders of a corporation, resident at its domicile, in calling a meeting to wind it up on such short notice that the majority stockholders resident at its place of business cannot attend the meeting, will not cause equity to interfere, if the proceeding is strictly according to law and the foreign stockholders might have appointed an agent to represent their interests. *Id.*

10. Provisions in the by-laws, as to notice of a meeting to consolidate with another corporation, can have no application to a proceeding to liquidate the corporation and sell the assets. *Id.*

11. At common law an insolvent corporation can make a general assignment in trust to an assignee for the benefit of creditors. *Vanderpool v. Gorman* (N. Y.) 548

12. An assignment by a corporation for the benefit of creditors is a corporate act which may be performed by the president and secretary under the authority of the board of directors, in the absence of any statute or by-law providing that it shall be otherwise done. *Id.*

Forfeiture.

13. Nonresidence of the officers, directors, and stockholders of a domestic corporation, is not, in the absence of statutory requirements, express or implied, a ground for forfeiture of its franchises. *North & S. Rolling-Stock Co. v. People, Schaefer* (Ill.) 463

14. Neglect of the officers of a corporation to have its property listed for taxation is not sufficient cause for a forfeiture of its franchises. *Id.*

15. The mere fact that the books of a corporation have been kept most of the time in a foreign state, contrary to a statutory requirement, is not sufficient cause to forfeit its franchises, if the two places of location are but a short distance apart across the boundary line, and they have been produced at the principal office whenever any one entitled to do so desired to see them. *Id.*

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Foreign.

16. Courts have no visitatorial power over foreign corporations doing business within the state, unless it is expressly conferred by statute. *Republican Mountain Silver Mines v. Brown* (C. C. App. 8th C.) 776

17. The invalidity of a resolution passed at its domicile by a foreign corporation to wind up its affairs will not entitle the courts of a foreign state in which it is doing business to decree its dissolution and appoint a receiver, if its directors have submitted to the jurisdiction so that relief may be afforded by simply joining the execution of the resolution. *Id.*

18. A corporation has, under the law of comity, the legal capacity to sue in states other than that from which its charter was obtained. *Cone Export & C. Co. v. Poole* (S. C.) 239

19. A foreign corporation can transact any lawful business in New York state which a nonresident natural person can do. *Lancaster v. Amsterdam Improvement Co.* (N. Y.) 323

20. A foreign corporation incorporated for the purpose of dealing in the purchase and sale of real property is not prevented by the statutes or public policy of the state of New York from transacting such business in that state. *Id.*

21. The power of a corporation created by another state to deal in the purchase and sale of real estate cannot be questioned by a party dealing with it, on the ground that such dealing is in excess of the powers granted to it by the laws under which it is incorporated. *Id.*

22. The right of a *de facto* corporation to transact business under a franchise which another state has attempted to confer cannot be questioned by individuals. *Id.*

23. A foreign corporation carrying on business in New York may there make an assignment for the benefit of its creditors without preferences, in the absence of any statute of the state of its creation prohibiting such assignment, although the laws of New York prohibit such an act on the part of domestic corporations. *Vanderpool v. Gorman* (N. Y.) 548

24. The prohibition of the New York statute against assignments by domestic corporations of property in contemplation of insolvency does not evince any public policy of the state forbidding the exercise by a foreign corporation having property in the state of its inherent common-law right to make such an assignment,—especially where the assignment is valid in the state of the creation of the corporation, and provides for an equal distribution of the property among all of the creditors, in conformity with the policy of New York regarding the distribution of the property of insolvent domestic corporations. *Id.*

25. A charge against a corporation of falsely and fraudulently posing as a domestic corporation, when it had in fact migrated to a foreign state, is not shown by the facts that the local office is not at all times open and the books are not always there, if the corporate property is within the state and the officers and books are frequently at the office, at least

as often as the business requires. *North & S. Rolling-Stock Co. v. People, Schaefer* (Ill.) 463

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For validity of contracts by foreign corporations which have not complied with statutory conditions of the right to do business, see **CONTRACTS**.

For foreign insurance companies, see **INSURANCE**.

See also **LIFE TENANTS**.

Corporations; right of nonresidents to become stockholders. 252

Recognition or exclusion of foreign corporations:—right to sue; right of contract; ownership of property; power to act as trustee, administrator, etc.; limitations by charter or statute of state where incorporated; good faith of foreign incorporation; statutory exclusion of or restriction upon foreign corporations; *de facto* foreign corporations; designation of agent and place of business; license tax; conditions against invoking federal jurisdiction; what constitutes "doing business" prohibited by statute; estoppel to deny character or powers. 289

Exclusion of foreign corporations as an interference with interstate commerce:—telegraph companies; insurance companies; packet company; express companies; railroad companies; bridge company; trading companies; publishing companies; loaning companies. 311

Right of foreign corporations to own real estate:—limitations by charter or laws of the state of incorporation; railroads; telegraphs; interest in mines; exercise of eminent domain; as to mortgages; enforcement of restrictions. 323

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Liability for acts of agents or servants. 263

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Assignment for creditors by; foreign corporations. 548

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COTENANCY.

A contract by brothers and sisters to whom land has descended in common, to hold the same as joint tenants, and that it shall pass to the survivor by descent or devise, and at the death of the last survivor shall pass to the child of one of such brothers by descent or devise, is not rendered unenforceable by such child by the fact that the last survivor has conveyed all the property, where the grantee had knowledge of the rights of such child,—especially where he obtained the property by fraud, without paying any consideration therefor. *Murphy v. Whitney* (N. Y.) 128

COURTS. See also **CONSTITUTIONAL LAW**, 6, 7; **CORPORATIONS**, 5-7.

1. The judiciary is the final authority in the construction of the constitution and the laws, and its construction should be received and followed by the other departments. *People, Engley, v. Martin* (Colo.) 201

2. Words forbidding the removal of officers "for political reasons," in a charter authorizing the governor to make such removals "at any time for cause, to be stated in writing," cannot be given any practical effect except by operating on the conscience of the Executive, and do not permit the review of his action by the courts on the ground that a removal was in fact made by him for political reasons, contrary to his written statement of the case. *Id.*

3. The reasonableness of an ordinance is open to judicial inquiry, when it is passed in the exercise of a general authority to legislate on the subject without prescribing the mode of its exercise. *Champer v. Greencastle* (Ind.) 768

4. General power to license and regulate places for the sale of liquor does not prevent judicial inquiry as to the reasonableness of an ordinance prohibiting the use of blinds, screens, etc., in such places. *Id.*

5. In the absence of legislative authority, the common council of a city has no power to determine the election and qualifications of the mayor, so as to prevent the courts from determining as to his right to the office. *Buckman v. State, Spencer* (Fla.) 806

6. The power to remove a teacher at pleasure, given to the board of regents of normal schools by Wis. Rev. Stat. § 404, subd. 3, is discretionary, and cannot be reviewed by the courts. *Gillan v. Board of Regents* (Wis.) 836

7. The determination of corporate authorities as to what is a local improvement is the subject of review by the courts. *Chicago v. Blair* (Ill.) 412

8. The same act may be an offense against both state and federal governments, punishable in each jurisdiction under its laws. *People v. Welch* (N. Y.) 117

9. Manslaughter committed within the territorial limits of a state by the misconduct or negligence of a pilot licensed under federal laws, in charge of a vessel which comes into collision with another, causing the death of a person, is punishable under state laws, although by U. S. Rev. Stat. § 5844, it is made an offense against the United States. *Id.*

10. The provision as to crimes, in U. S. Rev. Stat. § 5328, that nothing in title 70 shall impair the jurisdiction of the states, exempts the cases specified in that title, which are also offenses under the laws of the several states, from the operation of U. S. Rev. Stat. § 711, which declares that jurisdiction by federal courts in respect to crimes and offenses shall be exclusive of the courts of the states. *Id.*

11. A state statute permitting a simple contract creditor to file a bill in equity without reducing his claim to judgment, for the purpose of reaching assets to pay the debts of an insolvent corporation, is not applicable to proceedings in the federal courts. *Morrow Shoes Mfg. Co. v. New England Shoes Co.* (C. C. App. 7th C.) 417

12. The rule of law in Tennessee, which prevents the defense of contributory negligence from being a complete bar to an action for in-

jury to a person on a railroad track, under the statute, but makes it cause for reduction of damages, being one which grows out of the language of the statute itself, the construction thereof by the supreme court must be followed in federal courts, in an action arising in that state. *Byrne v. Kansas City, Ft. S. & M. R. Co.* (C. C. App. 6th C.) 698

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Courts; concurrent jurisdiction of state and federal. 117

COVENANT.

1. An estate to which the husband's covenant of warranty can attach is transferred where he joins with his wife in a deed of land of which neither has a valid title in fact, although she has color of title, of which he is in possession while his wife occupies the premises with him, and on their joint conveyance he delivers the possession to the grantee and shares in the purchase money,—especially where his covenant is not only with the grantee, but with her "heirs and assigns." *Mygatt v. Coe* (N. Y.) 850

2. Purchasers at a foreclosure sale are in privity with the mortgagor's grantor so as to be able to maintain an action against him for breach of the covenants in his deed. *Id.*

NOTES AND BRIEFS.

Covenant; privity of; running with land. 851

CRIMINAL LAW. See also COURTS, 8-10.

1. Voluntary intoxication is no justification or excuse for crime. *State v. O'Neil* (Kan.) 555

2. Where a person at the time of the commission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree of capacity, then he is not so responsible. *Id.*

3. That an officer's term has expired will not prevent his prosecution and punishment for misdemeanor in office. *Com. v. Coyle* (Pa.) 552

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Criminal law; criminal responsibility; act of drunken person. 556

Concurrent jurisdiction of crimes. 117

CROPS. See EMBLEMENTS.

CURTESY.

All inchoate interest as tenant by the curtesy is destroyed by an absolute divorce, unless it is preserved by statute. *Burgess v. Muldoon* (R. I.) 798

DAMAGES. See also INSURANCE, 10.

The full amount of damage to growing lettuce in a greenhouse, which is frozen by reason of the failure to supply water necessary 24 L. R. A.

for steam heating, is the measure of damages for such failure. *Watson v. Needham* (Mass.) 287

NOTES AND BRIEFS.

Damages; for seduction; exemplary. 889

DEAF MUTE. See WITNESSES, 3.

DEATH.

1. The fraudulent sale of a horse by one who knows that it has a contagious disease,—such as glanders,—to one who is ignorant of the fact, will render the seller liable for the death of one who contracts the disease while in charge of the horse for the purchaser, only in case such death is a natural and probable consequence of contact with the horse. *State, Hartlove, v. Fox* (Md.) 679

2. A statute making municipal corporations liable for the destruction "of property" by mobs will not make a city liable for the killing of a person by a mob. *Gianfortone v. New Orleans* (C. C. E. D. La.) 592

3. The protection of life by a municipal corporation being a public governmental duty, a city is not liable for failure in its performance, unless made so by statute. *Id.*

4. A recovery for the death of another cannot be had by one who receives from the estate of the deceased property greater in value than all the prospective benefits that would have accrued to him had death not ensued, where the statute creating the right of action gives damages only for the pecuniary loss, and provides that each beneficiary of the class of relatives specified shall recover separately for his own special injury. *San Antonio & A. P. R. Co. v. Long* (Tex.) 687

NOTES AND BRIEFS.

Death; cause of action for. 639

DEED. See REAL PROPERTY.

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Deed; exception and reservation; deed for street reserving minerals. 507

DEFENSE. See ACTION OR SUIT, 5.

DEFINITIONS.

1. Debts, see HOMESTEAD.

2. *De facto* Corporation, see CORPORATIONS, 2.

3. *De jure* Corporation, see CORPORATIONS, 3.

4. Gross lewdness is "open" within the meaning of Wis. Rev. Stat. § 4579, if committed in the presence of another person, even if that person is a child of tender years, too innocent to be offended by it. *State v. Juneau* (Wis.) 857

5. Owner, see CARRIERS, 5.

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 3; MUNICIPAL CORPORATIONS, 7.

DEMAND. See **MANDAMUS**, 4.**DESCENT AND DISTRIBUTION.**

1. The child of a cousin cannot take the parent's share, under the Connecticut Statute of Distributions, where the parent dies before the intestate. *Campbell's Appeal* (Conn.) 687

2. The common-law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in Connecticut, and therefore inheritance may be derived by collateral relatives through alien ancestors. *Id.*

NOTES AND BRIEFS.

Descent; common-law rule of; from alien ancestor. 667

DISCOVERY.

Bills of discovery are not authorized under the Texas practice, in which law and equity are blended into one system, and in which statutory provisions have been made for the discovery of evidence by simple interrogatories in a pending suit, and for depositions of the adverse party. *Cargill v. Kountze Bros.* (Tex.) 188

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Discovery; right to discovery by bill, where the statutes provide for the examination of the party before trial:—rules in different states; practice in federal courts; English practice. 188

DIVORCE. See **HUSBAND AND WIFE**, 2-5, **NOTES AND BRIEFS.**

DOG. See **ANIMALA**.

DRUNKENNESS. See **CRIMINAL LAW**, 1, 2; **HOMICIDE**.

EASEMENT.

Of public alley, see also **ALLEY**.

EIGHT-HOUR LAW. See **CONSTITUTIONAL LAW**, 12.

NOTES AND BRIEFS.

Eight-hour law; constitutionality of. 702

EJECTMENT. See also **ACTION OR SUIT**, 6.

The plaintiff in ejectment must rely on the strength of his own title, and not on the weakness of that shown by his adversary. *Bigler v. Baker* (Neb.) 255

ELECTRIC LIGHTS. See **CONTRACTS**, 28.

ELEVATED RAILROADS. See **EMINENT DOMAIN**, 1; **NUISANCES**, 8.

EMBLEMENTS.

The title to grass which is severed from realty after sale on execution, but before confirmation, does not pass to the purchaser of the land. *Yeazel v. Elnepuhr* (Neb.) 449
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EMINENT DOMAIN

Due process in, see **CONSTITUTIONAL LAW**, 14.

See also **ALLEY**, 4.

1. There is no "taking" of the property of an abutting owner by the erection in the bed of the street by an elevated-railroad company of a stone abutment 9 feet high, which reduces the width of the street in front of his premises to less than 10 feet, interfering with light and air and nearly destroying access to his property from the street. *Garrett v. Lake Roland Elev. R. Co.* (Md.) 398

2. The building of a viaduct over railroad tracks in a public street, which practically closes abutting property to access by teams from the street, is such an extraordinary and unusual use of the street as could not have been reasonably anticipated at the time of its dedication, and therefore the abutting owner is entitled to consequential damages, under the Colorado constitutional requirement of compensation for property damaged, although it is limited by the courts of that state to unusual or extraordinary uses. *Pueblo v. Strait* (Colo.) 892

3. A constitutional provision that compensation for land condemned "shall be ascertained by a jury of twelve men . . . as prescribed by law" is violated by a statute authorizing a verdict by a majority of the jury. *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 272

4. A jury in condemnation proceedings is neither a grand nor a petit jury, within the meaning of a constitutional provision against special or local laws for summoning grand and petit jurors. *Id.*

5. Telegraph poles in a highway do not constitute an additional servitude upon the fee for which owners must be compensated. *People v. Eaton* (Mich.) 721

NOTES AND BRIEFS.

Eminent domain; exercise of, by foreign corporation. 823

Telegraph or telephone poles as additional burden on highways. 721

Consequential injuries to abutting owners. 392, 397, 403, 517

EQUITY. See also **CORPORATIONS**, 5-7.

Equity, having acquired jurisdiction in case of a nuisance, may adjudge reasonable and adequate damages for past injuries. *Price v. Oakfield Highland Creamery Co.* (Wis.) 838

ESCAPE. See **ACTION OR SUIT**, 1.

ESTOPPEL.

1. The principle of estoppel by receiving benefits does not apply to prevent a defense that a contract is void as against public policy. *Brown v. Columbus First Nat. Bank* (Ind.) 206

2. One who executes a mortgage to a corporation as such to secure a loan of money cannot deny its corporate character to defeat foreclosure. *Falls v. United States Sav. L. & Bldg. Co.* (Ala.) 174

be organized is not estopped from denying the legal existence of the corporation on the ground that it has not been lawfully organized, when sued on his subscription. *Capps v. Hastings Prospecting Co.* (Neb.) 259

4. One entitled to administration, who stands by with knowledge of the application of another for appointment and the fact that he is administering upon the estate, is estopped to assert his prior right and claim the appointment made to be invalid. *Manning v. Leighton* (Vt.) 684

5. The simple fact that an abutting land owner did not, at the time a telegraph line was built in the highway, although aware of the purpose to build, object and prevent its construction by injunction proceedings, will not estop him, after the expiration of ten years from the date of such construction, from asserting his property interest in the highway and in the trees growing upon and in front of his premises. *Dailey v. State* (Ohio) 724

NOTES AND BRIEFS.

Estoppel; to deny character or powers of foreign corporation. 289

To deny validity of contract of foreign corporation because of failure to comply with statute. 815

Plea of. 264

EVIDENCE. See also BANKS, 8.

Judicial notice.

1. The laws of arithmetic are judicially noticed. *Falls v. United States, Sav. L. & Bldg. Co.* (Ala.) 174

2. The court will take judicial notice of the fact that trolley lines had not superseded horse cars in 1884 or 1885. *Meyer v. Krauter* (N. J. Err. & App.) 575

8. It is a matter of common knowledge that horses otherwise well broken and kind show signs of terror at the sight of a moving vehicle drawn by an invisible motor. *Id.*

4. Glanders is not a disease so frequently taken by man as to permit the court to take judicial notice that it is imminently dangerous to human beings. *State, Hartlove, v. Fox* (Md.) 679

5. It is a matter of common knowledge that the attendants of any particular church are not limited to its members, but are an indefinite and varied number. *McAlister v. Burgess* (Mass.) 158

Presumptions and burden.

6. The court of one state cannot presume that the common law has been altered in another state, in the absence of proof to that effect. *Vanderpool v. Gorman* (N. Y.) 548

7. It is a presumption of law that every public officer does his duty, and this presumption is especially strong in the case of the governor,—the chief executive officer of an independent state. *People, Engley, v. Martin* (Colo.) 201

8. Making a schedule compiled by commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of 24 L. R. A.

upon the right of trial by jury. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

9. The burden of showing that a corporation has committed or omitted acts which amount to a surrender or forfeiture of its rights and privileges is upon the one seeking a judgment of ouster for that reason. *North & S. Rolling-Stock Co. v. People, Schaefer* (Ill.) 462

10. He who questions the validity of an administration has the burden of establishing its invalidity, where the facts of the death of the person upon whose estate letters are granted, and of the existence of assets within the jurisdiction, appear upon the record as judicially ascertained. *Manning v. Leighton* (Vt.) 684

11. The burden of proof to establish the suicide of one whose life is insured is on the insurer, when suicide is set up as a defense. *Leman v. Manhattan L. Ins. Co. (La.)* 589

12. The death of a testatrix by suicide does not raise a presumption of insanity,—at least at the time of making a will six weeks before. *Es Bey's Succession* (La.) 577

18. The burden of proving insanity of a testator at the time of making a will properly executed and containing nothing to indicate unsoundness of mind is upon those who deny its validity, even if he was habitually insane. *Id.*

14. Fraud and illegality in contracts are not to be presumed. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 73

15. A seller of goods procured from him by fraud has the burden of showing participation by a subsequent purchaser in the fraudulent acts by which the goods were procured. *Morrow Shoe Mfg. Co. v. New England Shoe Co.* (C. C. App. 7th C.) 417

16. Proof, that a pledgee of goods from a retail dealer knew that the latter was being pressed by his creditors, and was pledging goods not paid for; that the goods were in larger quantities than was called for by the business, were deposited in a warehouse away from such business, with all marks erased from the original packages; and that they were transferred on such terms as precluded redemption without any inquiry on the part of such pledgee; and that the latter made false statements as to previous loans to a receiver of the property of the pledgor,—is sufficient to throw upon such pledgee the burden of explaining the transaction and showing himself to be a bona fide holder. *Id.*

17. In case of injury to a passenger by reason of an obstruction along the line of a railroad, the carrier has the burden to prove that it was the result of the passenger's negligence, or that the most thorough and perfect diligence could not have foreseen and prevented the injury. *Carrioco v. West Virginia O. & P. R. Co.* (W. Va.) 50

Best and secondary.

18. Although longhand notes are by statute made the best evidence of the evidence given on a previous trial by a witness since deceased, where they show that he made in his evidence an illustration, without showing what it was, a witness may be used to prove what such illustration was. *Id.*

Documentary.

19. A rule of a railroad company printed on a timetable, warning employes against certain risks, with a notice that they will have no claim for injuries received in consequence of taking such risks, is admissible in evidence against an employe suing for injuries and charged with violating the rule. *Ford v. Chicago, R. I. & P. R. Co.* (Iowa) 657

20. An *ex parte* map or diagram made by a witness and shown by him to be correct may be given in evidence, not as independent evidence, but to be considered by the jury in connection with other evidence, so as to enable them to understand and apply it. *Poling v. Ohio River R. Co.* (W. Va.) 215

21. A statute recognizing as evidence the proceedings of any legislative body "purporting on the face of the book to be printed by authority of the government" applies to a book compiled by an individual under statutes which are printed in full at the beginning of the book, and which recognize the compilation as authoritative and make it evidence. *Falls v. United States Sav. L. & Bldg. Co.* (Ala.) 174

22. A note found on burglarized premises the morning after the burglary, in which the addressee is invited to join in the burglary, is not competent evidence against him in the absence of any testimony tending to connect him with it. *State v. Weldon* (S. C.) 126

23. A schedule of rates cannot be excluded from evidence under the Illinois statutes, when accompanied by a regular certificate of the commissioners as to its publication, on the ground that it never took effect because never published as required by statute, since the statutes make the schedule and accompanying certificates *prima facie* evidence that the schedule offered is a schedule of the commissioners. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

24. The will of the deceased may be put in evidence to show that the plaintiff has sustained no loss by the death of the testator, where the action is based on a statute allowing a recovery for the pecuniary loss sustained by such death. *San Antonio & A. P. R. Co. v. Long* (Tex.) 637

25. The evidence of a witness given on a former trial of a civil case, who has since died, may be proved on a subsequent trial of the case. *Carrico v. West Virginia O. & P. R. Co.* (W. Va.) 50

Demonstrative.

26. In an action to recover damages for injury to a plaintiff's arm, necessitating its amputation, it is not error to allow him to exhibit to the jury the naked remnant of the arm. *Id.*

Parol as to writings.

27. A pass-book given by a bank to a depositor is not a written contract, but is *prima facie* evidence that the bank received amounts at the dates therein stated, and binds the bank like any other form of receipt, and is open to explanation by evidence *aliunde*. *Talcott v. Larned First Nat. Bank* (Kan.) 787

Opinions.

28. Opinions of witnesses as to the physical appearance and apparent state of health of a
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person are competent. *Robinson v. Exempt Hire Co.* (Cal.) 715

29. A witness cannot give an opinion as to the probability of continued aid from a parent to a child as a basis for damages from the wrongful killing of the parent. *San Antonio & A. P. R. Co. v. Long* (Tex.) 637

30. Expert testimony is not admissible on the question whether or not a glove contest is what is commonly known as a prize fight. *State v. Olympic Club* (La.) 452

Admissions.

31. No admission as to the ownership of chattels in possession of a carrier is shown by the fact that the one holding the bill of lading remains silent when an unsuccessful demand is made by a third person for them upon the carrier, in his presence, under alleged title papers, which will make the carrier's refusal to comply with the demand wrongful. *Kohn v. Richmond & D. R. Co.* (S. C.) 100

Declarations.

32. Evidence of declarations by deceased of intention to commit suicide is admissible in a murder case, if introduced solely to show the state of mind or intention of the one making them at the time they were made. *Com. v. Trefethen* (Mass.) 285

33. That deceased is a stranger to the proceeding will not exclude evidence of his declarations of intention to commit suicide, upon trial of an indictment charging one with murdering him. *Id.*

34. The trial judge cannot in his discretion exclude evidence of the alleged declaration of intention to commit suicide because of illegitimate pregnancy, made the day before the death of the one making them, whose condition continued until her death, because of lapse of time between the declaration and the death. *Id.*

35. Evidence locating the presence of deceased at another place at the time of an alleged interview at which she is alleged to have declared an intention to commit suicide is not of itself sufficient to exclude evidence of the alleged declarations from the jury, in a murder case. *Id.*

Relevancy.

36. Evidence that another employe had made complaint is inadmissible on the question of the employe's complaints of defects and promises to him to repair them. *Ford v. Chicago, R. I. & P. R. Co.* (Iowa) 657

37. Evidence of an intention to commit suicide is not immaterial in a murder case, where deceased was found dead under circumstances not inconsistent with the theory of suicide. *Com. v. Trefethen* (Mass.) 285

38. Evidence of former burglaries upon the same premises, committed by one under indictment for burglary, is competent against him when he is shown to have declared that he did not intend to work, and that if he did not make his support out of the prosecuting witness he would make it out of some one else. *State v. Weldon* (S. C.) 126

39. Evidence of abuse by his master of one apprenticed by overseers of the poor, and of its results, is admissible against them, al-

ment, should be known of its probable continuance and its effect. *Com. v. Coyle* (Pa.) 552

40. Ill treatment, and previous assaults by husband on wife, are admissible to prove motive in cases of marital homicide. *State v. O'Neil* (Kan.) 555

Sufficiency.

41. The fact that a child is of tender years will not prevent its testimony, if competent, from being sufficient to support a conviction of an indecent assault, when all the corroborative testimony has been given that is practically procurable. *State v. Juneau* (Wis.) 857

42. Proving blank indorsements after alleging indorsements to plaintiff will not constitute a failure of proof to sustain a finding in plaintiff's favor, where the execution of the indorsements was not denied so as to require them to be put in evidence. *Horn v. Bennett* (Ind.) 800

43. Proof of subsequent ratification will sustain an averment of agency. *Bigler v. Baker* (Neb.) 255

NOTES AND BRIEFS.

Evidence; suicide as evidence of testamentary incapacity. 577

Burden of proof of suicide of insured. 589

Admissibility of declarations, to show intent. 236

EXECUTORS AND ADMINISTRATORS. See also ATTORNEYS, 5; ESTATE, 4; EVIDENCE, 10.

1. An executor who has taken possession of testator's real estate and held it since testator's death, for the purposes of administration and paying debts, may maintain an action for permanent injury to the land by sediment placed in the stream by an upper proprietor. *Drake v. Lady Ensley Coal, L. & R. Co.* (Ala.) 64

2. A claim against the United States under the Act of Congress of 1882 providing for the distribution of the award for the Alabama depredations is property in the jurisdiction of the courts of the District of Columbia, authorizing the appointment there of an administrator of the deceased claimant. *Manning v. Leighton* (Vt.) 684

3. An ancillary administrator is not liable to pay for services contracted for by the foreign administrators, since there is no privity between them. *Id.*

4. The settlement of an estate in a foreign jurisdiction will not be held to bar a claim against the administrator arising after the death of the deceased, upon a showing only that a claim against an estate must be filed within a certain time after the issue of letters, and that notice was given the claimant but no claim was filed, since ordinarily those referred to as creditors of an estate are persons holding claims against the deceased in his lifetime, and the requirements as to the presenta-

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5. An administrator of the beneficiary of a claim against the United States, appointed to meet a requirement of the court, and taking charge of the case with its approval, does not, by making use of proofs procured by a former attorney, accept the benefit of the latter's services so as to render himself liable to pay for them, where such proofs are in the files of the court and beyond the control of such attorney, and he has no knowledge that the attorney whom he employs has made an arrangement with the former attorney, who is relying on him to act in his interest. *Id.*

NOTES AND BRIEFS.

Executor and administrator; foreign corporation as. 289

What assets will give jurisdiction to appoint administrator:—what value necessary; where assets are regarded as located; simple contract debts; interest in pending suit; action for wrongful death; specialties; judgments; corporate stock; insurance policy; claims against government; assets brought within jurisdiction after death of intestate; lands; deposits; doubtful claims; claims against personal representatives; bills and notes. 684

EXEMPTION. See HOMESTEAD; LANDLORD AND TENANT, NOTES AND BRIEFS.

EXHIBIT. See EVIDENCE, 26.

EXPLOSIONS. See NUISANCES, 1.

EX POST FACTO. See CONSTITUTIONAL LAW, 2.

EXPRESS COMPANIES.

NOTES AND BRIEFS.

Right of foreign company to enter state. 311

FIREWORKS.

A city is not liable for the explosion of fireworks in a street, under a permit granted by a city officer under an ordinance prohibiting such display without such permit, especially where the charter denies liability for malfeasance, misfeasance, or neglect of duty of any officer or other authorities of the city. *Fisfield v. Phantia* (Ariz.) 430

NOTES AND BRIEFS.

Fireworks; liability for injury by. 430

FORFEITURE. See CORPORATIONS, 12-15, NOTES AND BRIEFS.

FORGERY.

1. An assignment or sale of the unearned salary of a public-school teacher, with an order therefor, although void on the ground of public policy, is not so plainly worthless that it cannot be the subject of forgery. *People v. Munroe* (Cal.) 83

2. A writing may be the subject of forgery though not sufficient to create a legal liability if genuine, when it is such that if genuine it might injure another. *Id.*

NOTES AND BRIEFS.

Forgery; of worthless instruments:—(1) the general rule; (2) what constitutes legal efficacy; (a) must be intelligible and certain; (b) must be an order and not a mere request; (c) must not be mere matter of opinion; (d) must not be mere recommendation to courtesy; (e) must purport to be the act of another; (3) instruments void on their face; (4) efficacy which is apparent only; (a) must be sufficient to deceive; (b) must be subject of legal proceedings; (c) apparent capacity or authority to make; (5) real efficacy not apparent; (6) instruments requiring further steps to perfect them; (7) naked and conditional promises; (8) instruments not in statutory form; (9) prohibited instruments; (10) unstamped instruments; (11) instruments executed in fictitious names. 88

FRANCHISE. See **INSURANCE**, 4.

FRAUD AND FRAUDULENT CONVEYANCES. See also **EVIDENCE**, 14-16; **REPLEVIN**; **TROVER**, 8.

1. Concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent, and entitles the seller to possession as against the purchaser or his voluntary assignee. *Morrow Shoe Mfg. Co. v. New England Shoe Co.* (C. C. App. 7th C.) 417

2. An auctioneer who sells goods for a fraudulent purchaser thereof, under such circumstances as to charge him with notice that they have been obtained by fraud, is liable for the value of the goods equally with the fraudulent purchaser, and not merely for the amount of commissions received by him upon the sale, although he has accounted for the proceeds of such goods to his principal. *Id.*

3. A statute regulating and permitting voluntary assignments by insolvent debtors for the benefit of creditors does not affect or qualify the right of such debtors to make preferences among their creditors where they do not make any such assignment. *Sandwich Mfg. Co. v. Max* (S. D.) 524

4. The right of a debtor to pay one or more creditors in preference to others, and the right to make a general assignment for the benefit of all his creditors ratably, are distinct and independent rights. *Id.*

NOTES AND BRIEFS.

Fraud and fraudulent conveyances; validity of preferences to creditors. 525

GLANDERS. See **EVIDENCE**, 4.

GLOVE CONTEST. See **PRIZE-FIGHTING**.

GUARANTY. See also **ACTION OR SUIT**, 5; **BANKS**, 2.

A guaranty of dividends of a corporation for a term of years, made by the manager to persons who were formerly his competitors in business, which the corporation has been formed to continue under what is substantially a partnership arrangement, while both parties are prohibited from becoming interested in 24 L. R. A.

competing business during that period, implies the existence of the corporation during the time specified, capable of earning and declaring dividends. *Lorillard v. Clyde* (N. Y.) 118

HACKS. See **NUISANCES**, 2.

HIGHWAYS.

Minerals in, see **BOUNDARIES**.

See also **ALLEY**; **INJUNCTION**, 1; **NUISANCES**, 2-4; **PUBLIC IMPROVEMENTS**, 2.

1. The grantees of lots under the town site Act of Congress have the right and privilege to have a street on which the lots abut forever kept open. *Dooly Block v. Salt Lake Rapid Transit Co.* (Utah) 610

2. The rights of abutting owners to use a street as a means of access to their lots and for light and air is the same where the fee of the street is held by a city in trust for the use of the public as where the fee is owned by the abutting owners. *Id.*

3. The legislature in delegating power over streets to municipal corporations cannot authorize any action which will materially injure the property of abutters in the right of access to their property and to light and air. *Id.*

4. The Missouri doctrine that a city may authorize a railroad track in a street does not extend to the allowance of a practical monopoly of the street by the railroad. *Lockwood v. Wabash R. Co.* (Mo.) 516

5. A city cannot authorize a steam railroad in a narrow highway devoted to wholesale business, when the operation of the railroad virtually destroys the use of the street for street purposes at least 8½ hours every day between 7 A. M. and 6 P. M., and the city charter declares that no railroad shall be so constructed as to prevent the public from using any street, while the general law prohibits railroads from impairing the usefulness of a street. *Id.*

6. If the construction of an additional track for a street-railway company would be an unnecessary obstruction to and interference with the ordinary use of the street, and the track privileges of an existing railroad company are sufficient for the business of two or more companies, they should all be obliged to use them in common. *Dooly Block v. Salt Lake Rapid Transit Co.* (Utah) 610

7. A telegraph company has no right to cut off branches from trees in a highway, which belong to an abutting owner, in order to clear a way for its line, merely because it has permission from the public authorities to construct its line along the highway. *Dailey v. State* (Ohio) 724

8. Authority to construct a telegraph line upon a highway does not empower the company to injure the property of an adjoining land owner, or to appropriate any of his property-rights in trees in the highway, except upon the condition that compensation be first made. *Id.*

9. An owner of land adjoining a public highway, whose title extends to the centre of the road, who has cultivated shade trees planted partly on his own land and partly in the line

has a property interest in such trees, and the right to their enjoyment subject only to the convenience of public travel. *Dailey v. State* (Ohio) 724

10. The destruction of shade trees standing on the outer edge of the sidewalk in front of a residence, because the municipal authorities regard them as an obstruction of the walk and injurious to health, does not render the city or its authorized agents liable for damages to the abutting proprietor. *Tate v. Greensboro* (N. C.) 671

11. Tanks to hold water for sprinkling streets, erected in a street under license from the municipality, cannot be removed by it without making compensation to the owner, unless they have become actual nuisances. *Savage v. Salem* (Or.) 787

NOTES AND BRIEFS.

See also EMINENT DOMAIN; PUBLIC IMPROVEMENTS.

Highways; private right of action for obstruction of. 156

Injury to easement of abutting owner. 406

Destruction of trees on. 671

Injury to trees in, by telegraph line. 724

Nuisance in. 787

HOMESTEAD.

A judgment for a tort, as well as a judgment for a contract, is included in the Michigan constitutional provision exempting homesteads "for any debts contracted." *Mertz v. Berry* (Mich.) 789

NOTES AND BRIEFS.

Homestead; exemption from liability for torts; generally; fine or costs; official bonds. 789

HOMICIDE. See also COURTS, 9; INDICTMENT, ETC.

Under a statute establishing degrees of the crime of murder, and providing that willful, deliberate, and premeditated killing shall be murder in the first degree, intoxication at the time of the killing may be considered upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation. *State v. O'Neil* (Kan.) 555

HORSE. See SALE, 1.

HUSBAND AND WIFE. See also CURTESY.

1. A married woman may make herself chargeable with the value of services rendered upon her employment to secure a divorce from her husband, although the suit is discontinued. *Wolcott v. Patterson* (Mich.) 629

2. The requirement of two years' residence, under the Florida statutes, in order to give jurisdiction of a suit for divorce, does not apply to a suit for alimony, under Fla. Rev. Stat. § 1486, but this may be brought if the wife is a bona fide citizen of the state. *Miller v. Miller* (Fla.) 187
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on the ground that both parties are residents and citizens of other states will not prevent the court from making an order for temporary alimony pending the determination of that issue. *Id.*

4. The prohibition of La. Code, art. 161, to the effect that in case of divorce on the ground of adultery the guilty party can never contract matrimony with his or her accomplice in adultery, is directed against marriage between the guilty spouse and the particular person or persons who are designated in the petition for the divorce, or described in the evidence in support of it, and upon which petition and evidence the decree of divorce is founded, and does not affect marriage with any other person with whom adultery had been committed during the prior marriage. *Re Hernandez's Succession* (La.) 831

5. The prohibition of the statute of New York to the effect that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extraterritorial effect, being a penal statute; and it cannot be given the effect of annulling a contract of marriage between persons at the time residing abroad, from one of whom a divorce had been obtained in another state for adultery, notwithstanding it was solemnized in the city and state of New York,—the contracting parties announcing their intention to be to thereafter reside in Louisiana, and afterwards actually residing there. *Id.*

NOTES AND BRIEFS.

Compelling payment of alimony, see CONTEMPT.

See also SPECIFIC PERFORMANCE.

Husband and wife; liability of wife and husband for legal service to her in a divorce suit:—(I.) husband's liability; (1) doctrine of; (2) necessities; (3) husband not liable; (II.) liability of wife; (1) in general; (2) wife's promise to pay; (a) prior promise; (b) subsequent promise; (c) under state statutes; (3) English decisions. 629

Power to grant alimony. 137

Effect of statutes forbidding remarriage of guilty party after divorce:—effect in other states; effect in state where enacted; remarriage in state of enactment; marrying in another state and returning to state of prohibition. 831

INCOMPETENT PERSONS. See CRIMINAL LAW, 2; EVIDENCE, 12, 13.

INDEPENDENT CONTRACTOR. See CARRIERS, 6; LATERAL SUPPORT.

INDICTMENT, INFORMATION, AND COMPLAINT.

Where a murder may have been committed by different means, and it is doubtful which was employed, its commission by all may be charged in one count of the information, and proof of any one will sustain the allegation; but the means so charged in the same count

of the information must not be repugnant. *State v. O'Neil* (Kan.) 555

INFANTS. See also EVIDENCE, 41; WITNESSES, 1.

INITIALS. See NAME.

INJUNCTION.

1. An injunction to prevent the laying of an additional track for a street railroad in a street may be granted to abutters, where the track would constitute an unnecessary interference to travel and an especial injury to the property-rights of the abutters. *Dooly Block v. Salt Lake Rapid Transit Co.* (Utah) 610

2. Allowing filth from a creamery to flow, either by percolation or otherwise, upon premises of an adjoining owner, where it becomes thickened at the top and of a grayish or greenish color, and emits a stench, may be perpetually enjoined. *Price v. Oakfield Highland Creamery Co.* (Wis.) 333

3. A judgment rendered on an unauthorized appearance by an attorney, after the defendant had by demurrer given the court jurisdiction of his person, cannot on collateral attack be declared a nullity and perpetually enjoined; but the remedy is to open up the judgment and stay proceedings thereon until a trial on the merits can be had. *Hollinger v. Reeme* (Ind.) 46

NOTES AND BRIEFS.

Injunction; against nuisance. 334

INSOLVENCY. See also ASSIGNMENT FOR CREDITORS, NOTES AND BRIEFS; CONFLICT OF LAWS, 1, 2; CORPORATIONS, 11, 12, 23, 24.

When a conveyance of property is made in good faith directly to a creditor in absolute executed payment of a debt, the transaction lacks the essential element of a trust, and cannot be brought within the range of a law denying preferences in insolvent assignments. *Sandwich Mfg. Co. v. Maz* (S. D.) 524

INSURANCE. See also CONFLICT OF LAWS, 3; STATUTES, 4.

1. Assessment fire associations organized under Ohio Rev. Stat. §§ 8686-8690, are not authorized to receive into their membership persons who are nonresidents of the state. *State, Richards, v. Manufacturers' Mut. F. Asso.* (Ohio) 252

2. An unincorporated guaranty and accident Lloyds association of another state, which issues policies in that name and has a board of managers with powers like those of corporate directors, to whom each member gives a power of attorney for management of the business, and the members of which contract for several liability to a limited amount, with the right to transfer their membership, must be held, when conducting business in Ohio without compliance with the conditions of the statutes, to be exercising a franchise and acting as a corporation so as to be subject to quo warranto proceedings. *State, Richards, v. Ackerman* (Ohio) 293

3. An assessment fire association under Ohio Rev. Stat. §§ 8686-8690, is not authorized to do insurance business on what is known as the "joint-stock" plan, nor on the "contingent-liability" plan, as defined in § 3634 of the statutes; but it is confined to insurance business in which its members insure each other against loss by fire and other casualties, and agree to be assessed specifically for payment for losses and for incidental purposes. *State, Richards, v. Manufacturers' Mut. F. Asso.* (Ohio) 252

4. The whole business of insurance being regulated by the Ohio statutes, which make it unlawful for any company, corporation, or association to do such business except on specified conditions, the carrying on of such business is the exercise of a franchise. *State, Richards, v. Ackerman* (Ohio) 298

5. The Order of Iron Hall was a secret and fraternal society within the Connecticut statute excepting such societies from the law requiring the authority of the insurance commissioner to entitle a foreign corporation to do insurance business within the state. *Fawcett v. Supreme Sitting of Order of I. H.* (Conn.) 815

6. The facts that the seal of a benefit society contains the words "\$1,000 in seven years," and the by-laws are so worded as to lead persons to expect not to exceed two assessments per month, which return from such assessments is impossible of accomplishment, thereby furnishing designing men an easy means for entrapping the unwary, do not establish fraud as a matter of law, so as to give the association no right to assessments collected. *Id.*

7. Proofs of loss stating suicide as the cause of death, although admissible, are not conclusive against plaintiff in an action on a life policy. *Leman v. Manhattan L. Ins. Co.* (La.) 589

8. The proceeds of insurance belong to the beneficiaries, and not to the estate of the deceased, when a certificate is payable to the member's "heirs at law." *Mullen v. Reed* (Conn.) 664

9. A widow is included among the "heirs at law," within the meaning of an insurance certificate payable to the heirs at law of the member, where, under the laws of the state, she would be entitled to a distributive share. *Id.*

10. A plaintiff can recover only those benefits accrued at the commencement of the action, in a suit for benefits, where he is entitled to a certain sum for each week that he is sick and disabled. *Robinson v. Exempt Fire Co.* (Cal.) 715

NOTES AND BRIEFS.

Insurance; restrictions on business of foreign insurance companies:—as to assets; license taxes; charges for fire department or firemen's fund; certificates; other requirements; other "states;" what companies within the statutes; violation of statute; retaliatory statutes. 293

Proof of death; effect of statements in proofs. 589

INTENT. See EVIDENCE, 37, 38.

INTEREST.

1. Interest from the time the action was brought may be added in case of the recovery

cal equipment. *Edison General Electric Co. v. Canadian P. Nav. Co.* (Wash.) 815

2. The rate of interest on a county warrant which is by statute to draw "legal interest" after presentation to the treasurer and indorsement to show that it is not paid for want of funds cannot be reduced by a statute reducing the rate of interest, as the rate which first begins to run upon it is a part of the contract obligation. *Union Sav. Bank & T. Co. v. Gelbach* (Wash.) 859

NOTES AND BRIEFS.

Interest; change of rate of. 859

INTOXICATING LIQUORS. See also COMMERCE, 3.

1. The purchaser of intoxicating liquor sold in violation of law is not a participant with the seller so as to be guilty of the offense. *State v. Cullins* (Kan.) 312

2. An ordinance prohibiting the use of screens, blinds, stained glass, or anything that will obstruct the view of the interior of saloons, is unreasonable and therefore invalid, under a mere general authority to license and regulate saloons. *Champer v. Greencastle* (Ind.) 768

3. Municipal authority "to license and regulate" the sale of intoxicating liquors does not include the authority to prohibit it absolutely. *Ex parte Sikes* (Ala.) 774

4. The only qualification of power contained in a grant to a municipality of the power "to fix the price of licenses" is that it shall not be prohibitory. *Id.*

5. A license fee of \$2,000 is not invalid as prohibitory, or as a license for revenue as distinguished from a license tax for police purposes, where the agreed facts show that there is a population of 4,000 inhabitants, and the retail sales of the business for four years aggregate \$851,000, while two thirds of the entire expense required to police the city are traceable solely to the sale of liquor within its corporate limits. *Id.*

6. Removing intoxicating liquor from the platform to the freight room of a depot is a transportation or conveyance thereof from "one place to another" within the state, within the meaning of the Iowa statute making transportation or conveyance an offense, in the absence of a certificate from the county auditor that the consignee is authorized to sell such liquors. *State v. Rhodes* (Iowa) 245

NOTES AND BRIEFS.

Intoxicating liquors; liability of purchaser on illegal sales:—generally; assisting purchaser; disqualification of purchaser as a witness; collateral rulings. 212

Municipal power to prohibit screens in bar-rooms. 768

IRON HALL. See INSURANCE, 5.

JUDGMENT. See also HOMESTEAD; INTERJUNCTION, 3.

1. The entry, by the clerk, of a judgment for a larger amount than asked for in the com- 24 L. R. A.

the language of the prayer, is to be regarded as a clerical, and not a judicial, error, in determining the power of the court to correct it. *Kindel v. Beck & P. Lithographing Co.* (Colo.) 811

2. A judgment of the Court of Alabama Claims making an award to an ancillary administrator appointed in the District of Columbia cannot be collaterally attacked on the ground that foreign administrators were entitled to recognition. *Manning v. Leighton* (Vt.) 684

3. The appointment of an administrator cannot be collaterally attacked because the petition for administration fails to allege the death of the intestate, since the jurisdiction of the court did not depend upon the formality of the petition or adherence to any technical rule of procedure. *Id.*

4. The appointment of an administrator cannot be collaterally attacked on the ground that the petition falsely represented the petitioner to be a creditor of the intestate, where neither the residence of a creditor within the jurisdiction nor the application of one is essential to the jurisdiction. *Id.*

5. An objection to a judgment granting equitable relief in an action at law is not well founded under the Nebraska practice, which recognizes no forms of action, and allows either legal or equitable relief, according as the pleadings or proof warrant. *Kirkwood v. Hastings First Nat. Bank* (Neb.) 444

6. A meritorious defense must be shown in order to have relief against a judgment on the ground of fraud. *Hollinger v. Reems* (Ind.) 46

7. The right to relief against a fraudulent judgment rendered on unauthorized appearance by an attorney is not shown, where the debtor had left the case pending for four years with no one to look after it, and failed to discover it for six years afterwards, making no inquiry at any time, and delaying nearly a year after discovery. *Id.*

JUDICIAL NOTICE. See EVIDENCE, 1-5.

JUDICIAL SALE. See EMBLEMENTS.

1. The right to the possession of rents, profits, and usufruct of real estate sold on execution remains in the debtor until final confirmation of the sale. *Yeasel v. Kinspahr* (Neb.) 449

2. Until final confirmation of a sale of real property on execution, the legal title of the execution debtor is not divested, although on confirmation the title of the purchaser relates back to the time the judgment became a lien, except as affected by subsequent tax liens. *Id.*

3. A purchaser of real estate at a sale thereof on execution acquires thereby, prior to confirmation, only the lien which the execution creditor had on such land. *Id.*

JURY. See EMINENT DOMAIN, 4; QUO WARRANTO, NOTES AND BRIEFS.

JUSTICE OF THE PEACE. See also **CONTRACTS**, 17, 18.

Judgment on the pleadings may be rendered on appeal from a justice's court to the district court, when full pleadings are filed and show that the only answer is a set-off which is barred by statute. *Talcott v. Larned First Nat. Bank* (Kan.) 787

LANDLORD AND TENANT.

The constitutional exemption of a certain amount of a debtor's personal property precludes a statutory lien for rent on personal property kept on the leased premises; and while the debtor can expressly waive such exemption, he does not waive it by the mere fact of entering into a lease while such statute is in force, as the legislature cannot thus indirectly destroy the constitutional right of exemption. *Hodges v. Cooksey* (Fla.) 812

NOTES AND BRIEFS.

Availability of exemptions against claim for rent; statutory lien for rent; waiver of exemption; equitable lien. 812

LATERAL SUPPORT. See also **TRESPASS.**

The owner of premises who contracts for excavations, with agreement that the contractors shall do the necessary shoring, etc., "as required by law," is not liable for an entry by the contractors on the premises of the adjoining property, without license, to do such shoring as the law requires them to do only when afforded the necessary license. *Ketcham v. Newman* (N. Y.) 102

LAUNDRY. See **LIEN**.

LEGALIZATION. See **ACTION OR SUIT**, 4.

LEVY AND SEIZURE. See **LANDLORD AND TENANT.**

LEWDNESS. See **DEFINITIONS.**

LICENSE. See also **CONSTITUTIONAL LAW**, 5; **INTOXICATING LIQUORS**, 8-5.

Constitutional authority to make and enforce all such police, sanitary, and other regulations as are not in conflict with general laws, does not justify a municipality in prohibiting the maintenance of a public laundry in any except two designated blocks of the town without a license, to be granted only on obtaining the written consent of the owners of a majority of the real estate in the block where the business is to be conducted and in the four surrounding blocks. *Ex parte Sing Lee* (Cal.) 195

NOTES AND BRIEFS.

License; revocability of. 607
License tax; on foreign corporation. 289

LIEN. See **LANDLORD AND TENANT.**

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LIFE TENANTS.

1. New shares of preferred stock issued in twice the amount of the old shares but at one half the rate of interest, in settlement or compromise of claims of the holders on account of back and unpaid dividends, constitute capital, and not income, as between a life tenant and remainderman. *Mills v. Britton* (Conn.) 536

2. An action to establish an agreement by brothers and sisters to whom land has descended in common, to hold the same as joint tenants, and that it shall pass by descent or devise to the survivor and from the latter to a child of one of the brothers, and to set aside conveyances of the land by the survivor, is not prematurely brought by such child, on the ground that the survivor is not yet dead and that the child is not entitled to possession, since if the agreement is valid he has a vested remainder in the property and the right to protect the estate, so that he may receive the same when it should come to him by the terms of the agreement. *Murphy v. Whitney* (N. Y.) 123

NOTES AND BRIEFS.

Life tenants; rights in stock dividend. 536

LIMITATION OF ACTIONS.

1. The cause of action by a *de jure* officer against a *de facto* officer for fees or salary received by the latter does not accrue until the right to the office is determined, where this is in litigation. *Kreitz v. Behrensmeyer* (Ill.) 59

2. An amendment to a declaration, charging a common-law liability or implied contract obligation to repay money obtained by wrongful overcharges, states a new cause of action within the rule as to the Statute of Limitations, where the original counts sought to recover treble damages as a statutory penalty. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

LLOYDS. See **INSURANCE**, 2.

LOST INSTRUMENTS.

NOTES AND BRIEFS.

Recovery of. 435

MAILS. See **RAILROADS**, 2.

MALICIOUS MISCHIEF. See **ANIMALS.**

MANDAMUS.

1. Mandamus to compel the repair of a railroad track, a part of which is torn up, may be refused in the discretion of the court, where the road has been abandoned for months and cannot be operated except at great loss, not taking into account the repairs and taxes, and the proceeding not being commenced for the purpose of compelling the operation of the road. *State, Little, v. Dodge City, M. & T. R. Co.* (Kan.) 564

2. An eligible person lawfully appointed to a vacant office of town clerk, and duly notified thereof, may be compelled to accept, by mandamus. *People, German Ins. Co. v. Williams* (Ill.) 492

to serve in a public office does not preclude proceedings to compel the service. *People, German Ins. Co. v. Williams* (Ill.) 493

4. No demand is necessary before application for a mandamus to compel acceptance of a public office. *Id.* 494

NOTES AND BRIEFS.

Mandamus; to compel acceptance of office. 492

To compel operation of railroad; in general; increased facilities; compelling completion of road. 564

MARKETS.

1. An ordinance prohibiting the sale of vegetables in any other than a designated place between 7 A. M. and 2 P. M., which applies to all persons equally, is not unconstitutional or invalid, where the municipality has power to establish markets and provide for the cleanliness and salubrity of the city. *State v. Sarra-dat* (La.) 584

2. The fact that one raises his own produce gives him no right to sell it in violation of a city ordinance. *Id.*

3. Prohibiting the owners of wagons from selling their produce from wagons between the hours of 7 A. M. and 2 P. M., where no fees or dues are collected from the wagons, which may be backed up to the market banquettes for the delivery of goods previously sold to the owners of stalls, is not unconstitutional or oppressive, where the owners could rent stalls and dispose of their goods within the market during these hours. *Id.*

NOTES AND BRIEFS.

Markets: regulations restricting sales:—(I.) American cases; regulations and ordinances as affecting contracts; corporate privileges and grant; market regulations and rules; requiring license for sales in market; license for streets; license for shops; prohibition of sales except at market; tax; slaughtering; (II.) English cases; market rights and disturbances; tolls; sales by samples; license and regulation. 584

MASTER AND SERVANT.

Constitutional restrictions on contracts of, see CONSTITUTIONAL LAW, 4, 12.

See also ACTION OR SUIT, 2; CARRIERS, 6; CHARITIES, 8; LATERAL SUPPORT.

1. The right of an employé to recover for negligence of a corporation in hiring an incompetent servant over the protest of some of its officers is not affected by the failure of another employé to give notice of subsequent neglect and unfitness of such servant. *Mexican Nat. R. Co. v. Mussette* (Tex.) 642

2. A railroad company, although required by law to erect and maintain a cattle guard at a certain point, must make it safe as a crossing for employés, if it so locates its switch yards that they are constantly required to cross it. *Ford v. Chicago, R. I. & P. R. Co.* (Iowa) 657

3. A railway company is not responsible for the acts of an engineer and fireman in running an engine which it has rented to a bridge com- 24 L. R. A.

by several other railway companies, at a rental of \$10 a day, besides payment of the expenses of running the engine and the wages of the engineer and fireman, who were carried on the pay-roll of the railway company. *Byrne v. Kansas City, Ft. S. & M. R. Co.* (C. C. App. 6th C.) 663

4. A baggageman on a train is not serving his master in delivering drills which are carried merely to accommodate persons who have no contract with the carrier, and for which the carrier receives no benefit; and therefore his negligence in throwing the drills from the car, by which a person to whom they are sent is injured, does not make the carrier liable. *Walker v. Hannibal & St. J. R. Co.* (Mo.) 363

5. The fact that articles were sent by a ticket agent does not make a railroad company liable for negligence of a baggageman in throwing them from a train and injuring the person to whom they were sent, where they were sent by the ticket agent for his own benefit and carried by the baggageman merely as an accommodation, without the authority or knowledge of the carrier. *Id.*

6. The risk of injury from the caving in of the sides of a ditch 18 feet deep and 18 inches wide, while such ditches are not usually dug more than 6 or 8 feet deep, is not assumed by a laborer who does not know of the danger, but goes in under peremptory orders to dig it deeper. *Norfolk & W. R. Co. v. Ward* (Va.) 717

7. Obedience to orders will not be deemed contributory negligence, unless the danger was so glaring that no prudent man would enter into it even when, like the servant, he was not entirely free to choose. *Id.*

8. The proprietor of a theatre is liable for acts of a janitor and ticket taker, although he is also a special policeman, in wrongfully assaulting a person because he has engaged in a dispute as to his change with the ticket seller, who has attacked and beaten him,—especially when he has on his part committed no assault. *Dickson v. Waldron* (Ind.) 453

9. Arrests and detentions by agents or officers of a state agricultural society, which are not made for any of the causes for which power of arrest is given by statute to the society, are not within the scope of their powers so as to charge the society with liability. *A'Hern v. Iowa State Agri. Soc.* (Iowa) 635

NOTES AND BRIEFS.

For part performance of contract, see CONTRACTS.

Master and servant; disobedience of master's rules as contributory negligence:—rules binding on employés; examples; exceptions; notice; rule must not have been waived; disobedience must be unnecessary; rule must be applicable; disobedience must contribute to injury; willful injury; reasonableness of rule; rule construed; evidence; questions for court or jury. 657

Liability for servant's unauthorized act; scope of employment. 363

Acts of contractor. 108

Liability for act of special policeman. 433

Restriction of contracts between. 702

MAXIMS.

1. Aqua currit, et debet currere ut solebat. *Drake v. Lady Ensley Coal, I. & R. Co. (Ala.)* 64
2. Cessante ratione cessat lex. *Re Ricker (N. H.)* 740
3. Damnum absque injuria. *Booth v. Rome, W. & O. T. R. Co. (N. Y.)* 105; *Barnard v. Shirley (Ind.)* 568
4. Ex dolo malo non oritur actio. *Nester v. Continental Brew. Co. (Pa.)* 247
5. In pari delicto melior est conditio possidentis. *Fawcett v. Supreme Sitting of Order of I. H. (Conn.)* 815
6. Potior est conditio defendentia. *Nester v. Continental Brew. Co. (Pa.)* 247
7. Salus populi est suprema lex. *Booth v. Rome, W. & O. T. R. Co. (N. Y.)* 105
8. Sic utere tuo ut alienum non lœdas. *Drake v. Lady Ensley Coal, I. & R. Co. (Ala.)* 64

MINERALS. See BOUNDARIES.

MINES. See CONTRACTS, 19.

NOTES AND BRIEFS.

See also WATERS.

Mining; right of foreign company to engage in. 822

MOB. See DEATH, 2, 3; MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

MORTGAGE. See also ATTORNEYS' FEES; CONTRACTS, 28; NAME.

1. A deed of trust in favor of certain creditors does not become operative without their consent and before they have knowledge of it, so as to take priority over an attachment which is levied after the acceptance of the trust by the trustee and his taking possession of the property. *Alliance Milling Co. v. Eaton (Tex.)* 869
2. A mortgage securing several notes maturing at different periods is *pro tanto* a security for each in the order of its maturity. *Horn v. Bennett (Ind.)* 800
3. The fact that all the notes secured by a mortgage are made due by default does not change the rule of their priority according to their respective dates of maturity as stated in the notes themselves. *Id.*

NOTES AND BRIEFS.

See also ASSIGNMENT FOR CREDITORS.

Mortgages; right of foreign corporation to own. 322

Priority of notes falling due at different times secured by same mortgage:—*pro rata* rule; as to notes made to different parties; priority as regulated by maturity; priority as regulated by contract of assignment. 800

MUNICIPAL CORPORATIONS.

Power as to alley, see ALLEY, 3, 4.

Power over cemeteries, see CEMETERIES.

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Liability of, for mob, see DEATH, 2, 3.

See also COURTS, 3-5; FIREWORKS; HIGHWAYS; INTOXICATING LIQUORS, 2-5; LICENSE; MARKETS; OFFICERS, 4; WATERS, 4.

1. The incorporation of a city so laid out as to include a dairy farm not laid out into lots or blocks, and occupied only by the owner and his family, does not violate a constitution authorizing the incorporation of cities and towns, on the ground that it can extend only to cities and towns existing, and cannot include any territory not actually covered by the city or town, but the boundaries of such corporations may include some territory for prospective expansion. *Ferguson v. Snohomish (Wash.)* 795

2. The taxation of a dairy farm included within city limits, for general municipal purposes, is not an unconstitutional taking of private property without just compensation,—at least where the constitution requires that taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same. *Id.*

3. A constitutional provision that "no indebtedness shall be incurred . . . except in pursuance of an appropriation" does not prevent the legislature from incurring, or immediately directing the incurring of, indebtedness for the usual and current administration of state affairs,—such as making a contract for public printing,—without first making an appropriation for the specific purpose. *Carier v. Thorson (S. D.)* 784

4. Certificates of indebtedness of a city, purchased and placed uncanceled in a sinking fund of the city, even if the city continues to pay interest on them, do not constitute a part of the indebtedness of the city within the meaning of a constitutional restriction of the amount of its indebtedness. *Brooke v. Philadelphia (Pa.)* 781

5. A continuation of indebtedness not exceeding 7 per cent of the assessed valuation of a city, by creating new indebtedness as fast as the old debts are paid, is authorized by Pa. Const. art. 9, § 8, declaring that the debt of any city shall never exceed 7 per cent of the assessed value of the property therein. *Id.*

6. A loan of the city's credit to a corporation is not made by a contract between a city and a railroad company by which one half of the expense of abolishing grade crossings in the city is to be reimbursed to the city by the railroad company. *Id.*

7. The power of a city in respect to trees in streets can be delegated to a city committee composed of members of the board of aldermen. *Tate v. Greensboro (N. C.)* 671

8. A city is not liable to a lineman on its fire-signal system, for negligence in respect to the condition of a pole which breaks and injures him. *Pettingell v. Chelsea (Mass.)* 426

9. For lack of due diligence to furnish a supply of water according to contract for steam heating in a greenhouse, a municipal corporation may be liable for the damages. *Watson v. Needham (Mass.)* 287

See also INTOXICATING LIQUORS.

Municipal corporations; proof of incorporation; as trustees. 844

What may be included in. 795

Restriction of indebtedness of. 784, 781

Municipal corporations; liability for property destroyed by mob:—(I.) general doctrine; (II.) liability; (III.) grounds of liability; (IV.) extent of liability; (V.) when not liable; (VI.) contributory negligence; (VII.) necessity of notice; (VIII.) state statutes; (IX.) constitutionality of statutes; (X.) construction of statutes; (XI.) power to enforce judgment; (XII.) right of action over. 592

By-law to compel acceptance of office. 492

Liability for negligence. 427, 430

Liability of, for breach of contract. 287

NAME.A mistake in the initial of the middle name of a mortgagor does not necessarily defeat the effect of the record as notice, where there is nothing to show that there is more than one person of the name in question. *Fincher v. Hanegan* (Ark.) 548**NOTES AND BRIEFS.**

Name; form of Christian name required by recording Acts. 548

NEGLIGENCE.

Contracts to exempt from, see CONTRACTS, 9-11.

See also EVIDENCE, 17; RAILROADS, 9-11.

1. The sale by false representations to an innocent purchaser, of property known to the seller to be imminently dangerous to human beings and likely to cause them injury, renders the seller liable for resulting injury not only to the purchaser, but to such persons as may in the ordinary course of events be called upon to take charge of the property for him. *State, Hartlove, v. Fox* (Md.) 6792. If plaintiff's injury would have occurred from defendant's negligence just the same if plaintiff had been in no wise negligent, he is not prevented by his negligence from recovery. *Garrio v. West Virginia O. & P. R. Co.* (W. Va.) 50**NOTES AND BRIEFS.**

See also MASTER AND SERVANT.

Negligence; as to licensees. 532

As to licensees or trespassers. 215

Contracts against liability for. 647

In sale of dangerous article. 679

NEWSPAPER. See PUBLICATION.**NONRESIDENTS.** See CORPORATIONS, NOTES AND BRIEFS.**NOTICE.**

1. The knowledge of a conductor that a baggage man on the train over whom he has no 24 L. R. A.

control whatever is carrying articles is to be considered as no notice to the carrier. *Walker v. Hannibal & St. J. R. Co.* (Mo.) 3932. Knowledge acquired by one member of a firm of lawyers while transacting business of the firm, and relating thereto, is constructive notice to the other members of the firm. *Wiltbrock v. Parker* (Cal.) 1973. The constructive notice to one attorney of knowledge of his partner of matters pertaining to the firm business does not extend to a distinct transaction after dissolution of the firm, in which he is acting for a different client. *Id.***NUISANCES.** See also EQUITY; INJUNCTION, 2.1. The use of explosives in blasting on one's own premises does not constitute a nuisance which will create a liability without regard to negligence, where the blasting is the only proper mode of accomplishing a necessary work. *Booth v. Rome, W. & O. T. R. Co.* (N. Y.) 1052. The congregation of solicitors, hotel runners, and drivers of vehicles on the street in front of a railroad station, though constituting a nuisance to the public, if it does not interfere with the railroad company in the discharge of its duties is not a nuisance to the company for which it can obtain an injunction, although it may remotely affect the company's business by causing annoyance to its passengers. *Pittsburgh, Ft. W. & O. R. Co. v. Cheevers* (Ill.) 1563. The abutment and elevated structure of an elevated railroad built under legislative authority are not a nuisance, although they may create a liability for consequential damages. *Garrett v. Lake Roland Elev. R. Co.* (Md.) 3964. Tanks erected in a street by permission of the municipality, at points designated by it, to assist the owner in performing his contract of sprinkling the streets, cannot be treated as public nuisances *per se*. *Savage v. Salem* (Or.) 787**NOTES AND BRIEFS.**

Nuisance; abatement of. 324

In highways. 787

OBSCENE PUBLICATION.Payne's "Arabian Knights," Fielding's "Tom Jones," the works of Rabelais, Ovid's "Art of Love," "The Decameron" of Boccaccio, "The Heptameron" of Queen Margaret of Navarre, Rousseau's "Confessions," "Tales from the Arabic," and "Aladdin,"—are not so immoral that a receiver will be prevented from disposing of them when found among the assets which come into his hands. *Re Worthington Co.* (N. Y. Sup. Ct.) 110**NOTES AND BRIEFS.**

Obscene literature; unlawfulness of obscene and indecent publications:—at common law; indecent pictures; testing decency; questions for court and jury; motive and object of publication; mailing obscene letters; constitutionality of statutes; propriety of legislation. 110

OFFICERS.Removal of, see **COURTS**, 2.See also **ATTORNEYS**, 1; **CRIMINAL LAW**, 3; **EVIDENCE**, 7; **MANDAMUS**, 2, 3.

1. The eligibility to office of every voter is not implied in a constitutional provision that no person excepting a voter shall be elected or appointed to any office. *State, Thompson, v. McCallister* (W. Va.) 848

2. Requiring an officer to be a freeholder does not violate a constitutional provision against any "oath, declaration, or test" as a qualification for office, as that refers merely to religious or political tests. *Id.*

3. Legislative power to add qualifications for office is not excluded by a constitutional provision giving the legislature power to prescribe "terms of office, powers, duties, and compensation" of officers, as well as the manner of their election, appointment, and removal. *Id.*

4. The power of the governor over the fire and police board of the city of Denver, Colorado, in respect to orders of appointment and removal, depends entirely upon the terms of the charter as amended by the legislature in 1898. *People, Engley, v. Martin* (Colo.) 201

5. An order by the governor for the removal of a member of the fire and police board, under a charter provision authorizing him to make the removal "for cause to be stated in writing, and not for political reasons," is exclusive and conclusive proof of the cause for making the order, and cannot be attacked by extrinsic proof. *Id.*

6. A *de jure* officer may at common law recover the fees or salary paid to a *de facto* officer; and this rule is in force in Illinois, although under the constitution the fees of the office belong to the county from which the salary is paid for the discharge of the duties of the office. *Kraits v. Behrensmeyer* (Ill.) 59

7. The fact that a commission has not been issued to a *de jure* officer will not defeat his right to recover from a *de facto* officer the fees or salary received by the latter, where the term of office has expired before the termination of the litigation as to the title to the office. *Id.*

NOTES AND BRIEFS.

Officers; compelling citizens to accept of office:—penalties imposed by corporations; mandamus; American decisions. 492

Qualifications of. 848

De facto; rights in salary. 60

Right to charge fees. 469

OPTION. See **CONTRACTS**, 1-3.

PERPETUITIES. See also **CHARITIES**, 1.

An agreement between brothers and sisters to whom lands descend in common, to hold the same as joint tenants, and that upon the death of either the land shall pass by devise or descent to the survivor; with a subsequent agreement at a family meeting, reaffirming the prior agreement and providing that 24 L. R. A.

upon the death of the last survivor the land shall by devise or descent pass to the child of the only married one of such brothers and sisters, who is then in being,—is not void as creating a perpetuity under 1 N. Y. Rev. Stat. 723, §§ 14, 15, declaring void every future estate which shall suspend the absolute power of alienation for a longer period than during the continuance of not more than two lives in being, and declaring that such power is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed, since all the brothers and sisters uniting with such child can at any time convey a perfect, indefeasible title to the land. *Murphy v. Whitney* (N. Y.) 128

NOTES AND BRIEFS.

Perpetuities; what constitute. 128

PHYSICIANS.

The treatment by a so-called Christian scientist, of any physical or mental ailment for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship or as the performance of a duty, so as to take the case out of a statute making it unlawful to practice medicine without a certificate or diploma required by statute. *State v. Bunnell* (Neb.) 68

PLEADING. See also **LIMITATION OF ACTIONS**, 2.

1. A complaint which states the ultimate facts, without a statement of the acts made use of to accomplish the illegal purpose, is sufficient to state a cause of action either for enticing away plaintiff's wife or for her seduction. *French v. Deane* (Colo.) 387

2. A declaration for negligence need not specify the acts or omissions which constitute the negligence, as these are matters of proof. *Poling v. Ohio River R. Co.* (W. Va.) 215

3. A declaration in an action for causing the death of a person by contact with a diseased animal fraudulently sold by the defendant should allege that the death was the natural and probable consequence of contact with the animal. *State, Hartlove, v. Fox* (Md.) 679

4. The nature of the aid furnished by the one for whose wrongful killing a recovery is sought, to the plaintiff in the action, need not be set out in the complaint. *San Antonio & A. P. R. Co. v. Long* (Tex.) 687

5. Failure to allege capacity to sue does not render a complaint demurrable as not stating a cause of action. *Cone Export & C. Co. v. Poole* (S. C.) 289

6. Failure of the complaint of a foreign corporation to show charter power to contract and sue is not ground for demurrer under a statute allowing a demurrer only when it appears from the face of the complaint that plaintiff has not legal capacity to sue. *Id.*

7. The existence of a corporation is admitted by filing an information against it by its corporate name to procure a forfeiture of its charter. *North & S. Rolling-Stock Co. v. People, Schaefer* (Ill.) 463

8. A complaint for the recovery of money,

tain goods to defendant at prices named, which were reasonably worth the amount charged therefor, and that defendant promised to pay that amount a certain number of days after the sale and delivery, but that such time had elapsed and no payment has been made and the amount is still due,—states a cause of action. *Cons Export & O. Co. v. Pools* (S. C.) 289

POOR. See APPRENTICES.

NOTES AND BRIEFS.

Poor; liability of officers of. 552

POSTOFFICE. See RAILROADS, 2.

NOTES AND BRIEFS.

See also OBSCENE LITERATURE.

Postoffice; regulation of running of mail trains. 502

PRINCIPAL AND AGENT.

1. One dealing with a special agent does so at his peril. He must be careful to see that the agent's authority covers the act he does. *Dyer v. Duffy* (W. Va.) 839

2. A power of attorney merely to sell land implies that the agent shall sell for cash; and he cannot sell on credit in the absence of authority contained in such power of attorney. *Id.*

3. The simple transfer to a third person of a writing by which one is empowered to sell land, implying a cash sale, without any payment of purchase money, is not a sale. *Id.*

4. A proposal of sale made under a power of attorney limited to a reasonable time must be accepted within a reasonable time from the date of the power. *Id.*

5. An agent appointed by parol to sell land cannot receive purchase money unless so authorized by his power. *Id.*

PRIZE FIGHTING.

A glove contest with 5 oz. gloves, under the Marquis of Queensbury Rules, which allow no wrestling, roughing, or hugging the ropes, and no spikes in boots or shoes, and require a contestant who falls through weakness or otherwise to rise unassisted in ten seconds, and to be considered down when hanging on the ropes in a helpless state, is not "what is commonly called a prize fight," within the prohibition of the Louisiana statute, but is within the proviso thereto excepting glove contests in rooms of regularly chartered athletic clubs. *State v. Olympic Club* (La.) 452

NOTES AND BRIEFS.

Prize fights; what are. 452

PROXIMATE CAUSE.

1. Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion 24 L. R. A.

Co. v. Hammill (N. J. Sup.) 531

2. The negligence of an engineer having supervision over his fireman as well as locomotive, in leaving his engine under steam, where it was holding a train on a steep grade, may be deemed the efficient cause of an injury resulting from the inadvertent or unintentional act of the fireman in setting the engine in motion. *Mexican Nat. R. Co. v. Mussette* (Tex.) 643

PUBLICATION.

A weekly journal devoted primarily to the interests of the legal profession, but containing matters of interest to the general public, such as personal items, notices of passing events, a record of property transfers and mortgages, and general trade advertisements, and having bankers, brokers, real estate agents, merchants, and business men, as well as judges and lawyers, among its subscribers, is a newspaper within the Michigan statutes providing for publication of legal notices in a newspaper. *Lynch v. Durfee* (Mich.) 793

PUBLIC IMPROVEMENTS.

1. The basis of a special assessment or a special taxation is the enhancement in value of the property to the extent of the burden imposed. *Chicago v. Blair* (Ill.) 413

2. The sprinkling of streets is not a local improvement for which a special assessment can be laid on abutting property. *Id.*

NOTES AND BRIEFS.

Public improvements; right to impose on abutting owners the duty or expense of sprinkling, sweeping, and cleaning streets or sidewalks:—street sprinkling; street sweeping; compelling removal of ice and snow from sidewalks. 413

PUBLIC LANDS. See HIGHWAYS, 1; WATERS, 1.

NOTES AND BRIEFS.

Public lands; vested right in grant. 606

PUBLIC PRINTING. See MUNICIPAL CORPORATIONS, 8.

QUO WARRANTO.

1. An association, although unincorporated, may be ousted by quo warranto from acting "as a corporation," under Ohio Rev. Stat. § 6760. *State, Richards, v. Ackerman* (Ohio) 296

2. The constitutional guaranty that trial by jury shall remain inviolate forever extends to issues of fact on an information in the nature of a writ of quo warranto, since such issues were triable by jury at common law. *Buckman v. State, Spencer* (Fla.) 806

3. A plea of *non usurpavit* is not proper on an information in the nature of quo warranto, although it is filed by a private individual on his own relation, upon the refusal of the attorney general to commence the suit. *Id.*

NOTES AND BRIEFS.

- Quo warranto; to oust foreign association from exercise of corporate function. 298
 Right to jury in proceedings by. 806

RAILROAD COMMISSIONERS.

- Delegation of power to, see CONSTITUTIONAL LAW, 3.
 See also CONSTITUTIONAL LAW, 15.

RAILROADS.

- As carriers, see CARRIERS.
 Receivers of, see RECEIVERS, 1.
 See also COMMERCE, 4; MANDAMUS, 1; MASTER AND SERVANT, 2-5; PROXIMATE CAUSE, 2; MUNICIPAL CORPORATIONS, 6.

1. It is not an unreasonable regulation for the legislature to require all regular passenger trains to stop at county-seats. *State v. Gladson* (Minn.) 502

2. The fact that a passenger train carries United States mail does not relieve it from the operation of a state statute requiring all passenger trains to stop at county-seats. *Id.*

3. A railroad company is liable for injury to a person lawfully near its track who is struck by some of the tools which are thrown from another person who is hit by a train, although he was negligent, if the railroad company was also negligent in failing to give signals and this negligence co-operated with that of the person struck by the train. *Pennsylvania R. Co. v. Hammill* (N. J. Sup.) 581

4. A railroad company which has recognized the right of the public to use a footway alongside a railroad bridge, to and from a passenger station, and separated by a fence from the tracks, owes to a person who is using it the duty of ordinary care to protect him from danger. *Id.*

5. The requirement of a lookout on every locomotive, and the giving of an alarm and stopping of the train when any obstruction appears on the track, by Mill & V. (Tenn.) Code, § 1293, does not apply to a case where a person gets upon the railroad track so short a time before he is struck that it would be impossible to sound the alarm whistle and down brakes, or use any other means to stop the train. *Byrne v. Kansas City, Ft. S. & M. R. Co.* (C. C. App. 6th C.) 693

6. A railroad company is not responsible for injury to a trespasser, if no duty is omitted after becoming aware of his danger. *Raines v. Chesapeake & O. R. Co.* (W. Va.) 226

7. If those running a railroad train discover a trespasser in imminent danger on the track, they must use all reasonable exertions to avoid inflicting injury; otherwise, the company will be responsible. *Id.*

8. If a person, apparently capable and in the possession of his faculties, is seen walking on a railroad track, the servants of the company running the train, having given such signals as are required, have a right to act on the presumption that such person will step aside in time to remove himself from danger. *Id.*

9. A railroad company is not responsible—
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at least to a mere bystander—for the negligent act of a postal clerk in a mail car in catching a mail pouch from a mail crane when the train is running at full speed. *Poling v. Ohio River R. Co.* (W. Va.) 215

10. A person standing on land of a railroad company, not in a highway, near a mail crane, for the purpose of witnessing the catch of a mail pouch, or some other like purpose, is a mere voluntary licensee, to whom the railroad company does not owe the duty of keeping the mail crane in suitable and safe condition. *Id.*

11. The defense of contributory negligence is not defeated, although the burden of proof is thrown on the defendant by Iowa Code, § 1288, providing that an injured party in order to recover damages from a railroad company for neglect or refusal to comply with the statute requiring safe crossings and cattle-guards need only prove such neglect and refusal. *Ford v. Chicago, R. I. & P. R. Co.* (Iowa) 657

12. A horse railway is not a railroad within the meaning of Tenn. Code, § 1304, which requires the stopping of every engine or train before crossing an intersecting railroad. *Byrne v. Kansas City, Ft. S. & M. R. Co.* (C. C. App. 6th C.) 693

NOTES AND BRIEFS.

See also CARRIERS.

Right of foreign railroad companies in state. 811

Right of foreign corporation to own land in state. 322

Compelling operation of; compelling increased facilities; compelling completion of road. 564

Liability for negligence of postal clerk. 216

Negligence as to licensees. 582

Necessity of lookout; negligence as to trespasser. 694

RATIFICATION. See BANKS, 4.

REAL PROPERTY. See also CORPORATIONS, NOTES AND BRIEFS.

The word "issue" is a word of purchase, and not of limitation, in a deed creating a life estate, with remainder to the issue of the body of the life tenant. *McIlhinny v. McIlhinny* (Ind.) 489

RECEIVERS.

1. A receiver appointed in another state, of a railroad in that state, should be, not only on grounds of comity, but as a wise policy, appointed by a court to take charge of a small portion of the road which extends into its jurisdiction. *Port Royal & A. R. Co. v. King* (Ga.) 730

2. A court will not turn over to a receiver and assignee of a foreign corporation, who is appointed in another state, a fund which is in the hands of a local receiver, unless satisfied that no injustice will thus be done to citizens in that state. *Fawcett v. Supreme Sitting of Order of I. H.* (Conn.) 815

3. Funds in the hands of a Connecticut re-

of the Order of Iron Hall in that state, and made up of the reserved funds which were in the hands of the trustees of such local branches, which had been created by retaining, under the laws of the order, 20 per cent of assessments collected,—are subject to an equitable lien, on the insolvency of the corporation, for repayment of certificate-holders in that state, if they elect to treat the contract as rescinded, and will be retained for distribution among them, instead of paying them over to a receiver and assignee appointed in Indiana, where the corporation was created and is being wound up; especially where he claims the money for distribution among the creditors of the corporation generally, without any distinction in favor of certificate-holders. *Fawcett v. Supreme Sitting of Order of I. H.* (Conn.) 815

NOTES AND BRIEFS.

Receivers; foreign; recognition of. 816

RECORDS. See NAME.

NOTES AND BRIEFS.

Records; form of Christian name required in. 543

REGENTS. See SCHOOLS.

RELIGIOUS SOCIETIES.

1. The constitution of a church, recognized and acquiesced in as the organic law of the church for more than fifty years, must be held to have been regularly adopted. *Bear v. Heasley* (Mich.) 615

2. A new constitution of a church, making some changes on the subject of infant baptism, the washing of feet, and secret societies, and adding a provision as to lay delegation and the declaration of a belief in "depravity," "justification," "regeneration," "adoption," "sanctification," and "endless punishment," made by the general conference of the church, which had no authority to change the constitution, is illegal, although these matters had been previously included in the discipline of the church, which the general conference had power to change, excepting where it would change the confession of faith. *Id.*

3. The decision of a general conference which is the highest tribunal of a church, that a new constitution and confession of faith have become the fundamental belief and constitution of the society, is not binding upon the courts where it is clearly shown that the fundamental law of the church, requiring a request by two thirds of the whole society before a change in the constitution can be made, has not been complied with, but that one general conference had appointed a commission to prepare a new constitution and submit it to a vote of the church, and a succeeding general conference declared the constitution adopted, although the affirmative vote of the church, while more than two thirds of the members voting, was much less than two thirds of the whole society. *Id.*

4. Members of a church who adhere to the 24 L. R. A.

though constituting a small minority, are entitled to the church property, where the majority by revolutionary action have adopted a new constitution and refuse longer to submit to the organic law of the association. *Id.*

NOTES AND BRIEFS.

Religious societies; constitution of; change of doctrine. 615

REMAINDERMEN. See LIFE TENANTS.

REMOVAL OF CAUSES.

NOTES AND BRIEFS.

Stipulation against, by foreign corporation. 259

REPLEVIN.

A person obtaining goods by fraudulent pretenses is guilty of a tortious taking, and no demand for possession is necessary to enable the person defrauded to maintain replevin for them, unless they have passed to a third person holding them bona fide for a valuable consideration without notice. *Morrow Shoe Mfg. Co. v. New England Shoe Co.* (C. C. App. 7th C.) 417

RESUME. For resumé of contents of book, see p. 865

RETALIATORY STATUTES. See INSURANCE, NOTES AND BRIEFS.

SALE. See also FRAUD AND FRAUDULENT CONVEYANCES, 1.

1. There is no warranty that a horse will not take fright at a trolley car, by representing it to be sound and kind in single and double harness. *Meyer v. Krauter* (N. J. Err. & App.) 575

2. A purchaser of goods is affected by the fraudulent acts and intents of the seller in procuring them from a third person, if he has knowledge thereof, or of the existence of such facts and circumstances as are naturally and justly calculated to awaken suspicion in the mind of an honest man of ordinary care and prudence and lead him to inquiry. *Morris Shoe Mfg. Co. v. New England Shoe Co.* (C. C. App. 7th C.) 417

SCALPING. See CARRIERS, NOTES AND BRIEFS.

SCHOOLS. See also CONTRACTS, 20; COURTS, 6.

No by-law or contract of the board of regents of normal schools can bargain away, limit, or restrict the statutory power of the board to remove a teacher at pleasure. *Gillan v. Board of Regents* (Wis.) 336

NOTES AND BRIEFS.

Schools; removal of teacher. 336

SHELLEY'S CASE. See REAL PROPERTY.

SHERIFF. See ACTION OR SUIT, 1.

SPECIFIC PERFORMANCE. See also CONTRACTS, 8.

1. Specific performance cannot be ordered of a contract for the sale of land, made by a man whose wife did not join in it and who refuses to execute the conveyance; nor can the husband alone be compelled to execute it, with a deduction from the purchase price of the value of her dower interest, as this changes the contract. *Barbour v. Hickey* (D. C.) 763

2. An unexplained delay of two years before filing a bill for specific performance of a contract to convey improved city property, upon which the price has not been paid, will defeat the relief sought. *Id.*

3. Specific performance being addressed to the sound discretion of the court, the party asking it must have been ready, willing, and prompt in the performance of those things incumbent on him; and where he has not been so, and it would impose hardship and be inequitable upon the other party, specific performance will be refused. *Dyer v. Duffy* (W. Va.) 339

4. A contract between abutters on a street about to be closed, that certain parts of the bed of the street shall be awarded to each, without specifying any instrument of title, and that then one shall sell and the other buy "at the market price" a strip fronting 7 feet on a designated street to a 10-foot alley not located, —is too indefinite to be specifically enforced. *Schwanebeck v. Smith* (Md.) 168

NOTES AND BRIEFS.

Specific performance; of contract for conveyance where wife refuses to unite in the conveyance:—(1) specific performance against wife; (a) on contract of husband; (b) on contract of wife; (2) contracts enforceable against both; (3) specific performance against husband; (4) abatement for deficiency in title; (5) requiring husband to obtain wife's signature; (6) mutuality; (7) enforcing contracts against vendee. 763

SPRINKLING STREETS. See PUBLIC IMPROVEMENTS, 2.

STATUTE OF FRAUDS. See CONTRACTS, 4-7.

STATUTES.

1. The title of an act, "Providing for the Organization and Regulation of Banks, and Prescribing Penalties for Violations," does not contain more than one subject. *Blaker v. Hood* (Kan.) 854

2. A provision requiring officers to tax and collect fees for the creation of a fund out of which their salaries shall be paid is within the scope of the title of an act entitled "An Act Fixing the Compensation and Prescribing the Duties of Officers." *Henderson v. State, Stout* (Ind.) 469

3. The compensation of officers, whether of state, county, or township, is a matter which may be embraced in a single statute. *Id.*

4. A constitutional provision against special laws regulating practice in the courts does not apply to a statute making insurance companies liable to damages and attorneys' fees in case of default in payment of policies. *Union C. L. Ins. Co. v. O'Connell* (Tex.) 504

5. The invalidity of a statute as to fees of officers, on the ground that it is local and special as far as it applies to other officers, does not make it invalid as to sheriffs if the provisions as to the latter are complete within themselves and capable of being executed independently of provisions relating to other officers. *Henderson v. State, Stout* (Ind.) 469

6. A statute applying alike to all officers elected after it takes effect is not local or special because officers previously elected are exempt from its provisions. *Id.*

7. A statute changing a rule of evidence is applicable to a pending action. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

8. A statute must be read in the light of all general laws upon the same subject in force at the time of its passage. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 78

9. Common-law terms used in an Act of Congress creating an offense without defining the terms may be interpreted by the common law. *Id.*

10. An alleged violation of the Anti-Trust Act of Congress must be clearly within its provisions, as the statute is a criminal one. *Id.*

11. Words which have acquired a well-understood meaning by judicial interpretation must be presumed to be used in that sense in a subsequent statute, unless the contrary clearly appears. *Id.*

12. Re-enactment of a statute which has been construed by the courts must be presumed to be with the intent to adopt that construction. *Cargill v. Kountze Bros.* (Tex.) 188

13. No part of a statute can be sustained when it is apparent from inspection that unconstitutional sections of the statute formed an inducement to its passage. *Low v. Res Printing Co.* (Neb.) 702

14. A statute providing for condemnation of land is not entirely repealed, so as to be incapable of amendment, by a constitutional provision which renders inoperative the clauses of the statute relating to the jury. *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 273

15. Provisions in a statute as to unlawful discrimination in rates will not, even if unconstitutional, make invalid other provisions as to reasonableness of rates. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 141

16. The invalidity of a provision allowing a verdict by a majority of the jury, in a statute as to condemnation, does not make the whole statute void. *Jacksonville, T. & K. W. R. Co. v. Adams* (Fla.) 273

NOTES AND BRIEFS.

Statutes; local and special; sufficiency of title. 469

STOCKHOLDERS. See CORPORATIONS, NOTES AND BRIEFS.

STREET SPRINKLING. See HIGHWAYS, 11; PUBLIC IMPROVEMENTS, NOTES AND BRIEFS.

STREET SWEEPING. See PUBLIC IMPROVEMENTS, NOTES AND BRIEFS.

SUICIDE. See EVIDENCE, 11, 12, 87, NOTES AND BRIEFS; INSURANCE, 7.

TAXES. See also MUNICIPAL CORPORATIONS, 2; TELEGRAPHS.

A sale of land for direct taxes is void, although no tender of the taxes was made, where the tax commissioners had established a uniform rule that they would receive the taxes from no one but the owner in person, although he was at the time within the Confederate lines. *Gould v. Carr* (Fla.) 130

TELEGRAPHS. See also EMINENT DOMAIN, 5; HIGHWAYS, 7, 8.

An ordinance imposing a tax of \$2 on each telegraph, telephone, electric-light, or other pole except trolley poles used exclusively for wires of street railways, does not violate the right of a telegraph company which has accepted the provisions of the Act of Congress of July, 1866, giving it the privilege of operating a line over post roads. *Postal Teleg. Cable Co. v. Baltimore* (Md.) 161

NOTES AND BRIEFS.

See also EMINENT DOMAIN.

Telegraph and telephone companies; power of state to control or impose burdens upon, when doing interstate business;—license for doing business; tax on messages; tax on gross receipts; tax on franchises; tax on property or capital stock; charge for poles and wires; state monopolies; revocation of license; placing wires under ground; state regulation of business. 161

Telegraphs; cutting trees on highway for. 724

Right of foreign telegraph company to enter state. 811

Right of foreign telegraph company to own property in state. 822

TENDER.

1. The tender of the whole amount of purchase money before it was due, under a contract by which part was to be paid in interest-bearing notes, is not a proper tender of performance of the contract. *Barbour v. Hickey* (D. C.) 763

2. A certified check is not properly tendered instead of money. *Id.*

THEATRE. See MASTER AND SERVANT, 8.

TICKET BROKERS. See CARRIERS, NOTES AND BRIEFS.

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Regulation of sale of, see CONSTITUTIONAL LAW, 5, 8, 9, 16, 17; CONTRACTS, 27.

TOWN SITE. See HIGHWAYS, 1.

TREES. See also ESTOPPEL, 5; HIGHWAYS, 7-10, NOTES AND BRIEFS; MUNICIPAL CORPORATIONS, 7.

One who, having knowledge of the rights of a land owner in trees on or beside a highway, proceeds, against his protest, heedlessly, recklessly, and carelessly to injure them, may be prosecuted under Ohio Rev. Stat. § 6840, for a wrongful injury to property. *Dailey v. State* (Ohio) 524

TRESPASS. See also CASE.

Entry by contractors on the premises of another to shore up his building, without license and against his protest, is a trespass although the statute makes it necessary to protect his wall in cases of excavation, "if afforded the necessary . . . license. . . and not otherwise." *Ketcham v. Newman* (N. Y.) 109

TRIAL.

By jury, see EVIDENCE, 8.

See also EMINENT DOMAIN, 3, 4; QUO WARRANTO, 2.

1. A territorial statute providing for a verdict by three fourths of the jury in a civil case does not violate that clause of the Federal Constitution which provides for the right of trial by jury. *Hess v. White* (Utah) 277

2. In addressing the jury in a criminal cause, counsel may be allowed, in the discretion of the trial court, to read from standard works on matters of science and art, when pertinent, by way of argument or illustration; but it would be an abuse of this privilege to make it the pretense of getting improper matter before the jury as evidence, or to present matters of law conflicting with the instructions of the court. *State v. O'Neil* (Kan.) 553

3. When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury. *Raines v. Chesapeake & O. R. Co.* (W. Va.) 226

4. But when the facts are such that all reasonable men must draw from them the same conclusion,—when there is no room for two reasonable opinions about it,—it becomes a question of law for the court. *Id.*

5. Whether an engineer leaving an engine standing under steam, holding a train on a steep grade, ought to have foreseen that an ignorant fireman left in charge might unintentionally or inadvertently put it in motion, is a question for the jury. *Mexican Nat. R. Co. v. Mussette* (Tex.) 642

6. The character of the way used by the public, whether by dedication, prescription, or invitation, is a matter of law, when the facts are undisputed. *Pennsylvania R. Co. v. Ham mill* (N. J. Sup.) 531

7. An instruction should be granted which

asks that no inferences be allowed against a defendant for failure of plaintiff's wife to testify, where she cannot be called without plaintiff's consent. *French v. Deans* (Colo.) 887

8. An instruction that recovery can be had only for the loss of such pecuniary benefits as would have resulted "from the mental or bodily labor" of the deceased is wrong, where the prospective benefits were from the income of the property of the person killed. *San Antonio & A. P. R. Co. v. Long* (Tex.) 687

9. Averments that plaintiff had lost a certificate of deposit on which suit is brought, and that it was not indorsed, being put in issue, a finding merely that there is due to the plaintiff the amount of such certificate, without finding on either of the issues named, is insufficient. *Kirkwood v. Hastings First Nat. Bank* (Neb.) 444

NOTES AND BRIEFS.

See also QUO WARRANTO.

Trial; constitutionality of verdict by less than all the jurors. 272, 277

TROVER.

1. A demand of goods in the hands of a carrier, by virtue of a chattel mortgage after condition broken, but without any legal process, made by a constable acting merely as agent of the mortgagees, will not make the carrier liable for conversion if it refuses to surrender them, where the goods were received from a third person who has a bill of lading therefor. *Kohn v. Richmond & D. R. Co.* (S. C.) 100

2. The refusal of a creditor of an insolvent estate to surrender to an administrator *de bonis non* certificates of stock standing in the name of a deceased administratrix is not a conversion where the creditor claims no interest in them except as creditor of the estate, and there is pending a claim of the administrator *de bonis* against commissioners of the estate for a conversion by the deceased administratrix. *Mills v. Britton* (Conn.) 586

3. Persons who deal in goods fraudulently obtained by a third person, recklessly and with knowledge of such facts and circumstances as would have put cautious and prudent men on inquiry, are chargeable with the value of the goods obtained by them from the fraudulent purchaser, which they convert to their own use, although they have paid the full value and the property has passed beyond the reach of the process of the court. *Morrow Shoe Mfg. Co. v. New England Shoe Co.* (C. C. App. 7th C.) 417

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Trover; against carrier. 100

TRUSTEE.

NOTES AND BRIEFS.

Foreign corporations as. 289

TRUSTS.

NOTES AND BRIEFS.

Under contract of other persons. 124
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UNITED STATES. See ACTION OR SUIT, 1.

USURY. See also BILLS AND NOTES, 2
CONFLICT OF LAWS, 4.

An agreement for a loan to be paid in seven equal annual installments, with interest reserved for the whole time at 6 per cent per annum on the amount of the original loan, is usurious under a statute permitting interest at 8 per cent per annum. *Falls v. United States Sav. L. & Bldg. Co.* (Ala.) 174

NOTES AND BRIEFS.

Usury; by loan association. 175

VERDICT. See APPEAL AND ERROR, 7, 11
TRIAL, NOTES AND BRIEFS.

WATERS.

Action for pollution of, see CASE.

See also EXECUTORS AND ADMINISTRATORS, 1;
MUNICIPAL CORPORATIONS, 9.

1. The privilege of acquiring tidelands, given to a certain class of persons by Wash. Act March 26, 1890, is not a vested right, but by subsequent statute may be taken away from one who has not availed himself of the privilege, but merely continued in possession of the adjoining lands, as he was when the privilege was created. *Allen v. Forrest* (Wash.) 606

2. One who sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, is not liable to injunction and damages for allowing the water to flow into a natural watercourse of a basin in which the well is situated, and which is the only practicable outlet for the flow from such well, if the owner is free from negligence or malice and uses due care in avoiding injury to his neighbors. *Barnard v. Shirley* (Ind.) 568

3. The pollution of the waters of a stream by washing iron ore, whereby the water is laden with refuse and *débris*, rendering it unfit for stock and drinking purposes, and causing the deposit of a sediment upon portions of the farm of a lower proprietor, is an actionable injury to such proprietor, where the injury might have been prevented by the construction of proper basins to contain the water until the sediment was settled, before turning the water back into the stream. *Drake v. Lady Ensley Coal, I. & R. Co.* (Ala.) 64

4. A contract to supply water for a boiler to make steam to heat a greenhouse is one which a municipal corporation may legally make, where it has a municipal water supply. *Watson v. Needham* (Mass.) 287

NOTES AND BRIEFS.

Waters; how far stream may be polluted for mining purposes;—caring for "tailings;" mine water; refusal of injunction; estoppel; joint tort; prior appropriation. 64

WITNESSES.

1. The competency as a witness of a child over four years of age is a question addressed

2. That the complaint of one suing for damages for personal injuries alleges injury to his mind does not prevent the court in its discretion from permitting him to testify at the trial. *Dickson v. Waldron* (Ind.) 483

3. An untutored deaf mute may be permitted to testify by signs through an interpreter who is not an expert, if it is satisfactorily

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NOTES AND BRIEFS.

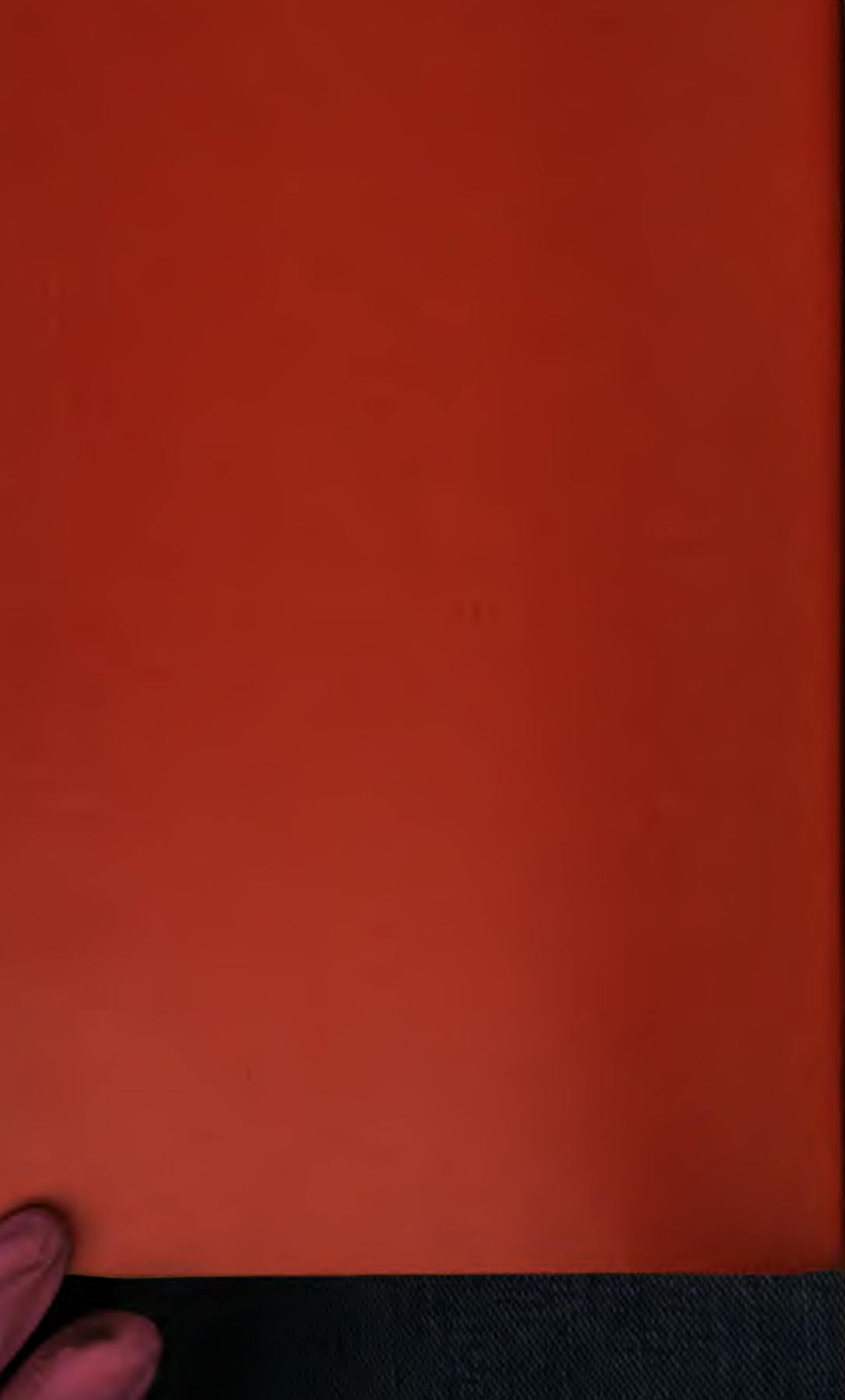
Witness; deaf and dumb person as; competency. 126

Competency of children. 838

WOMEN. See ATTORNEYS, 2.

L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY
WAY AFFECTED BY LATER DECISIONS THAT HAVE
CITED THESE CASES AS PRECEDENTS, WITH
HOLDINGS OF CITING CASES; ALSO
REFERENCES TO LATER AN-
NOTATIONS CITING
CASES OR NOTES



L. R. A. CASES AS AUTHORITIES.

CASES IN 24 L. R. A.

24 L. R. A. 33, *PEOPLE v. MONROE*, 100 Cal. 664, 38 Am. St. Rep. 323, 35 Pac. 326.

Fraud sustaining indictment for forgery.

Cited in *People v. Leonard*, 103 Cal. 203, 37 Pac. 222, holding indictment charging bank officer with making false entries with intent to defraud, sufficient without showing their effect to defraud; *Santolini v. State*, 6 Wyo. 119, 71 Am. St. Rep. 906, 42 Pac. 746, holding indictment for forgery not setting out indorsements showing apparent legal efficacy of instrument, good.

What may be subject of forgery.

Cited in *People v. James*, 110 Cal. 158, 42 Pac. 479, holding order for liquor, presented by Indian to whom law forbids furnishing liquor, subject of forgery; *Caffey v. State*, 36 Tex. Crim. Rep. 205, 61 Am. St. Rep. 841, 36 S. W. 82 (dissenting opinion), majority holding incomplete check for teacher's wages, invalid on face, not subject of forgery; *People v. McGlade*, 139 Cal. 69, 72 Pac. 600, holding instrument showing on its face that it may have been used to consummate fraud, susceptible of forgery, although of no legal significance; *Gordon v. Com.* 100 Va. 829, 57 L. R. A. 746, 41 S. E. 746, holding instrument one of legal efficacy within rules relating to forgery, when by any possibility it may operate to injury of another.

Cited in footnotes to *State v. Evans*, 28 L. R. A. 127, which holds written request to pay money to person named "and charge to him at my office" not subject of forgery; *Hickson v. State*. 54 L. R. A. 327, which holds instrument requesting addressee to let bearer have a "single rig" which the signer promises to return, may be subject of forgery; *Gordon v. Com.* 57 L. R. A. 744, which holds irregular check subject of forgery after payment, as to its effect as receipt; *White v. Wagar*, 50 L. R. A. 60, which holds labels and trademarks not subject of forgery; *State v. Taylor*, 25 L. R. A. 591, which holds unauthorized signing of name to note with signed statement that act authorized, not forgery.

24 L. R. A. 46, *HOLLINGER v. REEME*, 138 Ind. 363, 46 Am. St. Rep. 402, 36 N. E. 1114.

Vacation of judgments on ground of excusable negligence or fraud.

Cited in *Jones v. Crowell*, 143 Ind. 223, 42 N. E. 612, holding in action to set aside decree want of authority in attorney appearing, meritorious defense, and L. R. A. Au.—Vol. III.—43.

that no rights of innocent third parties intervene, must appear; *Majors v. Craig*, 144 Ind. 42, 43 N. E. 3, holding, to correct judgment by default, defendant's inability to prevent judgment by reasonable diligence must appear; *Indiana, I. & I. R. Co. v. Lynch*, 145 Ind. 2, 43 N. E. 934, holding, *obiter*, relief from judgment alleged to be obtained by fraud not obtainable where action on docket eight years, and three elapse after judgment; *State v. Hindman*, 159 Ind. 591, 65 N. E. 911, holding attack by cross-complaint in action upon forfeited recognizance, alleging that forfeiture was fraudulently obtained, direct, not collateral attack.

Cited in footnote to *Travelers' Protective Asso. v. Gilbert*, 55 L. R. A. 533, which denies right to resort to equity to vacate judgment for fraud when remedy at law adequate.

Cited in notes (31 L. R. A. 201, 211) on injunctions against judgments for want of jurisdiction or which are void; (32 L. R. A. 328) on general equitable jurisdiction in regard to injunctions against judgments.

Presumption of validity of judgment.

Cited in *Bruce v. Osgood*, 154 Ind. 379, 56 N. E. 25, holding judgment of domestic court of co-ordinate jurisdiction entitled to full credit.

24 L. R. A. 50, *CARRICO v. WEST VIRGINIA C. & P. R. CO.* 39 W. Va. 86, 19 S. E. 571.

Exhibition of injury to jury.

Cited in *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 38, 58 S. W. 278, holding exposure of injured limb to jury competent; *Orscheln v. Scott*, 90 Mo. App. 366, holding in assault case exhibition of injury to jury competent; *Hall v. Manson*, 99 Iowa, 712, 34 L. R. A. 213, footnote p. 207, 68 N. W. 922, denying right to reject measurement in jury's presence of woman's foot and leg 6 inches above ankle, in suit for injuries.

Power of court to order physical examination.

Cited in footnotes to *Wanek v. Winona*, 46 L. R. A. 448, which sustains court's power to order physical examination of plaintiff under penalty of dismissal of action; *Austin & N. W. R. Co. v. Cluck*, 64 L. R. A. 494, denying power of court to compel physical examination in absence of express legislative authority; *Atchison, T. & S. F. R. Co. v. Palmore*, 64 L. R. A. 90, sustaining right to physical examination of injured eyes, in action to recover for permanent injury to eyes; *Lane v. Spokane Falls & N. R. Co.* 46 L. R. A. 153, which sustains power of court to order physical examination of woman by experts in action for personal injuries; *Stack v. New York, N. H. & H. R. Co.* 52 L. R. A. 328, which denies power of court to compel plaintiff to submit to physical examination; *O'Brien v. La Crosse*, 40 L. R. A. 831, which denies power of court to order examination as to condition of plaintiff's bladder under evidence that it might be dangerous; *State v. Height*, 59 L. R. A. 438, which holds unlawful, disclosures by physicians of knowledge as to venereal disease obtained by examination against his will of one accused of rape; *Bagwell v. Atlanta Consol. Street R. Co.* 47 L. R. A. 486, which holds action for injury to minor daughter should not be dismissed for her refusal, after attaining majority, to submit to physical examination.

Duty of railroad to keep right of way clear.

Distinguished in *New York, N. H. & H. R. Co. v. Baker*, 50 L. R. A. 203,

39 C. C. A. 240, 98 Fed. 697, denying liability of railroad for injury to passenger from derrick near track used by employees of state board raising grade of railroad.

Liability for independent contractor's negligence.

Cited in *Baltimore City Pass. R. Co. v. Nugent*, 86 Md. 360, 39 L. R. A. 164, 38 Atl. 779, denying liability of railroad for breaking of trolley wire erected by independent contractor from hidden defect.

Cited in footnotes to *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Hoff v. Shockley*, 64 L. R. A. 538, holding property owner not liable to traveler for injury from obstruction placed in street by independent contractor; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116, holding landlord not relieved from liability to tenant for freezing of pipes, by fact that he employed independent contractor to heat building; *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 116, which holds landlord liable to tenants of lower floor for injury from freezing of automatic fire extinguisher in portion retained by former though building heated by independent contractor.

Presumption that passenger's accident due to carrier's negligence.

Cited in footnotes to *Budd v. United Carriage Co.* 27 L. R. A. 279, which holds running and kicking of team to public carriage makes prima facie case of negligence as to care of passenger; *Springer v. Ford*, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger through unexplained breaking of elevator appliance.

Contributory negligence.

Cited in *Barrickman v. Marion Oil Co.* 45 W. Va. 652, 44 L. R. A. 100, 32 S. E. 327, holding instruction that contributory negligence may be determined from evidence of both parties, proper.

Effect of negligence not contributing to injury.

Cited in *Kansas & A. Valley R. Co. v. White*, 14 C. C. A. 484, 32 U. S. App. 192, 67 Fed. 482, holding railroad liable for death of person on car platform, where such negligence did not contribute to injury.

Distinguished in *Klinkler v. Wheeling Steel & I. Co.* 43 W. Va. 225, 27 S. E. 237, holding conductor's negligence in failing to stop at crossing of intersecting road defeats recovery.

Duty to avoid injuring persons guilty of contributory negligence.

Cited in *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 418, 23 S. E. 593, holding instruction that railroad liable for failure to exercise ordinary care whereby trespasser injured, proper; *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 389, 23 L. R. A. 761, 19 S. E. 578 (dissenting opinion), majority denying railroad's liability for injury to drunken passenger falling off car platform after refusing to go inside; *Couch v. Chesapeake & O. R. Co.* 45 W. Va. 57, 30 S. E. 147, by *Dent, J.*, dissenting, who holds railroad liable for killing child on track which might have been seen by keeping proper lookout.

To what extent instructions must be supported by evidence.

Cited in *State v. Cross*, 42 W. Va. 260, 24 S. E. 996, by Brannon, J., dissenting, who holds instruction sustained by slight evidence proper; *McDonald v. Cole*, 46 W. Va. 188, 32 S. E. 1033, holding refusal of instruction supported by only colorable evidence, proper.

Nonprejudicial instruction.

Cited in *Bentley v. Standard F. Ins. Co.* 40 W. Va. 754, 23 S. E. 584, holding incorrect instruction, clearly working no prejudice, not reversible error.

24 L. R. A. 57, *PEOPLE ex rel. FAIRCHILD v. PRESTON*, 140 N. Y. 549, 56 N. Y. S. R. 480, 35 N. E. 979.

Advance payment of dues in building association.

Cited in *Mutual Ben. Loan & Bldg. Co. v. Lynch*, 54 App. Div. 563, 67 N. Y. Supp. 6, sustaining mortgage to building and loan association exacting six months' dues in advance.

Stock issuable by building and loan associations.

Cited in *Johnson v. National Bldg. & L. Asso.* 125 Ala. 479, 82 Am. St. Rep. 257, 28 So. 2, and *Coltrane v. Baltimore Bldg. & L. Asso.* 110 Fed. 295, sustaining issue of full-paid building association stock; *Re Building & Loan Asso* 8 Pa. Dist. R. 568, 30 Pittsb. L. J. N. S. 113, 2 Dauphin Co. Rep. 279, opinion of attorney general, sustaining power of building association to issue prepaid stock up to amount of instalment stock outstanding; *Synnott v. Cumberland Bldg. Loan Asso.* 54 C. C. A. 557, 117 Fed. 383, as to right of building and loan association to issue prepaid stock; *People v. New York Bldg. Loan Bkg. Co.* 41 Misc. 306, 84 N. Y. Supp. 844, as to right of building, loan, and accumulating fund association to issue preferred stock.

Cited in footnotes to *Rhodes v. Missouri Sav. & L. Co.* 42 L. R. A. 93, which holds foreign loan association issuing paid-up stock not entitled to exemption from usury given, by statute not authorizing issuance of paid-up stock; *Sumrall v. Columbia Finance & Trust Co.* 44 L. R. A. 659, which holds void, issuance of preferred stock by loan association.

Interest-bearing stock.

Cited in *Latimer v. Equitable Loan & Invest. Co.* 81 Fed. 779, sustaining issue of paid up interest-bearing building association stock.

Distinguished in *Dickinson v. Continental Trust Co.* 23 Misc. 491, 52 N. Y. Supp. 672, denying power of building association to issue full-paid stock with guaranteed interest.

Rights of shareholders in building associations.

Cited in *People's Bldg. Loan & Sav. Asso. v. Tinsley*, 96 Va. 328, 31 S. E. 508, holding borrowing member of New York building association entitled to credit for instalments paid and dividends, less losses sustained; *O'Malley v. People's Bldg. Loan & Sav. Asso.* 92 Hun, 577, 36 N. Y. Supp. 1016, holding shareholder may recover only amount of earnings on matured building and loan association certificate; *Hieronymus v. New York Nat. Bldg. & L. Asso.* 46 C. C. A. 684, 107 Fed. 1005, Affirming 101 Fed. 16, holding borrowing member not entitled to cancelation of mortgage until stock fully paid.

Building association loans for definite period.

Cited in *Eastern Bldg. & L. Asso. v. Olmsted*, 16 App. D. C. 414, sustaining power of loan association to make loan for definite period.

Implied corporate powers.

Cited in *Roby v. New York C. & H. R. R. Co.* 142 N. Y. 182, 36 N. E. 1053, raising, without deciding, question of railroad's power to lease for coal yard land condemned for use of road.

24 L. R. A. 59, *KREITZ v. BEHRENSMEYER*, 149 Ill. 496, 36 N. E. 983.

Right of de jure officer to emoluments.

Cited in *Blore v. Union County*, 64 N. J. L. 263, 81 Am. St. Rep. 495, 45 Atl. 633, holding one forcibly retaining possession of public office after term expired not entitled to salary; *Booker v. Donohoe*, 95 Va. 366, 28 S. E. 584, sustaining right of *de jure* officer, although not qualifying by taking oath or giving bond, to recover fees from *de facto* officer; *Coughlin v. McElroy*, 74 Conn. 404, 92 Am. St. Rep. 224, 50 Atl. 1025, holding *de jure* officer entitled to recover from *de facto* officer fees paid latter by city.

Cited in footnote to *Rasmussen v. Carbon County*, 45 L. R. A. 295, which holds payment to *de facto* officer not prevent *de jure* officer obtaining salary except while excluded from office for failure to qualify.

Nature of incumbent's interest in office.

Cited in *Mial v. Ellington*, 134 N. C. 149, 65 L. R. A. 704, 46 S. E. 961, holding incumbent for definite time, by appointment to legislative office, has no interest therein of which legislature may not deprive him.

24 L. R. A. 64, *DRAKE v. LADY ENSLEY COAL, IRON & R. CO.* 102 Ala. 501, 48 Am. St. Rep. 77, 14 So. 749.

Pollution of waters.

Cited in footnotes to *Weston Paper Co. v. Pope*, 56 L. R. A. 899, which sustains liability for pollution of stream by discharge from strawboard works though business skilfully conducted; *Strobel v. Kerr Salt Co.* 51 L. R. A. 687, which authorizes injunction against diversion of stream for use in salt works, causing pollution of stream by return of part; *Barrett v. Mt. Greenwood Cemetery Asso.* 31 L. R. A. 109, which authorizes injunction against connecting city drain with spring brook; *Barnard v. Shirley*, 24 L. R. A. 508, which refuses to enjoin flow of water from artesian well used to bathe patients in sanitarium into natural watercourse.

Cited in notes (39 L. R. A. 685) on municipal power over nuisances affecting highways and waters; (41 L. R. A. 751) on correlative rights of upper and lower proprietors as to use of flow of water in stream.

24 L. R. A. 68, *STATE v. BUSWELL*, 40 Neb. 158, 58 N. W. 728.

Unlicensed practice of medicine.

Cited in *Lincoln Medical College v. Poynter*, 60 Neb. 231, 82 N. W. 855, holding law governing practice of medicine police measure; *State v. Wilcox*, 64 Kan. 792, 68 Pac. 634, sustaining constitutionality of act regulating practice of medicine, surgery, and osteopathy; *State v. Paul*, 56 Neb. 373, 76 N. W. 861, holding person not within exceptions stated by act regulating practice of medicine liable

for performing operations and administering remedies under direction of licensed physician.

Cited in footnotes to *Parks v. State*, 59 L. R. A. 190, which sustains requirement that magnetic healer procure license; *Justice v. State*, 59 L. R. A. 601, which holds refusal to permit administration of medicine to minor children while sick not deprival of necessary sustenance; *State v. Biggs*, 64 L. R. A. 140, holding legislation attempting to confer right to treat all diseases upon licensed doctors, unconstitutional.

Osteopathy.

Cited in *Little v. State*, 60 Neb. 751, 51 L. R. A. 719, 84 N. W. 248, holding osteopath liable for practising without license; *People v. Gordon*, 194 Ill. 570, 88 Am. St. Rep. 165, 62 N. E. 858, holding osteopath or magnetic healer, not using medicines, within statute forbidding unlicensed treatment of physical injury or deformity.

Cited in footnote to *State v. Liffing*, 46 L. R. A. 334, which denies necessity of certificate from medical board for practice of osteopathy.

Christian science.

Distinguished in *State v. Mylod*, 20 R. I. 641, 41 L. R. A. 431, 40 Atl. 753, holding practice of Christian science not violation of act prohibiting unlicensed practice of medicine or surgery; *Kansas City v. Baird*, 92 Mo. App. 211, holding Christian science healer not within statutory definition of physician.

24 L. R. A. 73, *UNITED STATES v. TRANS-MISSOURI FREIGHT ASSO.*
7 C. C. A. 15, 4 Inters. Com. Rep. 443, 19 U. S. App. 36, 58 Fed. 58.

Action by district attorney for services in preparing brief in *United States v. Ady*, 22 C. C. A. 223, 40 U. S. App. 312, 76 Fed. 361.

Statutory construction.

Cited in *Butler v. United States*, 87 Fed. 661, construing statute providing for compensation of clerk of court with reference to general laws theretofore existing.

Combinations of railroads.

Reversed in 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, which holds contract between competing railroads to regulate rates, within Federal statute prohibiting contracts in restraint of interstate commerce.

Cited in *Pearsall v. Great Northern R. Co.* 73 Fed. 937, sustaining contract between railroads for interchange of traffic and joint use of terminal facilities; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 73 Fed. 438, holding contract of railroad with another, to exclusion of others for interchange of traffic, not in unlawful restraint of trade; *United States v. Joint Traffic Asso.* 76 Fed. 897, holding joint traffic association not raising rates unreasonably not in restraint of commerce; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 582, 9 C. C. A. 664, 27 U. S. App. 1, 61 Fed. 997, holding railroad pooling agreement, suppressing competition and establishing rates without regard to reasonableness, void.

Cited in footnote to *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds valid, contract by owners of mines, furnaces, and railroad from same to give entire traffic to connecting railroad.

Public policy.

Cited in *Daniels v. Benedict*, 38 C. C. A. 597, 97 Fed. 372, and *Deming v. McClaughry*, 51 C. C. A. 354, 113 Fed. 644, holding public policy evidenced by laws and customs; *Parker v. Moore*, 111 Fed. 473, holding policy of law not question for court; *United States v. Addyston Pipe & Steel Co.* 78 Fed. 724, and *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 200, 17 C. C. A. 69, 36 U. S. App. 152, 70 Fed. 207, holding party alleging must clearly show contract against public policy; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 197, 17 C. C. A. 64, 36 U. S. App. 152, 70 Fed. 202, holding stipulation in lease of land from railroad against liability for negligently setting fire to buildings thereon, valid; *Van Cott v. Pratt*, 11 Utah, 214, 39 Pac. 827, holding ordinance waiving municipality's statutory exemption from garnishment, void.

Combination to control prices.

Cited in footnotes to *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, which holds void, combination of manufacturers to control sales and prices in large number of states; *Herriman v. Menzies*, 35 L. R. A. 318, which sustains association of master stevedores fixing minimum prices with stipulation against unauthorized discounts; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *People v. Milk Exchange*, 27 L. R. A. 437, which holds incorporated milk exchange constituting combination to fix price of milk, illegal; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price, not within statute for suppression of conspiracies; *State ex rel. Crow v. Armour Packing Co.* 61 L. R. A. 464, which holds unlawful combination to fix prices, shown by acts of competing dealers.

Combinations to suppress competition.

Cited in *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 20, 35 U. S. App. 16, 66 Fed. 643, holding combination of watch-case manufacturers refusing to sell to dealers handling plaintiff's goods, not illegal.

Cited in footnotes to *West Virginia Transp. Co. v. Standard Oil Co.* 56 L. R. A. 804, which sustains malicious competition to get customers from rival and obtain business for one's self; *Hawarden v. Youghioghney & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right of action against wholesalers and favored retailers combining to drive other retailers out of business.

Anti-trust laws.

Reversed in 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, which holds provisions of Federal anti-trust act not confined to cases where restraint of trade unreasonable.

Cited in *United States v. Debs*, 5 Inters. Com. Rep. 210, 64 Fed. 754, holding conspiracy to tie up by strike interstate railroads using Pullman cars, within anti-trust act of 1890; *Re Grice*, 79 Fed. 644, holding statute prohibiting combinations reasonably restricting competition unconstitutional.

Cited in footnotes to *Fuqua v. Pabst Brewing Co.* 35 L. R. A. 241, which holds beer brought from other state under invalid trust agreement subject to anti-trust law of state on arrival; *Gibbs v. McNeeley*, 60 L. R. A. 152, which holds anti-trust act violated by combination of manufacturers of product of state, market for four fifths of which in other states, to limit production and raise price.

Cited in note (64 L. R. A. 705, 706, 710, 713, 716) on illegal trusts under modern anti-trust laws.

24 L. R. A. 100, KOHN v. RICHMOND & D. R. CO. 37 S. C. 1, 34 Am. St. Rep. 726, 16 S. E. 376.

Carrier's liability for conversion.

Cited in Merz v. Chicago & N. W. R. Co. 86 Minn. 35, 90 N. W. 7, holding that conversion will not lie upon reasonable delay by common carrier to ship goods claimed by stranger to bill of lading.

Disapproved in Shellenberg v. Fremont, E. & M. Valley R. Co. 45 Neb. 492. 50 Am. St. Rep. 561, 63 N. W. 859, and Atchison, T. & S. F. R. Co. v. Jordon Stock-Food Co. 67 Kan. 89, 72 Pac. 533, holding common carrier refusing to surrender to owner liable for conversion.

Conversion of mortgaged chattels by bona-fide purchaser.

Cited in footnote to Dean v. Cushman, 55 L. R. A. 959, which denies liability for conversion without demand, of purchaser in good faith of mortgaged chattels from mortgagor in possession.

24 L. R. A. 102, KETCHAM v. NEWMAN, 141 N. Y. 205, 56 N. Y. S. R. 816. 36 N. E. 197.

Lateral support of buildings.

Cited in Gildersleeve v. Hammond, 100 Mich. 436, 33 L. R. A. 49, 67 N. W. 519, holding superstructure not entitled to lateral support of adjoining lands; Bohrer v. Dienhart Harness Co. 19 Ind. App. 514, 49 N. E. 296, by Wiley, J., dissenting, who holds duty of owner to protect building on adjoining premises from dangers of excavation.

Liability for acts of independent contractors.

Cited in footnotes to Boomer v. Wilbur, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; Peerless Mfg. Co. v. Bagley, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; Wertheimer v. Saunders, 37 L. R. A. 146, which holds landlord liable for independent contractor's negligence in putting new roof on building; Sanford v. Pawtucket Street R. Co. 33 L. R. A. 564, which denies liability of street railway company for negligence of contractor building road; Hoff v. Shockley, 64 L. R. A. 538, holding property owner not liable for injuries from obstructions placed in street by independent contractor.

24 L. R. A. 105, BOOTH v. ROME, W. & O. TERMINAL R. CO. 140 N. Y. 267. 55 N. Y. S. R. 656, 37 Am. St. Rep. 552, 35 N. E. 592.

Legislative authority justifying acts causing consequential injury.

Cited in Spring v. Delaware, L. & W. R. Co. 88 Hun, 388, 34 N. Y. Supp. 810, holding railroad coal pocket constituted nuisance to adjoining owners, and was not authorized by franchise; Garvey v. Long Island R. Co. 9 App. Div. 255, 41 N. Y. Supp. 397, holding turntable constituting nuisance not authorized by statute authorizing railroad; Mundy v. New York, L. E. & W. R. Co. 75 Hun, 484, 27 N. Y. Supp. 469, holding railroad embankment causing flood not sanctioned by legislative authority so as to relieve railroad from liability; Wickham v. Lehigh Valley R. Co. 85 App. Div. 185, 83 N. Y. Supp. 146, holding railroad company liable for overflow resulting from construction of necessary embankment; Moody v. Saratoga Springs, 17 App. Div. 209, 45 N. Y. Supp. 365, holding

nuisance created by village sewer not justified by act authorizing construction: *Glens Falls Gaslight Co. v. Van Vranken*, 11 App. Div. 423, 42 N. Y. Supp. 339, raising, without deciding, question of liability of village constructing sewer for injury to gas pipes.

Extent of right to make lawful use of property.

Cited in *White v. Nassau Trust Co.* 168 N. Y. 155, 64 L. R. A. 278, 61 N. E. 169, Reversing *White v. Tebo*, 43 App. Div. 420, 60 N. Y. Supp. 231, denying liability to owner of neighboring pier for dredging lands under water for dry-dock; *Negus v. Becker*, 143 N. Y. 310, 25 L. R. A. 670, 42 Am. St. Rep. 724. 38 N. E. 290, denying liability of owner increasing height of party wall, for its fall without negligence; *Tucker v. Mack Paving Co.* 61 App. Div. 524, 70 N. Y. Supp. 688, denying injunction against blasting rock from quarry, when necessary and done in proper manner; *McGuire v. Bloomingdale*, 33 Misc. 345, 68 N. Y. Supp. 477, denying injunction against reasonable use of electric plant by department store adjoining apartment house; *Bowden v. Edison Electric Illuminating Co.* 29 Misc. 172, 60 N. Y. Supp. 835, holding owner of machinery producing noise and vibration injurious to adjoining property, entitled to reasonable use only; *Leonard v. Hotel Majestic Co.* 17 Misc. 231, 40 N. Y. Supp. 1044, denying injunction against use of driveway through rear of hotel adjoining complainant's premises; *Bates v. Holbrook*, 171 N. Y. 470, 64 N. E. 181, holding compressed air plant for use along section of subway for three or more years, nuisance; *Farrell v. New York Steam Co.* 23 Misc. 727, 53 N. Y. Supp. 55, holding steam plant occasioning some annoyance but not materially lessening enjoyment of property, no nuisance; *Rosenheimer v. Standard Gaslight Co.* 36 App. Div. 5, 55 N. Y. Supp. 192, holding gas plant emitting smoke, noxious vapors, and loud noises, nuisance; *Bly v. Edison Electric Illuminating Co.* 54 App. Div. 430, 66 N. Y. Supp. 737, holding electric power plant creating noise, smoke, and vibration constitutes nuisance; *Garvey v. Long Island R. Co.* 150 N. Y. 330, 70 Am. St. Rep. 550, 54 N. E. 57, holding railroad turntable causing vibrations injuring adjacent buildings, nuisance; *Maltbie v. Bolting*, 6 Misc. 346, 26 N. Y. Supp. 903, holding temporary use of guarded coal holes, not nuisance.

Distinguished in *Moon v. National Wall-Plaster Co.* 31 Misc. 633, 66 N. Y. Supp. 33, holding owner of machinery discharging dust owing to remediable defects, liable.

Liability for injuries by concussion from blasting.

Cited in *French v. Vix*, 143 N. Y. 93, 37 N. E. 612, holding no liability exists for inevitable damage to neighboring property by blasting conducted with due care; *Holland House Co. v. Baird*, 169 N. Y. 140, 62 N. E. 149, denying liability for injuries to building resulting from blasting in street without proving negligence; *Simon v. Henry*, 62 N. J. L. 488, 41 Atl. 692, denying liability of sewer contractor for injury to adjacent property by blasting; *De Carvajal v. Young Men's Christian Asso.* 37 Misc. 728, 76 N. Y. Supp. 474, denying injunction against blasting carefully carried on in adjacent lot; *Frazier v. Pennypack Trap Rock Co.* 17 Montg. Co. L. Rep. 115, denying injunction against non-negligent necessary blasting in quarry causing vibrations injurious to adjoining premises; *Fitz Simons & C. Co. v. Braun*, 94 Ill. App. 536, holding contractor unnecessarily using explosives in tunnel liable for injuries to buildings; *Newell v. Woolfolk*, 91 Hun. 212, 36 N. Y. Supp. 327; *St. Nicholas Skating & Ice Co. v. Cody*, 26 Misc. 766, 50 N. Y. Supp. 1063, holding use of larger blasts than necessary

renders user liable for resulting damage to adjoining premises; *Wheeler v. Norton*, 92 App. Div. 372, 86 N. Y. Supp. 1095, holding subcontractors liable for resultant damages from breaking water main by negligent blasting; *Sullivan v. Dunham*, 161 N. Y. 297, 47 L. R. A. 719, 76 Am. St. Rep. 274, 55 N. E. 923: Same Case, 10 App. Div. 442, 41 N. Y. Supp. 1083, holding one blasting stumps without negligence liable for injury to traveler in highway struck by piece of wood.

Cited in footnotes to *Fitzsimons & C. Co. v. Braun*, 59 L. R. A. 421, which sustains liability for injury, by vibration, to adjoining property, from use of high explosive for excavating on own land; *Wadsworth v. Marshall*, 32 L. R. A. 588, which sustains liability for failure to give notice of blast, for injuries resulting from frightening horse which has passed place of blast.

Distinguished in *Reilly v. Erie R. Co.* 72 App. Div. 478, 76 N. Y. Supp. 620, holding one maintaining dynamite magazine liable for injury to person sitting in distant house.

Distinguished and limited in *Hill v. Schneider*, 13 App. Div. 305, 43 N. Y. Supp. 1, granting injunction against blasting injuring adjoining premises where work performable in another way.

Pleading in action for negligent blasting.

Cited in *Kratzer v. Saratoga Springs*, 8 App. Div. 613, 40 N. Y. Supp. 474, upholding sufficiency of complaint alleging wrongful physical invasion of plaintiff's premises.

Distinguished in *Roemer v. Striker*, 142 N. Y. 136, 36 N. E. 808, holding in action for injuring property by negligent blasting, that work done by contractor admissible under general denial.

24 L. R. A. 110, *Re WORTHINGTON CO.* 62 N. Y. S. R. 115, 30 N. Y. Supp. 361.

Obscene publications.

Cited in footnotes to *People v. Ketchum*, 27 L. R. A. 448, which holds purpose to exhibit obscene picture not shown by merely sitting for negative of it; *Com. v. McCance*, 29 L. R. A. 61, which requires indictment to practically describe indecent parts of book obscene in part.

24 L. R. A. 113, *LORILLARD v. CLYDE*, 142 N. Y. 456, 37 N. E. 489.

Effect of intervening impossibility of performance of contract.

Cited in *Dolan v. Rodgers*, 149 N. Y. 493, 44 N. E. 167, holding subcontractor excused from full performance when stopped by nonconsent of primary grantor of contract; *Re Daly*, 58 App. Div. 52, 68 N. Y. Supp. 596, holding contract to publish theater programs under owner's supervision terminated by death of either party; *Buffalo & L. Land Co. v. Bellevue Land & Improv. Co.* 165 N. Y. 254, 51 L. R. A. 955, 59 N. E. 5, Affirming 32 App. Div. 542, holding breach of covenant to run street cars every half hour excused by impossibility due to heavy snows; *Hayes v. Gross*, 9 App. Div. 15, 40 N. Y. Supp. 1098, holding burning of building excuses full performance of contract to do work thereon; *Regan v. Fosdick*, 19 Misc. 492, 43 N. Y. Supp. 1102, denying tenant's liability on implied renewal of lease where prevented from moving by quarantine order; *Herter v. Mullen*, 169 N. Y. 44, 44 L. R. A. 709, 70 Am. St. Rep. 517, 53 N. E. 700, holding tenant's omission to surrender premises at expiration of term excused by impossibility due to illness; *Mason v. Standard Distilling & Distributing Co.* 85 App. Div.

525, 83 N. Y. Supp. 343, holding guaranty by corporation of stock of another corporation does not survive voluntary dissolution of corporation issuing stock; *Brown v. Schleier*, 55 C. C. A. 479, 118 Fed. 985, holding vendible lease by national bank for ninety-nine years not void because for longer period than corporate life of bank.

Distinguished in *Kinsman v. Fisk*, 37 App. Div. 448, 56 N. Y. Supp. 33, holding vendee of stock guaranteeing vendor's employment by corporation for stated term and salary, liable therefor after receiver appointed; *Babbitt v. Gibbs*, 150 N. Y. 286, 44 N. E. 952, holding right to compensation for services on reorganization of railroad not lost by change in agencies contemplated; *New York Poly-clinic Med. School v. King*, 27 Misc. 251, 57 N. Y. Supp. 796, holding breach of contract to publish journal due to dispute with printer not excusable; *Windmuller v. Standard Distilling & Distributing Co.* 115 Fed. 748, raising, without deciding, liability to pay guaranteed dividend after corporation's dissolution.

Splitting demands.

Cited in *Fox v. Phyfe*, 36 Misc. 208, 73 N. Y. Supp. 149, holding entire claim for legal services cannot be split into several suits; *People v. Welch*, 141 N. Y. 266, 57 N. Y. S. R. 392, 38 Am. St. Rep. 793, 36 N. E. 328, Affirming 74 Hun, 474, 57 N. Y. S. R. 42, 26 N. Y. Supp. 694.

Concurrent jurisdiction of state and Federal courts over crime.

Followed in *Sexton v. California*, 180 U. S. 324, 47 L. ed. 835, 23 Sup. Ct. Rep. 543, sustaining concurrent jurisdiction of state with United States court over offense of extorting money under threat to accuse person of crime under laws of United States.

Cited in note (61 L. R. A. 286) on negligent homicide.

24 L. R. A. 123, *MURPHY v. WHITNEY*, 140 N. Y. 541, 56 N. Y. S. R. 510, 35 N. E. 930.

Suspension of power of alienation.

Cited in *Sawyer v. Cubby*, 146 N. Y. 196, 40 N. E. 869, sustaining legacy conditional on legatee's paying testator's insurance premiums and on payment of insurance to beneficiary within one year; *Neilson v. Brown*, 31 Misc. 564, 65 N. Y. Supp. 585, sustaining trust with remainder to life beneficiary's children on severally becoming twenty-five; *Torpy v. Betts*, 123 Mich. 241, 81 N. W. 1094, sustaining devise of remainder after wife's death to son conditioned on payment to daughter, with fee to survivor upon death of either without issue.

Joint tenancy.

Cited in *Colson v. Baker*, 42 Misc. 410, 87 N. Y. Supp. 238, holding that owner in fee may, by direct grant, deed to another and himself in joint tenancy, without intervention of third party.

Part performance of contract within statute of frauds.

Cited in *Kincaid v. Kincaid*, 85 Hun, 144, 32 N. Y. Supp. 476, decreeing specific performance of agreement to give life lease, within statute of frauds, in part performance of which deed had been made and delivered; *Greenly v. Shelmidine*, 83 App. Div. 563, 82 N. Y. Supp. 176, sustaining verbal agreement as to realty, when partly performed by conveyance of property; *Veeder v. Horstmann*, 85 App. Div. 161, 83 N. Y. Supp. 99, holding oral agreement respecting real estate

which is binding upon original parties, binding upon their privies, in absence of intervening equities.

Prayer for excessive relief as ground for demurrer.

Cited in *Heath v. Heath*, 18 Misc. 523, 42 N. Y. Supp. 1087, holding complaint demanding greater relief than plaintiff entitled to not demurrable.

24 L. R. A. 126, *STATE v. WELDON*, 39 S. C. 318, 17 S. E. 688.

Evidence of other offenses.

Cited in note (62 L. R. A. 324) on evidence of other crimes in criminal cases.

24 L. R. A. 130, *GOULD v. CARR*, 33 Fla. 523, 15 So. 259.

Adverse possession.

Cited in *Barrs v. Brace*, 38 Fla. 268, 20 So. 991, holding enclosure by fence with understanding for removal to true line when ascertained not adverse holding; *Reyes v. Middleton*, 36 Fla. 106, 29 L. R. A. 68, 51 Am. St. Rep. 17, 17 So. 937, holding conveyance showing on face possession adverse to grantor, void as to adverse possessor.

24 L. R. A. 137, *MILLER v. MILLER*, 33 Fla. 453, 15 So. 222.

Residence conferring jurisdiction of divorce suit.

Cited in *Gredler v. Gredler*, 36 Fla. 373, 18 So. 762, holding applicant for divorce must allege and prove two years' prior residence in state.

Residence conferring jurisdiction of suit for alimony.

Cited in *Shrader v. Shrader*, 36 Fla. 512, 18 So. 672, granting alimony upon failure to support where husband resides in state; *Donnelly v. Donnelly*, 39 Fla. 231, 22 So. 648, holding bill for alimony must show husband or wife bona fide resident.

Allowance of temporary alimony.

Cited in *Milliron v. Milliron*, 9 S. D. 183, 62 Am. St. Rep. 863, 68 N. W. 286, holding temporary alimony and suit money allowable during pendency of action for separate maintenance; *Moore v. Moore*, 130 N. C. 337, 41 S. E. 943, holding amount of alimony *pendente lite* within discretion of court.

Cited in footnote to *Hite v. Hite*, 45 L. R. A. 793, which holds *prima facie* case of marriage made by wife on own showing insufficient to authorize alimony.

Domicil of wife for purpose of divorce.

Cited in footnotes to *Atherton v. Atherton*, 40 L. R. A. 291, which holds matrimonial domicil of wife leaving husband for cruelty may be changed by removal to other state; *Kempson v. Kempson*, 58 L. R. A. 484, which sustains jurisdiction in state where parties married and wife resides, of suit to enjoin fraudulent divorce suit by husband in other state.

24 L. R. A. 141, *CHICAGO, B. & Q. R. CO. v. JONES*, 149 Ill. 361, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247.

State control of corporations.

Cited in *Franklin L. Ins. Co. v. People*, 200 Ill. 621, 66 N. E. 379, holding corporations doing business in state subject to police power.

Regulation of business affected with public use.

Cited in *Danville v. Danville Water Co.* 178 Ill. 310, 69 Am. St. Rep. 304, 53 N. E. 118, sustaining act empowering cities to fix reasonable water rates; *People's Gaslight & Coke Co. v. Hale*, 94 Ill. App. 423, sustaining power of village trustees to fix gas rates.

Cited in notes (33 L. R. A. 183, 187) on legislative power to fix tolls, rates, or prices; (33 L. R. A. 210) as to when rates fixed by penal statute are sufficiently definite and certain.

— State regulation of carrier's rates.

Cited in *Inman v. St. Louis S. W. R. Co.* 14 Tex. Civ. App. 52, 37 S. W. 37, holding railroad bound to accept goods routed over connecting line upon tender of through joint rate fixed by railroad commission; *McChord v. Louisville & N. R. Co.* 183 U. S. 409, 46 L. ed. 296, 22 Sup. Ct. Rep. 165, dissolving injunction restraining railroad commission from proceeding to fix reasonable rates under Kentucky statute.

Distinguished in *Louisville & N. R. Co. v. Com.* 99 Ky. 140, 33 L. R. A. 212, 59 Am. St. Rep. 457, 35 S. W. 129, holding statute imposing penalty on carrier for charging more than reasonable compensation without fixing standard, void for uncertainty.

— Rate prescribed as evidence of reasonableness.

Cited in *Chicago Union Traction Co. v. Chicago*, 199 Ill. 642, 65 N. E. 470, holding rate of street car fare prescribed by ordinance presumptively reasonable.

Unlawful delegation of legislative power.

Cited in *Chicago v. Stratton*, 162 Ill. 503, 35 L. R. A. 87, 53 Am. St. Rep. 325, 44 N. E. 853, holding ordinance prohibiting erection of livery stable without consent of property owners not invalid as delegation of legislative power; *Fish v. McGann*, 205 Ill. 187, 68 N. E. 761, holding discretion given heads of departments to complete appointment of civil service employees, not delegation of legislative authority to fix period of probation.

Authority of railroad commissioners.

Cited in footnote to *State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co.* 47 L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

Validity of statutes prescribing rules of evidence.

Cited in *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 646, 60 N. W. 487, sustaining statute making copy of rate schedule certified by secretary of commission, evidence; *Schuler v. Hogan*, 168 Ill. 375, 48 N. E. 195, sustaining statute making certificate prima facie evidence of valid nomination; *Baltimore & O. S. W. R. Co. v. Tripp*, 175 Ill. 254, 51 N. E. 833, and *First Nat. Bank v. Lake Erie & W. R. Co.* 174 Ill. 43, 50 N. E. 1023, sustaining statute making communication of fire from locomotive prima facie evidence of negligence; *State v. Beach*, 147 Ind. 80, 36 L. R. A. 182, 46 N. E. 145, and *Meadowcroft v. People*, 163 Ill. 68, 35 L. R. A. 181, 54 Am. St. Rep. 447, 45 N. E. 303, sustaining statute making failure or suspension of banker within thirty days after receiving deposit, prima facie evidence of intent to defraud; *People ex rel. Hillel Lodge No. 72, I. O. B. B. v. Rose*, 207 Ill. 361, 69 N. E. 762, construing statute to mean that failure of corporation to annually report to secretary of state, is prima facie evidence of nonuser authorizing forfeiture of charter.

Cited in footnotes to *Vega S. S. Co. v. Consolidated Elevator Co.* 43 L. R. A. 843, which denies validity of statute making state weighmaster's certificate of weight of grain conclusive; *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which holds void, statute preventing railroad company from setting up in defense of suit for injury to employee, decisions of state where injury occurred; *Missouri, K. & T. R. Co. v. Simonson*, 57 L. R. A. 765, which holds void, statute making specifications of weights in bills of lading, conclusive.

Effect of statute prescribing rule of evidence.

Cited in *Hopper v. Chicago, M. & St. P. R. Co.* 91 Iowa, 647, 60 N. W. 487, holding duly certified copy of rate schedule cannot be excluded from evidence for defect in form of original certificate.

How far statutes affected by invalidity of part.

Cited in *Ritchie v. People*, 155 Ill. 123, 29 L. R. A. 88, 46 Am. St. Rep. 315, 40 N. E. 454, holding unconstitutional clauses, if separable, do not invalidate rest of act; *Scott v. Flowers*, 61 Neb. 623, 85 N. W. 857, holding residue of statute valid where unconstitutional portions separable and did not induce adoption; *Verdin v. St. Louis*, 131 Mo. 138, 33 S. W. 480 (separate opinion), sustaining validity of remainder of paving ordinance containing separable invalid provision for maintenance; *Morgan v. State*, 64 Neb. 370, 90 N. W. 108, holding that invalid taxing clause may be stricken out of ordinance licensing billiard rooms without invalidating remaining portions; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 578, 62 L. R. A. 419, 95 Am. St. Rep. 476, 34 So. 533, sustaining severance of unconstitutional portions of statute, when its provisions are not interdependent.

Effect of change in remedy on pending actions.

Cited in footnote to *Cassard v. Tracy*, 49 L. R. A. 272, which holds pending appeals within provision in new Constitution giving supreme court power to determine questions of fact as well as of law.

Relation of amendment to declaration back to commencement of suit.

Distinguished in *Foreman Shoe Co. v. F. M. Lewis & Co.* 92 Ill. App. 559, holding amendment after plea filed in another action not available to show identity of causes of action.

— As avoiding bar of limitations.

Cited in *Whalen v. Gordon*, 37 C. C. A. 74, 95 Fed. 309; *Harper v. Illinois C. R. Co.* 74 Ill. App. 76; *Eylenfeldt v. Illinois Steel Co.* 165 Ill. 188, 46 N. E. 266; *Richter v. Michigan Mut. L. Ins. Co.* 66 Ill. App. 608; *Fish v. Farwell*, 160 Ill. 247, 43 N. E. 367; *Secord-Hopkins Co. v. Lincoln*, 173 Ill. 363, 50 N. E. 1074, Affirming 73 Ill. App. 40,— holding amended declaration stating new cause of action does not relate back taking case of statute of limitations; *Chicago City R. Co. v. Leach*, 182 Ill. 365, 55 N. E. 334, holding amendment charging incompetency of servants in action based on operating cars at dangerous speed barred by statute; *Foster v. St. Luke's Hospital*, 191 Ill. 95, 60 N. E. 803, Affirming 86 Ill. App. 286, holding defective declaration cannot be amended after statute of limitations has run; *Brink's Exp. Co. v. O'Donnell*, 88 Ill. App. 461, holding bar of statute of limitations should be presented by plea to amendment setting up new cause of action.

Cited in footnote to *Love v. Southern R. Co.* 55 L. R. A. 471, which sustains

right to file new declaration after limitation period has elapsed, naming statutory beneficiaries in action for death.

Distinguished in *Metropolitan L. Ins. Co. v. People*, 106 Ill. App. 519; *Fish v. Farwell*, 54 Ill. App. 459; *New York L. Ins. Co. v. People*, 95 Ill. App. 140; *Swift v. Foster*, 163 Ill. 53, 44 N. E. 837; *Chicago City R. Co. v. McMeen*, 206 Ill. 114, 68 N. E. 1093,—holding amended declaration restating original cause of action not subject to bar of statute of limitations.

24 L. R. A. 152, *BURDICK v. PEOPLE*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948, 952.

Motion to annul judgment and opinion for collusion in *Re Burdick*, 162 Ill. 50, 44 N. E. 413.

Followed without discussion in *Burdick v. People*, 149 Ill. 611, 36 N. E. 952.

Statutes against ticket brokerage.

Cited in *State v. Corbett*, 57 Minn. 353, 24 L. R. A. 501, 4 Inters. Com. Rep. 697, 59 N. W. 317; *Com. v. Keary*, 14 Pa. Super. Ct. 587; *Allardt v. People*, 197 Ill. 508, 64 N. E. 533,—sustaining constitutionality of anti-scalper law; *Jannin v. State*, 42 Tex. Crim. Rep. 640, 53 L. R. A. 351, 96 Am. St. Rep. 821, 51 S. W. 1126, holding statute prohibiting selling of tickets without authority from railway company valid exercise of police power; *Ex parte Lorenzen*, 128 Cal. 437, 50 L. R. A. 57, 79 Am. St. Rep. 47, 61 Pac. 68, sustaining constitutionality of ordinance forbidding unauthorized gift, sale, or issue of street car transfers; *Jannin v. State*, 42 Tex. Crim. App. 640, 53 L. R. A. 351, footnote p. 349, 51 S. W. 1126, holding void, statute against sale of railroad tickets by other than company's agent; dissenting opinion in *People ex rel. Tyroler v. City Prison*, 157 N. Y. 136, 43 L. R. A. 272, footnote p. 264, 68 Am. St. Rep. 763, 51 N. E. 1006, Reversing 26 App. Div. 234, 50 N. Y. Supp. 56, majority holding statute forbidding unauthorized sale of passage tickets, unconstitutional.

Cited in footnote to *State v. Corbett*, 24 L. R. A. 498, which holds valid, act allowing sale of tickets by particular agents only.

Cited in note (53 L. R. A. 764) on constitutionality of statute attempting to grant monopoly.

Interference with interstate commerce.

Cited in *Willfong v. Omaha & St. L. R. Co.* 116 Iowa, 551, 90 N. W. 358, holding statute requiring sounding of whistle before reaching crossing, valid police regulation not interfering with interstate commerce.

Cited in footnote to *Burrows v. Delta Transp. Co.* 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

Passage ticket as contract.

Cited in *Chicago & A. R. Co. v. Dumser*, 161 Ill. 194, 43 N. E. 698, holding parol evidence admissible to show contract by railroad to carry passenger to destination, notwithstanding designation in ticket of terminal railroad for part of distance; *Chicago & A. R. Co. v. Mulford*, 162 Ill. 531, 35 L. R. A. 601, 44 N. E. 861, holding ticket "good for one first-class passage" bearing coupons good over connecting roads, not contract of selling company to transport holder over connecting roads.

Due process of law.

Cited in *Hanson v. Krehbiel*, 68 Kan. 675, 64 L. R. A. 793, 75 Pac. 1041, hold-

ing that due course of law means reparation for injury ordered by tribunal having jurisdiction, after fair hearing; *People ex rel. Hillel Lodge No. 72. I. O. B. B. v. Rose*, 207 Ill. 368, 69 N. E. 762 (dissenting opinion), majority holding statute valid, which provides that failure of corporation to file annual report with secretary of state, and pay filing fee, shall work forfeiture of charter.

24 L. R. A. 156, *PITTSBURGH, FT. W. & C. R. CO. v. CHEEVERS*, 149 Ill. 430, 37 N. E. 49.

Right of private remedy for public nuisance.

Cited in *Guttery v. Glenn*, 201 Ill. 291, 66 N. E. 305, holding closing of public street by public authorities public nuisance, and not restrainable at suit of private person in absence of special injury suffered by him.

Limitation of ordinance by prior contract.

Cited in footnote to *Lindsey v. Anniston*, 27 L. R. A. 436, which holds ordinance excluding hackmen from depots at train time not limited by prior contract between carrier and hackmen.

24 L. R. A. 178, *McALISTER v. BURGESS*, 161 Mass. 269, 37 N. E. 173.

Public charitable gifts.

Cited in *Re Bartlett*, 163 Mass. 514, 40 N. E. 899, holding gift of lot and money to be used when building of new village chapel may seem advisable, valid; *Teele v. Bishop of Derry*, 168 Mass. 342, 38 L. R. A. 630, 60 Am. St. Rep. 401, 47 N. E. 422, holding bequest in trust to build chapel for public worship under auspices of Roman Catholic church, valid; *Thompson v. Brown*, 62 L. R. A. 393, holding valid, devise of fund to be distributed "to the poor."

24 L. R. A. 161, *POSTAL TELEG. CABLE CO. v. BALTIMORE*, 79 Md. 502, 29 Atl. 819.

State and municipal taxation and regulation of electric companies.

Affirmed in 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356, sustaining municipal tax of \$2 each on telegraph, telephone, and electric poles.

Cited in footnotes to *Western U. Teleg. Co. v. Howell*, 30 L. R. A. 158, which sustains state law subjecting telegraph companies to penalties for acts of negligence entirely within state; *Michigan Teleph. Co. v. Benton Harbor*, 47 L. R. A. 104, which holds city's consent unnecessary to use of streets by telephone companies; *Western U. Teleg. Co. v. Freemont*, 26 L. R. A. 698, which upholds license tax on telegraph business as to messages wholly within the state; *Toledo v. Western U. Teleg. Co.* 52 L. R. A. 730, which sustains city's right to make local regulations for permitting stringing of telegraph wires in streets; *Hodges v. Western U. Teleg. Co.* 29 L. R. A. 770, which holds void, exaction of rent for use of streets for telegraph trolleys and wires.

Cited in notes (31 L. R. A. 803, 804, 808) on police regulation of electric companies; (60 L. R. A. 656) on corporate taxation and the commerce clause; (24 L. R. A. 312) on exclusion of foreign corporations as interference with interstate commerce; (24 L. R. A. 327) on right of foreign corporations to own real estate.

24 L. R. A. 168, SCHWANEBECK v. SMITH, 77 Md. 314, 26 Atl. 409.

Refusal of specific performance for indefiniteness of contract.

Cited in Horner v. Woodland, 88 Md. 513, 41 Atl. 1079, refusing specific performance of indefinite and obscure contract not showing farm intended to be sold.

Cited in footnotes to Davie v. Lumberman's Min. Co. 24 L. R. A. 357, which holds indefinite, contract to mine ore at fixed price as long as it can be made to "pay;" Stanton v. Singleton, 47 L. R. A. 334, which denies right to specific performance of contract for "opening and developing" mining property; Borner Bros. v. Canady, 55 L. R. A. 328, which refuses specific performance of indefinite contract to purchase standing timber on fourteen different tracts in two counties scattered over 5,000 acres.

24 L. R. A. 170, TENNESSEE USE OF UNITED STATES v. HILL, 9 C. C. A. 326, 22 U. S. App. 1, 60 Fed. 1003.

24 L. R. A. 174, FALLS v. UNITED STATES SAV. LOAN & BLDG. CO. 97 Ala. 417, 38 Am. St. Rep. 194, 13 So. 25.

Printed statutes as evidence.

Cited in Hollister v. McCord, 111 Wis. 544, 87 N. W. 475, holding statutes published by private person, under legislative authority, within law making statutes "purporting to be published" by government competent evidence; Summitt v. United States Life Ins. Co. 123 Iowa, 685, 99 N. W. 563, holding volume purporting to be laws of a state passed during specified period and bearing certificate of secretary of state, admissible as presumptive evidence of such laws.

Conflict of laws as to corporate powers.

Cited in Williams v. Gold Hill Min. Co. 96 Fed. 463, holding mortgage by foreign corporation not ratified by stockholders as required by state law, void; Fowler v. Bell, 90 Tex. 157, 39 L. R. A. 256, 59 Am. St. Rep. 788, 37 S. W. 1058, holding validity of chattel mortgage by foreign insolvent corporation to secure creditor, governed by law of state where property situated; Spinney v. Chapman, 121 Iowa, 43, 100 Am. St. Rep. 305, 95 N. W. 230, holding borrowing member of insolvent foreign loan association entitled to have his rights determined by laws of his own state.

Rights of foreign loan associations.

Cited in Eslava v. New York Nat. Bldg. & L. Asso. 121 Ala. 483, 25 So. 1013, sustaining right of foreign loan association to do business within state, subject to legal restrictions; National Mut. Bldg. & L. Asso. v. Pinkston, 79 Miss. 483, 30 N. W. 692, holding exception from usury laws in favor of domestic building association only; Fowler v. Bell, 90 Tex. 161, 59 Am. St. Rep. 788, 37 S. W. 1058, denying foreign corporation doing business within state exercise of powers not allowed by laws and policy of state.

Cited in footnote to Floyd v. National Loan & Invest. Co. 54 L. R. A. 536, which holds contract with foreign loan association not within exemption of domestic associations as to usury unless in conformity to local law.

Usury; contracts of building and loan associations.

Cited in Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 297, holding premium arbitrarily fixed by loan association usurious device; Lindsay v. United States Sav. & L. Asso. 120 Ala. 165, 42 L. R. A. 784, 24 So. 171, holding statute declaring premiums and fines debts, not interest, inapplicable to past transactions.

Cited in footnotes to *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds exaction of monthly premium which, with interest, exceeds legal rate, unauthorized; *Gray v. Baltimore Bldg. & L. Asso.* 54 L. R. A. 217, which holds percentage payable to loan association indefinitely, usurious though called "premium;" *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 56 L. A. A. 163, which holds requirement that borrower bid for stock and pay dues on same, device to cover usury.

Distinguished in *Pioneer Sav. & L. Co. v. Nonnemacher*, 127 Ala. 545, 30 So. 79, holding borrowing from and taking stock in loan association not usurious device where shareholder participates in management and profits.

— **Monthly payment contracts.**

Cited in *Union Sav. Bank & T. Co. v. Dottenheim*, 107 Ga. 616, 34 S. E. 217, holding loan, with interest calculated at highest rate for full period and aggregate of principal and interest made payable in monthly instalments, usurious.

— **Redemption from usurious mortgage.**

Cited in *Lindsay v. United States Sav. & L. Co.* 127 Ala. 372, 51 L. R. A. 395, 28 So. 717 (dissenting opinion), majority holding legal interest must be paid to redeem from usurious mortgage legally unenforceable except as to principal.

What law governs loans secured by mortgage.

Cited in *Ashurst v. Ashurst*, 119 Ala. 230, 24 So. 760, holding note and mortgage signed, and covering lands, in Alabama, and providing same "shall be governed by Alabama laws," Alabama transaction; *People's Bldg. Loan & Sav. Asso. v. Fowble*, 17 Utah, 130, 53 Pac. 999, holding building association loan secured by mortgage, payments being made to local agent, governed by law of place of performance; *Snyder v. Fidelity Sav. Asso.* 23 Utah, 301, 64 Pac. 870, construing loan contract, payable elsewhere, according to laws of state where mortgaged land situated; *National Mut. Bldg. & L. Asso. v. Burch*, 124 Mich. 66, 83 Am. St. Rep. 311, 82 N. W. 837, and *Building & L. Asso. v. Griffin*, 90 Tex. 489, 39 S. W. 656, holding loan by foreign association, valid where payable, governed by usury laws of state where mortgaged property situated; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 897, 47 Am. St. Rep. 841, 21 S. E. 924, and *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 966, 57 L. R. A. 802, 84 Am. St. Rep. 657, 30 So. 51, holding foreign building association loan, valid where payable, subject to usury laws of state where mortgaged property situated and payments actually made; *Mellwaine v. Iseley*, 96 Fed. 69, following North Carolina rule that mortgage to loan association subject to local usury laws, regardless of expressed intention.

Cited in footnote to *National Mut. Bldg. & L. Asso. v. Brahan*, 57 L. R. A. 793, which holds usury in loan by foreign loan association to resident, secured by mortgage on land in state, determined by local law; *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds contract treated as domestic, where application for loan made to association doing business in state, through resident agent, secured by mortgage on land in state, where money also used.

Cited in notes (55 L. R. A. 944) on whether *lex rei sitæ* necessarily controls with respect to interest and usury in action to foreclose mortgage on real property; (62 L. R. A. 67) on conflict of laws as to interest and usury.

Special privileges of building and loan associations.

Cited in footnote to *Julien v. Model Bldg. Loan & Invest. Asso.* 61 L. R. A. 668, which sustains statute giving mortgages to loan associations priority over all liens filed after date of their record.

24 L. R. A. 183, *CARGILL v. KOUNTZE BROS.* 86 Tex. 386, 40 Am. St. Rep. 853, 22 S. W. 1015, 25 S. W. 13.

Discovery of evidence.

Cited in *Austin & N. W. R. Co. v. Cluck*, 64 L. R. A. 499, denying court's authority to introduce new process to enable parties to secure evidence in support of their case.

Cited in footnotes to *Reynolds v. Burgess Sulphite Fibre Co.* 57 L. R. A. 949, which holds production of broken machinery for examination by intending experts compellable; *Martin v. Elliott*, 31 L. R. A. 169, which denies power of court to order veterinary surgeon to go on owner's premises without consent to examine horse whose condition in dispute; *Ex parte Clarke*, 46 L. R. A. 835, which denies power to compel witness to produce books and papers without showing their materiality.

Cited in note (63 L. R. A. 694) on equitable remedy to subject choses in action to judgment after return of no property found.

24 L. R. A. 195, *Ex parte SING LEE*, 96 Cal. 354, 31 Am. St. Rep. 218, 31 Pac. 245.

Constitutionality of municipal police regulations.

Cited in *Ex parte Whitwell*, 98 Cal. 79, 19 L. R. A. 730, 35 Am. St. Rep. 152, 32 Pac. 870, holding ordinance prescribing character of building to be used for hospitals for insane, not to be located within 400 yards of school or dwelling, invalid; *Los Angeles v. Hollywood Cemetery Asso.* 124 Cal. 348, 71 Am. St. Rep. 75, 57 Pac. 153, holding ordinance prohibiting establishment or enlargement of cemetery within county without supervisor's permission, invalid; *Shreveport v. Robinson*, 51 La. Ann. 1310, 26 So. 277, holding ordinance prohibiting laundry within certain limits except in stone or brick buildings, invalid; *Jew Ho v. Williamson*, 103 Fed. 19, holding quarantine of large district, permitting free intercourse of persons within it, unreasonable; *Fischer v. St. Louis*, 194 U. S. 372, 48 L. ed. 1024, 24 Sup. Ct. Rep. 673, sustaining ordinance prohibiting erection of dairy stable within city limits without authority from municipal assembly.

Cited in notes (21 L. R. A. 796) on constitutionality of statutes restricting contracts and business; (36 L. R. A. 608) on power of municipal corporations to define, prevent, and abate nuisances; (38 L. R. A. 652) on municipal power over nuisances relating to contract or business.

Delegation of municipal power.

Cited in note (20 L. R. A. 725, 727) on delegation of municipal power as to license, franchise, and buildings.

24 L. R. A. 197, *WITTENBROCK v. PARKER*, 102 Cal. 93, 41 Am. St. Rep. 173, 36 Pac. 374.

When relation of attorney and client exists.

Cited in *Lawall v. Groman*, 180 Pa. 539, 40 W. N. C. 199, 57 Am. St. Rep. 662,

37 Atl. 98, holding attorney representing mortgagor may act for mortgagee in examining title.

Attorney's knowledge as notice to client or partners.

Cited in *Deering v. Holcomb*, 26 Wash. 597, 67 Pac. 240, holding attorney's knowledge of facts sufficient to put him on inquiry as to fraud starts statute of limitations to running against client, and is constructive notice to partners.

Pleadings; character determined by court.

Cited in *Dunham v. Travis*, 25 Utah, 70, 69 Pac. 468, holding character of pleadings determinable by court notwithstanding designation thereof.

24 L. R. A. 201, *PEOPLE ex rel. ENGLEY v. MARTIN*, 19 Colo. 565, 36 Pac. 543.

Fire and police board; governor's power of removal.

Cited in *People ex rel. Parish v. Adams*, 31 Colo. 478, 73 Pac. 866, holding that under constitutional amendment constituting city fire and police board appointed by governor, fire and police board of city and county until election of successors, takes from governor power of removal.

Judicial control of executive branch.

Cited in *People ex rel. Alexander v. District Court*, 29 Colo. 205, 68 Pac. 242, holding state board of assessors cannot be enjoined from performing statutory duties.

Conclusiveness of determination of public officer.

Cited in *State v. Nield*, 4 Kan. App. 632, 45 Pac. 623, holding determination of attorney general as to existence of grounds for appointing assistant, conclusive; *State ex rel. Williams v. Kennelly*, 75 Conn. 707, 55 Atl. 555, holding act of mayor in removing director of public works, in exercise of his discretion, upon assignment of cause, final.

Motives of other departments not reviewable.

Cited in *Denver v. Coulehan*, 20 Colo. 481, 39 Pac. 425, 27 L. R. A. 755, holding motives of co-ordinate department not subject to judicial investigation.

Injunction improper to enforce private rights.

Cited in *People v. McClees*, 20 Colo. 414, 26 L. R. A. 650, 38 Pac. 468, denying injunction against delivery of certificates of election by secretary of state to certain persons; *School Dist. No. 1 v. Carson*, 9 Colo. App. 10, 46 Pac. 846, denying injunction restraining school board from discharging teacher.

Summary removal of officer.

Cited in footnote to *Moore v. Strickling*, 50 L. R. A. 279, which holds office of one required to prosecute keeper and inmates of house of ill fame forfeited by resorting to same for immoral purposes.

Assumption of facts in ex parte proceeding.

Cited in *Re House Bill No. 250*, 26 Colo. 236, 57 Pac. 49, holding in *ex parte* proceedings on question from governor, facts assumed by governor may be taken as true, but are not binding in subsequent legislation, nor necessarily in such proceeding.

24 L. R. A. 206, **BROWN v. FIRST NAT. BANK**, 137 Ind. 655, 37 N. E. 158.

Contracts against public policy.

Cited in *Edgerly v. Hale*, 71 N. H. 146, 51 Atl. 679, holding sheriff's agreement making compensation for serving writs dependent on success of actions, illegal; *McCollom v. Shaw*, 21 Ind. App. 68, 51 N. E. 488, holding board of county commissioners cannot contract with member for services performable by another.

Estoppel to assert invalidity of contract.

Cited in *Reed v. Johnson*, 27 Wash. 56, 57 L. R. A. 409, 67 Pac. 381, holding party acting under contract against public policy not estopped to assert illegality; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 104, 60 L. R. A. 828, 66 N. E. 436, holding gas company enjoying benefits of partly performed municipal contract, permitting it to lay pipes in street, estopped to question city's power to stipulate therein as to gas rates.

24 L. R. A. 212, **STATE v. CULLINS**, 53 Kan. 100, 36 Pac. 56.

Purchaser not particeps criminis with seller in illegal sale.

Cited in *Westheimer v. Weisman*, 60 Kan. 756, 57 Pac. 969, holding purchaser not party to crime of agent taking order for liquor contrary to statute, from person unauthorized to sell; *Anderson v. South Chicago Brewing Co.* 173 Ill. 217, 50 N. E. 655, holding purchaser not punishable under act declaring sale of mortgaged chattels without mortgagee's consent, misdemeanor.

24 L. R. A. 215, **POLING v. OHIO RIVER R. CO.** 38 W. Va. 645, 18 S. E. 782.

Sufficiency of allegations of negligence.

Cited in *Trump v. Tidewater Coal & Coke Co.* 46 W. Va. 239, 32 S. E. 1035, holding declaration on which judgment according to law and right of case may be given, sufficient; *Davidson v. Pittsburgh, C. C. & St. L. R. Co.* 41 W. Va. 410, 23 S. E. 593, holding declaration alleging negligence generally, without so characterizing specific act, sufficient; *Oliver v. Ohio River R. Co.* 42 W. Va. 709, 26 S. E. 444, holding allegation that defendant negligently put plaintiff on certain work, sufficient; *Bias v. Chesapeake R. & O. R. Co.* 46 W. Va. 355, 33 S. E. 240, holding declaration for negligent killing alleging place where and how deceased killed, sufficient; *Snyder v. Wheeling Electrical Co.* 43 W. Va. 663, 39 L. R. A. 500, 64 Am. St. Rep. 922, 28 S. E. 733, holding declaration alleging negligence generally, specifying with reasonable certainty main act, sufficient basis for evidence of incidental circumstances; *Louisville & N. R. Co. v. Marbury Lumber Co.* 125 Ala. 249, 50 L. R. A. 623, 28 So. 438 (dissenting opinion), majority holding complaint that defendant negligently set fire to plaintiff's property, sufficient; *Hannum v. Hill*, 52 W. Va. 168, 43 S. E. 223, holding that allegation that injury complained of resulted from defendant's negligence should be more specific.

Cited in note (59 L. R. A. 216) on sufficiency of general allegations of negligence.

Witness's diagram to explain evidence.

Cited in *King v. Jordan*, 46 W. Va. 109, 32 S. E. 1022, holding plat shown approximately correct may be used to illustrate and apply evidence.

What objections available on appeal.

Cited in *Kay v. Glade Creek & R. R. Co.* 47 W. Va. 471, 35 S. E. 973, holding

where stenographic report part of certificate of evidence, exceptions clearly identifiable may be considered without formal bill of exceptions.

Carrier's liability for mail clerk's negligence.

Cited in footnote to *Pennsylvania R. Co. v. Russ*, 26 L. R. A. 283, which denies carrier's liability for mail agent's negligence in throwing off mail bag.

Railroad's liability with respect to mail crane.

Cited in footnote to *Cleghorn v. Western R. Co.* 60 L. R. A. 269, which holds railroad company liable for frightening of horse by mail crane erected on or beside highway.

Care required in lawful use of own property.

Cited in *Snyder v. Philadelphia Co.* (W. Va.) 63 L. R. A. 898, 46 S. E. 366, holding owner opening gas well to allow gas to blow water out, required to exercise care to prevent injury to persons riding on highway; *Ritz v. Wheeling*, 45 W. Va. 266, 43 L. R. A. 151, 31 S. E. 993, holding landowner not liable to trespasser for unsafe condition of premises; *St. Louis & S. F. R. Co. v. Bennett*, 16 C. C. A. 303, 32 U. S. App. 621, 69 Fed. 528, holding railroad bound only to refrain from wanton injury to trespassers.

Exception to refusal to direct verdict, when waived.

Cited in *Bennett v. Perkins*, 47 W. Va. 430, 35 S. E. 8, holding exception to refusal to strike out plaintiff's evidence waived by going on with case; *Louisville, N. A. & C. R. Co. v. Hendricks*, 13 Ind. App. 13, 40 N. E. 82, holding exception to refusal to direct verdict waived by proceeding with case.

Constitutionality of demurrer to evidence.

Cited in *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 436, 32 L. R. A. 362, 34 S. W. 1029, holding practice of demurring to evidence constitutional.

When verdict may be directed.

Cited in *Ritz v. Wheeling*, 45 W. Va. 264, 43 L. R. A. 150, 31 S. E. 993, and *Ketterman v. Dry Fork R. Co.* 48 W. Va. 610, 37 S. E. 683, holding case may be taken from jury where verdict against undisputed evidence would be set aside; *Smith v. Parkersburg Co-Operative Asso.* 48 W. Va. 239, 37 S. E. 645, holding case cannot be taken from jury where evidence, though slight, tends to prove case.

24 L. R. A. 226, *RAINES v. CHESAPEAKE & O. R. CO.* 39 W. Va. 50, 19 S. E. 505.

When negligence question for jury.

Cited in *Young v. West Virginia & P. R. Co.* 44 W. Va. 221, 28 S. E. 932, holding verdict of jury conclusive as to negligence where facts disputed; *Ketterman v. Dry Fork R. Co.* 48 W. Va. 612, 37 S. E. 683, holding negligence question for jury when facts disputed or different conclusions deducible; *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 357, 33 S. E. 240, holding negligence of engineer running over child trespassing on railroad question for jury; *Paden v. Van Blarcom*, 100 Mo. App. 194, 74 S. W. 124, holding negligence of householder in not testing valves of gas stove before turning on gas, resulting in injury to domestic through explosion, question for jury.

— Question for court.

Cited in *Klinkler v. Wheeling Steel & I. Co.* 43 W. Va. 226, 27 S. E. 237, hold-

ing negligence question for court where only one reasonable conclusion deducible from facts.

Presumption that trespasser will avoid danger.

Cited in *Teel v. Ohio River R. Co.* 49 W. Va. 91, 38 S. E. 518, denying railroad's liability for death of person sitting on track, where no helplessness appears, and adequate warning given; *Gunn v. Ohio River R. Co.* 42 W. Va. 680, 36 L. R. A. 578, 26 S. E. 546, denying engineer's right to presume that young child will get out of way of train.

Railroad's duty to prevent injury.

Cited in *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 203, 33 L. R. A. 76, 24 S. E. 570 (dissenting opinion), majority denying railroad's liability for injury to drunken passenger refusing to enter car.

— To trespassers.

Cited in *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 418, 23 S. E. 593, holding instruction that railroad liable for failure to use reasonable care to avoid injuring trespasser, proper.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co.* 49 L. R. A. 99, which denies duty toward trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

Cited in note (55 L. R. A. 422) on doctrine of last clear chance.

Proximate cause.

Cited in footnote to *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds failure to build fence not proximate cause of injury to one pushed on track by cow.

24 L. R. A. 231, *TIMBERLAKE v. THAYER*, 71 Miss. 279, 14 So. 446.

Recovery on partly performed contract.

Cited in *Riddell v. Peck-Williamson Heating & Ventilating Co.* 27 Mont. 59, 69 Pac. 241, denying recovery upon *quantum meruit* upon partly performed contract to instal heating apparatus.

Cited in footnote to *Hildebrand v. American Fine Art Co.* 53 L. R. A. 826, which sustains right to recover *pro rata* on entire contract of employment terminated by employer for cause.

Cited in note (30 L. R. A. 61) on right to rescind or abandon contract because of other party's default.

24 L. R. A. 235, *COM. v. TREFETHEN*, 157 Mass. 180, 31 N. E. 961.

Admissibility of declarations evidencing mental state.

Cited in *Horner v. Yance*, 93 Wis. 354, 67 N. W. 720, and *New York, S. & W. R. Co. v. Moore*, 44 C. C. A. 677, 105 Fed. 722, holding letters of wife to husband, before alleged alienation of affections, admissible on question of damages; *French v. State*, 93 Wis. 338, 67 N. W. 706, holding exclusion of evidence of defendant's mental condition four days after homicide, error; *Sturbridge v. Franklin*, 160 Mass. 152, 35 N. E. 669, holding evidence of wife's conversations before marriage admissible as tending to throw light on subsequent altercations.

— Knowledge.

Cited in *State v. Marsh*, 70 Vt. 297, 40 Atl. 836, holding deceased's declaration

that he was giving horse arsenic in increasing doses admissible to show knowledge of its character.

— **Intention.**

Cited in *Viles v. Waltham*, 157 Mass. 543, 34 Am. St. Rep. 311, 32 N. E. 901, holding declarations admissible to show intention to change domicile; *Com. v. Crowley*, 165 Mass. 571, 43 N. E. 509, holding defendant's declarations as to apprehending assault when arming himself admissible on trial for homicide; *State v. Young*, 119 Mo. 523, 24 S. W. 1038, holding declarations of person that he was going to deceased's house for certain purpose admissible to explain presence near time of murder; *Mathews v. Great Northern R. Co.* 81 Minn. 360, 53 Am. St. Rep. 383, 84 N. W. 101, holding person's declarations about time of boarding train admissible to show purpose; *Inness v. Boston, R. B. & L. R. Co.* 168 Mass. 435, 47 N. E. 193, holding declarations of person leaving house admissible to show intention to become passenger on train; *Re Valentine*, 93 Wis. 55. 67 N. W. 12, holding person's declarations that she had destroyed will, admissible; *Green v. State*, 154 Ind. 661, 57 N. E. 637, holding evidence of threats by third person to commit crime admissible; *State v. Hayward*, 62 Minn. 497, 65 N. W. 63 (separate opinion), holding declaration of murdered woman that she had engagement with defendant, competent as original evidence of intention to meet him, but not as part of *res gestæ*; *Seifert v. State*, 160 Ind. 470, 98 Am. St. Rep. 340, 67 N. E. 100, holding admissible, in action for criminal abortion resulting in death of decedent, statement of deceased to defendant before sickness of purpose to get rid of child; *State v. Mortensen*, 26 Utah, 334, 73 Pac. 562, holding admissible in prosecution for murder, declarations of decedent upon evening of death, that he was going out to see defendant; *Atchison, T. & S. F. R. Co. v. Ryan*, 62 Kan. 689, 64 Pac. 603, holding, *obiter*, declarations of intention to support nephew admissible on question of pecuniary loss sustained by death.

Limited in *Hale v. Life Indemnity & Invest. Co.* 65 Minn. 551, 68 N. W. 182, holding declarations of intention to commit suicide, two years before alleged act, inadmissible.

Disapproved in *Siebert v. People*, 143 Ill. 588, 32 N. E. 431, holding declarations, not accompanied by acts, of intention to suicide, inadmissible on trial for murder; *State v. Fitzgerald*, 130 Mo. 429, 32 S. W. 1113, holding declarations of intention to suicide, not dying declarations or part of *res gestæ*, inadmissible.

Admissibility of declarations tending to admit guilt.

Cited in *Com. v. Devaney*, 182 Mass. 36, 64 N. E. 402, holding defendant's intentional misstatement of material facts admissible to show guilt; *State v. Snowden*, 23 Utah, 330, 65 Pac. 479, holding defendant's consent to default in wife's divorce action admissible on trial for adultery; *State v. Cronin*, 64 Conn. 305, 29 Atl. 536, holding accused's remark on day following, showing clear recollection of statements made shortly after shooting, admissible to disprove degree of intoxication.

Review of discretionary ruling by trial judge.

Cited in *French v. State*, 93 Wis. 339, 67 N. W. 706, holding exclusion of evidence of subsequent mental condition as lacking probative force reviewable on appeal.

Examination of jurors.

Cited in *Com. v. Thompson*, 159 Mass. 58, 33 N. E. 1111, and *Com. v. Poisson*,

157 Mass. 512, 32 N. E. 906, holding extent of examination of jurors as to interest or bias, within judge's discretion; *Atlantic & D. R. Co. v. Reiger*, 95 Va. 423, 28 S. E. 590, holding refusal of question on *voir dire* not reversible error where materiality not shown.

24 L. R. A. 245, *STATE v. RHODES*, 90 Iowa, 496, 58 N. W. 887.

What constitutes arrival of liquor within state.

Reversed in 170 U. S. 412, 42 L. ed. 1090, 18 Sup. Ct. Rep. 664, holding liquor not "within state" until delivery to consignee.

Cited in *State v. Intoxicating Liquors*, 95 Me. 143, 49 Atl. 670, holding liquor arrived at destination and stored in freight house, within state.

Cited in footnote to *State v. Holleyman*, 45 L. R. A. 567, which holds liquor bought in other state for purchaser's own use and carried in own conveyance not within state until purchaser's home reached.

Cited in note (46 L. R. A. 419, 420) on liability of carrier for transporting intoxicating liquors.

24 L. R. A. 247, *NESTER v. CONTINENTAL BREWING CO.* 161 Pa. 473, 41 Am. St. Rep. 894, 29 Atl. 102.

Combinations not affecting public interests.

Cited in *State v. Central R. Co.* 109 Ga. 724, 48 L. R. A. 354, 35 S. E. 37, upholding consolidation of railroads where public interests not injuriously affected.

Contracts in restraint of trade.

Cited in *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 119, 50 L. R. A. 178, 85 Am. St. Rep. 125, 28 So. 669, holding contract not to operate competing ice plant, illegal; *Fox Solid Pressed Steel Co. v. Schoen*, 27 Pittsb. L. J. N. S. 200, 77 Fed. 31, holding agreement not to manufacture truck frames, void.

Cited in footnote to *Clark v. Needham*, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years.

— To suppress competition.

Cited in *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 134, 29 C. C. A. 158, 54 U. S. App. 723, 85 Fed. 288, holding combination of iron-pipe manufacturers restricting competition, illegal; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 108, 46 L. R. A. 563, 52 S. W. 853, holding plumbers' association punishing by penalties competition among members, illegal, though confined to part of plumbers in one city; *Milwaukee Masons & Builders' Asso. v. Niezerowski*, 95 Wis. 136, 37 L. R. A. 130, footnote p. 127, 60 Am. St. Rep. 97, 70 N. W. 166, holding combination by association of masons and builders requiring addition of at least 6 per cent to lowest bid made to committee, before submitting to competition, void.

Distinguished in *Stockton v. American Tobacco Co.* 55 N. J. Eq. 375, 36 Atl. 971, denying injunction restraining corporation from carrying on business in such manner as to establish monopoly.

— To regulate prices.

Cited in *United States v. Coal Dealers' Asso.* 85 Fed. 264, holding combination of wholesale and retail coal dealers arbitrarily fixing prices, illegal; *State ex*

rel. Durner v. Huegin, 110 Wis. 253, 62 L. R. A. 742, 85 N. W. 1046, holding agreement between newspaper publishers as to advertising rates, illegal; *National Harrow Co. v. Hensch*, 39 L. R. A. 300, footnote p. 299, 27 C. C. A. 351, 55 U. S. App. 53, 83 Fed. 38, Affirming 76 Fed. 669, holding agreement by owner of patent with corporation organized by rival manufacturers to sell no harrow for less than schedule price, invalid; *State ex rel. Durner v. Huegin*, 62 L. R. A. 742, holding combination between independent concerns to compel another to reduce rates, or lose customers, illegal; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 443, 57 L. R. A. 548, 90 Am. St. Rep. 126, 41 S. E. 553, denying right of mercantile dealers to combine and prevent sales to another dealer unless he sells at fixed prices.

Cited in footnotes to *Brown v. Jacobs' Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices; *Herriman v. Menzies*, 35 L. R. A. 318, which sustains association of master stevedores fixing minimum prices with stipulation against unauthorized discounts; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent and maintain agreed prices; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price, not within statute for suppression of conspiracies; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 62 L. R. A. 632, holding combination of merchants looking to maintenance at fixed prices, not void as against public policy.

— To blacklist debtors.

Cited in *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 69, 71 S. W. 691, denying right of breweries to agree not to sell to debtor of any of them until debt was paid.

Actions based on illegal transaction.

Cited in *Wetzel v. Linnard*, 15 Pa. Super. Ct. 508, holding equity will not set aside mortgage given to settle criminal prosecution; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 115, 46 L. R. A. 565, 52 S. W. 853, holding association cannot collect penalty for violating by-law restraining competition, although member had mulcted customer; *Robson v. Hamilton*, 41 Or. 245, 69 Pac. 651, sustaining equitable relief when it is not necessary to base it on violation of rules of public policy.

24 L. R. A. 252, *STATE ex rel. RICHARDS v. MANUFACTURER'S MUT. FIRE ASSO.* 50 Ohio St. 145, 33 N. E. 401.

Liability of members of mutual insurance associations.

Cited in *Richards v. Swaim & McC. Canning Co.* 7 Ohio N. P. 70, 9 Ohio S. & C. P. Dec. 70, holding liability of members of mutual insurance association limited by amount of losses; *Corey v. Sherman* (Iowa) 32 L. R. A. 512, 64 N. W. 828, holding members insuring on assessment plan not liable to make good losses of members paying all cash premiums; *Richards v. Swaim & McC. Canning Co.* 7 Ohio N. P. 71, 9 Ohio S. & C. P. Dec. 70, holding members of mutual insurance association must sign Constitution.

Distinguished in *Richards v. Louis Lipp Co.* 69 Ohio St. 363, 100 Am. St. Rep. 679, 69 N. E. 616, holding party receiving policy from mutual insurance asso-

ciation estopped to deny liability for assessments on ground that he has not signed Constitution.

24 L. R. A. 255, *BIGLER v. BAKER*, 40 Neb. 325, 58 N. W. 1026.

Vacation of judgment by default.

Cited in *Masten v. Indiana Car & Foundry Co.* 25 Ind. App. 187, 57 N. E. 148, holding vacation of judgment on default will not be disturbed unless clear abuse of discretion appears; *Bradley v Slater*, 55 Neb. 336, 75 N. W. 826, holding court may vacate judgment for surprise at same term, though motion not filed in time limited.

Review of order granting new trial.

Cited in *Weber v. Kirkendall*, 44 Neb. 770, 63 N. W. 35, holding stronger showing of abuse of discretion in vacating judgment on default required than where trial denied; *School District v. Bishop*, 46 Neb. 853, 65 N. W. 902, holding stronger showing of abuse of discretion required to reverse order allowing than denying new trial; *State ex rel. Chadron Loan & Bldg. Asso. v. Westover*, 2 Herdman (Neb.) 770, 89 N. W. 1002, denying mandamus to require vacation of order setting aside decree of foreclosure and granting new trial, and to compel reinstatement of decree.

Weakness of adverse title unavailable to plaintiff in ejectment.

Cited in *Comstock v. Kerwin*, 57 Neb. 5, 77 N. W. 387, and *Chicago, B. & Q. R. Co. v. Schalkopf*, 54 Neb. 450, 74 N. W. 826, holding plaintiff in ejectment must rely on strength of own, not weakness of adversary's, title.

Possession taking oral contract to purchase land out of statute.

Cited in *Schields v. Horbach*, 49 Neb. 270, 68 N. W. 524, holding subsequent possession of tenant orally contracting to buy premises presumed to be under lease; *Lewis v. North*, 62 Neb. 559, 87 N. W. 312, holding tenant's continued possession will not take contract of purchase out of statute, unless clearly resulting from contract.

Statute of frauds, agent's contract to sell land.

Cited in *O'Shea v. Rice*, 49 Neb. 897, 69 N. W. 308, holding agent's contract to sell lands void unless authority evidenced in writing.

Validity of option contracts.

Cited in footnote to *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations.

Want of mutuality no defense to specific performance.

Cited in *Burnell v. Bradbury*, 67 Kan. 765, 74 Pac. 279, holding want of mutuality no defense to specific performance of contract where party seeking relief has performed all conditions.

24 L. R. A. 259, *CAPPS v. HASTINGS PROSPECTING CO.* 40 Neb. 470, 42 Am. St. Rep. 677, 58 N. W. 956.

Enforcement of subscription to stock of proposed corporation.

Cited in *Williams v. Citizens' Enterprise Co.* 25 Ind. App. 352, 57 N. E. 581, and *Williams v. Citizens Enterprise Co.* 153 Ind. 497, 55 N. E. 425, holding sub-

scription for stock of proposed corporation enforceable only upon *de jure* organization.

Cited in note (33 L. R. A. 594) on withdrawal of subscription for shares of corporation.

What sufficient attempt to incorporate.

Cited in footnote to *Slocum v. Head*, 50 L. R. A. 324, which holds persons attempting to incorporate by filing original articles instead of copies, entitled to all rights of corporation as to persons dealing with them as such.

Estoppel to deny legal corporate existence.

Cited in footnote to *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds borrower from foreign loan association estopped to defeat foreclosure of mortgage on ground that corporate articles not properly acknowledged.

24 L. R. A. 263, *THOMAS v. CITY NAT. BANK*, 40 Neb. 501, 58 N. W. 943.

National bank's liability for president's act.

Second appeal in *City Nat. Bank v. Thomas*, 46 Neb. 861, 65 N. W. 895, holding bank bound by guaranty of negotiable paper by president, while apparently engaged in performing official duties.

Cited in *Blanchard v. Commercial Bank*, 21 C. C. A. 323, 44 U. S. App. 553, 75 Fed. 253, holding bank receiving benefits liable for loan negotiated by president; *Auten v. United States Nat. Bank*, 174 U. S. 148, 43 L. ed. 928, 19 Sup. Ct. Rep. 628, Affirming *United States Nat. Bank v. First Nat. Bank*, 24 C. C. A. 600, 49 U. S. App. 67, 79 Fed. 300, holding bank liable on notes indorsed for rediscount by president.

24 L. R. A. 266, *STATE ex rel. HENDERSON v. BURDICK*, 4 Wyo. 272, 33 Pac. 125.

When specific appropriation necessary.

Cited in *People ex rel. Hegwer v. Goodykoontz*, 22 Colo. 511, 45 Pac. 414, holding act creating office and fixing salary "payable the same as other officers," continuing appropriation; *State ex rel. Noonan v. King*, 108 Tenn. 277, 67 S. W. 812, holding statute fixing salary of inspector and providing for its monthly payment on warrant of comptroller "as other salaries are paid," appropriation justifying payment; *State ex rel. Ijams v. Burdick*, 4 Wyo. 346, 34 Pac. 1, holding "inspection fund" usable by live-stock commission without appropriation.

Distinguished in *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 101, 61 Am. St. Rep. 538, 69 N. W. 373, holding law providing for bounties on sugar manufactured in state not continuing appropriation, where duration of appropriations limited; *Goodykoontz v. Acker*, 19 Colo. 363, 35 Pac. 911, holding act fixing officer's salary "to be paid out of any money appropriated for that purpose," not appropriation.

Disapproved in *Shattuck v. Kincaid*, 31 Or. 388, 49 Pac. 758, holding statute fixing salary and time of payment of public officer not continuing appropriation.

24 L. R. A. 272, *JACKSONVILLE, T. & K. W. R. CO. v. ADAMS*, 33 Fla. 608, 15 So. 257.

Constitutional prohibition of special laws regulating practice.

Cited in *State ex rel. Lamar v. Jacksonville Terminal Co.* 41 Fla. 372, 27 So.

221, holding statute making appeals in all cases brought thereunder returnable in thirty days not special legislation.

Number of jurors necessary for valid verdict.

Cited in footnotes to *First Nat. Bank v. Foster*, 54 L. R. A. 549, which holds unauthorized, statute authorizing verdict by three fourths of jurors; *Hess v. White*, 24 L. R. A. 277, which holds valid, provision for verdict by three fourths of jury in civil case.

Cited in note (43 L. R. A. 78) on number and agreement of jurors necessary to constitute valid verdict.

Right to constitutional mode of assessment upon condemnation.

Cited in *Southern R. Co. v. Birmingham, S. & N. O. R. Co.* 180, Ala. 670, 31 So. 509, holding owner not precluded by other proceedings from having damages upon condemnation of land, assessed before entry by jury of twelve, when Constitution so prescribes.

24 L. R. A. 277, *HESS v. WHITE*, 9 Utah, 61, 33 Pac. 243.

Verdict by majority of jurors.

Followed in *Mackey v. Enzensperger*, 11 Utah, 155, 39 Pac. 541; *Leedom v. Earls Furniture & Carpet Co.* 12 Utah, 180, 42 Pac. 208; *Pratt v. Parsons*, 13 Utah, 32, 43 Pac. 620; *Smith v. Salt Lake City R. Co.* 13 Utah, 33, 43 Pac. 919; *Fred W. Wolf Co. v. Salt Lake City Brewing Co.* 10 Utah, 181, 37 Pac. 262; *American Pub. Co. v. Fisher*, 10 Utah, 154, 37 Pac. 259,—holding territorial statute permitting verdict by nine or more jurors in civil cases not denial of constitutional right of trial by jury.

Cited in footnote to *First Nat. Bank v. Foster*, 54 L. R. A. 549, which holds unauthorized, statute authorizing verdict by three fourths of jurors.

Cited in notes (24 L. R. A. 273) on constitutionality of verdict by less than all the jurors; (43 L. R. A. 81) on number and agreement of jurors necessary to constitute valid verdict.

24 L. R. A. 280, *WARD v. SUGG*, 113 N. C. 489, 18 S. E. 717.

Forfeiture of usurious interest.

Cited in *Faison v. Grandy*, 126 N. C. 830, 36 S. E. 276, Affirming on rehearing 128 N. C. 443, 83 Am. St. Rep. 693, 38 S. E. 897, holding note embracing usurious interest void in hands of bona-fide holder; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 889, 47 Am. St. Rep. 841, 21 S. E. 924, denying right to enforce usurious mortgage securing foreign loan; *Shannon v. Georgia State Bldg. & L. Asso.* 78 Miss. 968, 57 L. R. A. 803, 84 Am. St. Rep. 657, 30 So. 51, permitting recovery of usurious interest paid on mortgage securing loan from foreign lender; *Smith v. Old Dominion Bldg. & L. Asso.* 119 N. C. 255, 26 S. E. 41, holding all payments on usurious loan must be credited on principal; *Churchill v. Turnage*, 122 N. C. 432, 30 S. E. 122 (dissenting opinion), majority holding debtor seeking cancelation of usurious mortgage must pay principal and legal interest.

Rights of bona fide holder of negotiable paper.

Cited in *United States Nat. Bank v. McNair*, 116 N. C. 554, 21 S. E. 389, holding bona-fide indorsee of negotiable paper not void, illegal, or fraudulent, before maturity, takes free of equities.

24 L. R. A. 284, *INTERNATIONAL BLDG. & L. ASSO. v. HARDY*, 86 Tex. 610, 40 Am. St. Rep. 870, 26 S. W. 497.

Change of remedy as impairment of contract.

Cited in footnotes to *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit without extending period of limitations; *Kirkman v. Bird*, 58 L. R. A. 670, which sustains as to prior obligations statute exempting wages for sixty days preceding levy.

Distinguished in *Wilson v. Standefer*, 184 U. S. 410, 46 L. ed. 617, 22 Sup. Ct. Rep. 384, Affirming 93 Tex. 238, 54 S. W. 898, sustaining statute creating additional remedy in case of default by purchasers of school lands.

Contract remedy unaffected by legislation.

Cited in *Goddard v. Reagan*, 8 Tex. Civ. App. 275, 28 S. W. 352, holding power to sell given in deed of trust not affected by subsequent statute requiring sale in county; *Thompson v. Cobb*, 95 Tex. 147, 93 Am. St. Rep. 820, 65 S. W. 1090, holding power of mortgage trustee to sell upon any day unaffected by subsequent statute prescribing that such sales be upon specified days.

24 L. R. A. 287, *WATSON v. NEEDHAM*, 161 Mass. 404, 37 N. E. 204.

City's liability for failure of water supply.

Cited in *Lenzen v. Braunfels*, 13 Tex. Civ. App. 371, 35 S. W. 341, holding city liable for negligently failing to supply water to extinguish fire.

Cited in note (61 L. R. A. 95) on establishment and regulation of municipal water supply.

Disapproved in *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 182, 64 L. R. A. 236, 100 Am. St. Rep. 107, 75 Pac. 773, holding municipal contract for water for fire protection in general, will not support action for destruction of municipal property by fire, through water company negligently failing to furnish water.

Acquisition of water supply by eminent domain.

Cited in note (58 L. R. A. 242) on acquisition of water supply by right of eminent domain.

Measure of damages in absence of market price.

Cited in note (57 L. R. A. 201) on damages for breach of contract on sale of article that has no market price.

24 L. R. A. 289, *CONE EXPORT & COMMISSION CO. v. POOLE*, 41 S. C. 70, 19 S. E. 203.

Doing business in state within meaning of regulating statutes.

Cited in *Neal v. New Orleans Loan, Bldg. & Sav. Asso.* 100 Tenn. 615, 46 S. W. 755, holding foreign corporation making loan from, and payable at, home office need not comply with statutes regulating doing business in state where security located; *Havens & G. Co. v. Diamond*, 93 Ill. App. 567, holding foreign corporation soliciting orders by drummers not doing business within state.

Cited in footnotes to *St. Louis, A. & T. R. Co. v. Fire Asso.* 28 L. R. A. 83, which holds prosecution of suit by foreign corporation not doing business; *Seamans v. Knapp, S. & Co. Co.* 27 L. R. A. 362, which holds valid insurance contract

may be made in one state on property in another by company not entitled to do business in latter state; *Florsheim Bros. Dry Goods Co. v. Lester*, 27 L. R. A. 505, which holds taking of single mortgage by foreign corporation for past-due indebtedness not doing business; *Rose v. Kimberly & C. Co.* 27 L. R. A. 556, which denies right of foreign company prohibited from doing business in state, to collect assessment on insurance contract made by mail; *Seamans v. Temple Co.* 28 L. R. A. 430, which holds insurance contract made through mails by corporation not authorized to do business will not support action against insured for assessment; *People ex rel. Badische Anilin & Soda Fabrik v. Roberts*, 36 L. R. A. 756, which holds foreign corporation which is a special partner acting as sole agent in limited partnership admissible as doing business within state; *State v. Morehead*, 26 L. R. A. 585, which holds sale and delivery of sample sewing machine not sale by peddler.

Burdens on foreign corporations doing business in state.

Cited in footnotes to *Carson-Rand Co. v. Stern*, 32 L. R. A. 420, which holds compliance of foreign corporation with statutory requirements after motion for dismissal sufficient to prevent dismissal; *Southern Bldg. & L. Asso. v. Norman*, 31 L. R. A. 41, which upholds tax on gross receipts of foreign loan association; *Lewis v. American Sav. & Loan Asso.* 39 L. R. A. 559, which holds deposit of securities by foreign corporation as condition of doing business in state not *ultra vires*.

Cited in notes (24 L. R. A. 320) on validity of contracts made by foreign corporations which have not complied with statutory conditions as to right to do business in state; (24 L. R. A. 303, 305) on restrictions on business of foreign insurance companies; (30 L. R. A. 416) on limit of amount of license fees; (34 L. R. A. 738) on right to enforce stockholder's liability outside of state of incorporation.

Exclusion of foreign corporations.

Cited in footnotes to *Com. v. Mobile & O. R. Co.* 54 L. R. A. 916, which holds contract obligations impaired by requiring domestication of foreign railroad company in state; *Taylor v. Branham*, 39 L. R. A. 362, which holds liable as partners, members of foreign corporation carrying on business in state without being incorporated therein.

Cited in note (24 L. R. A. 314) on exclusion of foreign corporations as interference with interstate commerce.

Status of corporation outside of state of domicile.

Cited in footnotes to *Republican Mountain Silver Mines v. Brown*, 24 L. R. A. 776, which denies power of court of foreign state to decree dissolution of corporation; *American Waterworks Co. v. Farmers Loan & T. Co.* 25 L. R. A. 338, which holds corporation subject to laws of sovereignty under which it was created.

Cited in note (24 L. R. A. 462) on migration as ground for forfeiting corporate charter.

Lack of corporate existence as defense.

Cited in footnotes to *Maryland Tube & Iron Works v. West End Improv. Co.* 39 L. R. A. 810, which holds lack of corporate existence from failure to pay bonus tax, defense to action by corporation; *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds borrower from foreign loan associ-

ation estopped to defeat foreclosure of mortgage on ground that corporate articles not properly acknowledged.

De facto corporations.

Cited in footnotes to *State, Tidewater Pipe Co. Prosecutor, v. State Assessors*, 27 L. R. A. 684, which holds limited partnership a corporation for purpose of taxation; *Duke v. Taylor*, 31 L. R. A. 484, which holds *de facto* corporation not created by attempted organization in one state under charter granted in another.

Extinguishment of corporation.

Cited in footnote to *James v. Western North Carolina R. Co.* 46 L. R. A. 306, which holds mortgagor corporation not extinguished by foreclosure sale to foreign corporation.

Demurrer for failure to state cause of action.

Cited in *Knight v. Le Beau*, 19 Mont. 226, 47 Pac. 952, holding want of capacity to sue, ground of demurrer distinct from failure to state cause of action; *Northrup v. A. G. Wills Lumber Co.* 65 Kan. 771, 70 Pac. 879, denying right of demurrer against complaint of foreign corporation upon ground of lack of capacity to sue, unless such defect affirmatively appears upon face of complaint.

24 L. R. A. 298, *STATE ex rel. RICHARDS v. ACKERMAN*, 51 Ohio St. 163, 37 N. E. 828.

Legislative control of insurance business.

Cited in *People v. Loew*, 23 Misc. 576, 52 N. Y. Supp. 799, and *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 74, 45 L. ed. 755, 21 Sup. Ct. Rep. 535, Affirming 59 Ohio St. 53, 51 N. E. 546, holding privilege of carrying on insurance business a franchise, subject to conditions imposed by state; *People v. Loew*, 19 Misc. 251, 44 N. Y. Supp. 42, sustaining action against underwriters carrying on Lloyds insurance, for unlawfully exercising franchise.

Cited in footnotes to *Phoenix Assur. Co. v. Montgomery Fire Department*. 42 L. R. A. 468, which sustains statute imposing privilege tax on insurance companies to provide fund for benefit of fire companies; *Hoadley v. Purifoy*, 30 L. R. A. 351, sustaining state's power to regulate fire insurance business.

Cited in note (25 L. R. A. 238) on restrictions on insurance by incorporated associations or individuals; Lloyds associations.

Restrictions on business of foreign insurance companies.

Cited in *People v. Gay*, 107 Mich. 425, 30 L. R. A. 465, footnote p. 464. 65 N. W. 292, sustaining prohibiting solicitation of insurance within state for non-resident, without procuring certificate of authority.

Cited in footnotes to *Cook v. Howland*, 59 L. R. A. 338, which sustains confinement to residents of right to act as agents for foreign insurance companies; *Bankers' L. Ins. Co. v. Howland*, 57 L. R. A. 374, which denies insurance commissioners' power to question foreign company's mode of computing reserve, set forth in statement for license; *Travelers' Ins. Co. v. Fricke*, 41 L. R. A. 557, which holds license of foreign insurance company properly revoked for failure to pay full license fees in past years; *State ex rel. National Life Asso. v. Matthews*, 40 L. R. A. 418, which authorizes licensing of insurance on assessment plan for sole benefit of policy holders; *People ex rel. Traders' F. Ins. Co. v. Van Cleave*, 47 L. R. A. 795, which sustains right to license of foreign insurance com-

pany complying with requirements, regardless of similarity of name to that of domestic corporation; *People ex rel. Stephens v. Fidelity & C. Co.* 26 L. R. A. 295, which holds foreign corporation authorized to carry on multiform business in state not permitting incorporation for such business.

Cited in notes (24 L. R. A. 292) on recognition or exclusion of foreign corporations; (24 L. R. A. 312) on exclusion of foreign corporations as interference with interstate commerce.

What constitutes doing business within state.

Cited in footnotes to *Rose v. Kimberly & C. Co.* 27 L. R. A. 556, which denies right of foreign company prohibited from doing business in state, to collect assessment on insurance contract made by mail; *Seamans v. Knapp, S. & Co. Co.* 27 L. R. A. 362, which holds valid insurance contract may be made in one state on property in another by company not entitled to do business in latter state; *St. Louis, A. & T. R. Co. v. Fire Asso.* 28 L. R. A. 83, which holds prosecution of suit by foreign corporation not "doing business."

What constitutes board of fire underwriters.

Cited in footnote to *Childs ex rel. Smith v. Firemen's Ins. Co.* 35 L. R. A. 99, as to what constitutes board of fire underwriters entitled to premiums for maintenance of salvage corps.

Right to regulate enforcement of calls by foreign corporations upon resident stockholders.

Cited in *Nashua Sav. Bank v. Anglo-American Land-Mortg. & Agency Co.* 108 Fed. 782, as to right of foreign state to regulate enforcement of liability of its resident stockholders of foreign corporation.

24 L. R. A. 311, *KINDEL v. BECK & P. LITHOGRAPHING CO.* 19 Colo. 310, 35 Pac. 538.

Power of court to correct clerical error in record.

Cited in *People ex rel. Schmidt v. County Court*, 9 Colo. App. 47, 47 Pac. 469, sustaining power of trial court to correct at subsequent term clerical error in record of judgment.

Effect on contracts of foreign corporations of failure to comply with statutory requirements.

Cited in *Rockford Ins. Co. v. Rogers*, 9 Colo. App. 125, 47 Pac. 848, and *Fairbanks M. & Co. v. McLeod*, 8 Colo. App. 194, 45 Pac. 282, holding foreign corporation's failure to file certificate appointing agent, no defense to action on contract; *Miller v. Williams*, 27 Colo. 38, 59 Pac. 740, upholding validity of notes secured by deed of trust, in hands of foreign corporation not complying with statutory requirements; *Helvetia Swiss F. Ins. Co. v. Edward P. Ams Co.* 11 Colo. App. 269, 53 Pac. 242, holding foreign corporation's right to sue on contract unaffected by noncompliance with statutory requirements; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 452, 67 N. W. 493 (minority opinion), majority holding failure of foreign corporation to comply with statute does not affect contracts existing at time of enactment.

Cited in note (24 L. R. A. 317) on validity of contracts made by foreign corporations which have not complied with statutory conditions as to right to do business in state.

What constitutes doing business within state.

Cited in *Havens & G. Co. v. Diamond*, 93 Ill. App. 567, holding foreign corporation soliciting orders by drummers not doing business within state.

Cited in footnote to *Coit & Co. v. Sutton*, 25 L. R. A. 819, which holds foreign corporations selling through itinerant agents, goods made outside of state not doing business within state.

Exclusion of foreign corporations as interference with interstate commerce.

Cited in footnotes to *Milan Mill. & Mfg. Co. v. Gorton*, 26 L. R. A. 135, which holds sale and setting up of machinery by foreign corporation in state where it has no agency, act of interstate commerce; *Com. v. Mobile & O. R. Co.* 54 L. R. A. 916, which holds commerce not interfered with by requiring domestication of foreign railroad company; *MacNaughtan Co. v. McGirl*, 38 L. R. A. 367, which holds purchase of wool by agent of foreign corporation for shipment to other states, interstate, which may be engaged in without complying with statutory requirements.

Cited in note (24 L. R. A. 292, 296, 297) on recognition or exclusion of foreign corporations.

Regulation of electric companies.

Cited in footnote to *Toledo v. Western U. Teleg. Co.* 52 L. R. A. 730, which sustains city's right to make local regulations for permitting stringing of telegraph wires in streets.

Cited in note (31 L. R. A. 806, 808) on police regulation of electric companies.

Nonprejudicial error.

Cited in *Steinhauer v. Colmar*, 11 Colo. App. 498, 55 Pac. 291, holding defendant cannot complain of erroneously striking out of answer presenting no defense.

24 L. R. A. 315, *EDISON GENERAL ELECTRIC CO. v. CANADIAN P. NAV.*
CO. 8 Wash. 370, 40 Am. St. Rep. 910, 36 Pac. 260.

Effect on contracts of failure to comply with statutory conditions of doing business.

Cited in *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 384, 37 L. R. A. 511, 95 Am. St. Rep. 186, 49 Pac. 314, and *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 384, 37 L. R. A. 511, 95 Am. St. Rep. 186, 49 Pac. 314, sustaining right of unlicensed money-lender to recover loan; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 452, 67 N. W. 493 (dissenting opinion), majority holding foreign corporation's failure to comply with statute does not affect contracts existing at time of enactment; *Garratt Ford Co. v. Vermont Mfg. Co.* 20 R. I. 189, 39 L. R. A. 546, also footnote, 545, 78 Am. St. Rep. 852, 37 Atl. 948, holding valid, contract of unauthorized foreign corporation.

Cited in footnotes to *State Mut. F. Ins. Co. v. Brinkley Stave & Heading Co.* 29 L. R. A. 712, which upholds right of unauthorized foreign company to enforce claim for insurance premium; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* 35 L. R. A. 236, which holds void, bond insuring foreign corporation not complying with statutory requirements, against dishonesty of manager.

Cited in notes (34 L. R. A. 741) on right to enforce stockholder's liability out-

side of state of incorporation; (24 L. R. A. 305) on restrictions on business of foreign insurance companies; (24 L. R. A. 291, 293, 297) on recognition or exclusion of foreign corporations; (25 L. R. A. 569) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

What constitutes doing business within state.

Cited in footnote to *Coit & Co. v. Sutton*, 25 L. R. A. 819, which holds foreign corporations selling, through itinerant agents, goods made outside of state not doing business within state.

Estoppel to deny corporate character.

Cited in footnotes to *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds borrower from foreign loan association estopped to defeat foreclosure of mortgage on ground that corporate articles not properly acknowledged; *Maryland Tube & Iron Works v. West End Improv. Co.* 39 L. R. A. 810, which holds lack of corporate existence from failure to pay bonus tax, defense to action by corporation; *State v. O'Brien*, 26 L. R. A. 252, which holds foreign corporation's failure to comply with statutory conditions, no defense to charge of embezzlement by employee.

24 L. R. A. 322, *LANCASTER v. AMSTERDAM IMPROV. CO.* 140 N. Y. 576, 56 N. Y. S. R. 434, 35 N. E. 964.

What constitutes de facto corporation.

Cited in *Gilkey v. How*, 105 Wis. 45, 49 L. R. A. 485, 81 N. W. 120, holding *de facto* corporation effected by bona fide attempt to comply with statute, and transaction of business.

Right to question corporation's legal capacity.

Cited in *Novelty Mfg. Co. v. Connell*, 88 Hun, 256, 34 N. Y. Supp. 717, holding foreign corporation's failure to comply with statutory requirements no defense to action on contract; *Lasater v. Purcell Mill & Elevator Co.* 22 Tex. Civ. App. 36, 54 S. W. 425, sustaining right to sue, of corporation transacting business under franchise from another state; *Dunbarton Flax Spinning Co. v. Greenwich & J. R. Co.* 87 App. Div. 25, 83 N. Y. Supp. 1054, holding foreign corporation not prevented from maintaining action by prior failure to pay statutory license fee, when it had paid it at time of commencing action.

Cited in footnote to *Congregational Church Bldg. Soc. v. Everitt*, 35 L. R. A. 693, which denies right of heirs or next of kin to question legal capacity of corporation to take bequest in excess of statutory amount.

Cited in note (32 L. R. A. 294) on right of private persons to contest power of corporation to take or hold property.

Right of foreign corporations to hold land.

Cited in *Barcello v. Hapgood*, 118 N. C. 728, 24 S. E. 124, holding foreign corporations duly authorized by charter have same right as domestic to hold land; *Reorganized Church of Jesus Christ, L. D. S. v. Church of Christ*, 60 Fed. 941, sustaining right of foreign religious corporation to hold lands for purposes limited by state Constitution; *Watkins v. Iowa C. R. Co.* 123 Iowa, 401, 98 N. W. 910, holding title to land conveyed in fee to railroad company not lost by non-user.

Cited in footnote to *State ex rel. Winston v. Hudson Land Co.* 40 L. R. A. 430,

which holds conveyances to corporation invalid on aliens subsequently acquiring majority of corporate stock.

Cited in note (24 L. R. A. 290) on recognition or exclusion of foreign corporations.

Right to exercise eminent domain.

Cited in footnote to *Lancey v. King County*, 34 L. R. A. 817, which holds eminent domain exercisable by state in constructing public improvement to be conveyed to United States.

24 L. R. A. 333, *PRICE v. OAKFIELD HIGHLAND CREAMERY CO.* 87 Wis. 536, 58 N. W. 1039.

What constitutes nuisance.

Cited in *McCann v. Strang*, 97 Wis. 553, 72 N. W. 1117, holding electric light plant running late at night, not causing material injury, no nuisance.

Injunction against nuisance.

Cited in *Robb v. La Grange*, 158 Ill. 28, 42 N. E. 77, holding continuing nuisance enjoined.

24 L. R. A. 336, *GILLAN v. NORMAL SCHOOLS*, 88 Wis. 7, 58 N. W. 1042.

Removal of teachers.

Cited in footnote to *Freeman v. Bourne*, 39 L. R. A. 510, which upholds dismissal of school superintendent for indictment for, and conviction of, adultery.

24 L. R. A. 339, *DYER v. DUFFY*, 39 W. Va. 148, 19 S. E. 540.

Option contracts.

Cited in *Monongah Coal & Coke Co. v. Flemming*, 42 W. Va. 541, 26 S. E. 201, holding signed statement "I have this day sold" to certain person coal under certain farm, not option, but absolute contract of sale.

Cited in footnote to *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations.

When time is of essence of contract.

Cited in footnote to *Garrison v. Cooke*, 61 L. R. A. 342, which holds time of essence of subscription for cost of railroad in consideration of running of trains by specified date.

Dealing with agent under written authority.

Cited in *O'Connor v. O'Connor*, 45 W. Va. 366, 32 S. E. 276, holding receipt of payment by agent not thereto authorized by written authority does not confirm sale.

When principal not bound by unauthorized contract.

Cited in *Rohrbough v. United States Exp. Co.* 50 W. Va. 152, 88 Am. St. Rep. 849, 40 S. E. 398, denying express company's liability on money orders issued to one knowing agent's want of authority; *Rosendorf v. Poling*, 48 W. Va. 624, 37 S. E. 555, holding purchaser from agent without authority to sell, acquires, and can confer, no title; *Findley v. Cunningham*, 53 W. Va. 11, 44 S. E. 472, holding that evidence does not show special agency to make new promise on behalf of coparceners to pay debt of decedent.

Agent's sale on credit.

Cited in *State v. Chilton*, 49 W. Va. 456, 39 S. E. 612, holding public officer without actual authority cannot sell state property on credit; *Morton v. Morris*, 27 Tex. Civ. App. 266, 66 S. W. 94, holding sale by agent authorized to sell "on such terms as to him shall seem meet," unauthorized when made upon indefinite and unreasonable credit.

Specific performance.

Cited in *Urpman v. Lowther Oil Co.* 53 W. Va. 509, 97 Am. St. Rep. 1027, 44 S. E. 433, denying specific performance of contract to convey, after delay, if by reason of changed conditions hardship would result to vendor.

Cited in footnote to *Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co.* 35 L. R. A. 167, which refuses to require payment of interest not provided for as condition of specific performance of contract.

24 L. R. A. 343, *STATE ex rel. THOMPSON v. McCALLISTER*, 38 W. Va. 485, 18 S. E. 770.

Mandamus to determine right to office.

Distinguished in *Schmulbach v. Speidel*, 50 W. Va. 560, 55 L. R. A. 925, 40 S. E. 424, holding mandamus lies to correct improper motion from office.

What constitutes residence.

Cited in footnote to *State ex rel. Goodell v. McGeary*, 44 L. R. A. 446, which holds building and furnishing of new house with intention of living in same not make owner elector of ward while renting elsewhere.

When legislation unconstitutional.

Cited in *Chapman v. Reddick*, 41 Fla. 133, 25 So. 673, holding legislation not invalid unless clearly contrary to express or implied constitutional prohibition.

Husband's interest in wife's separate realty.

Cited in *Guernsey v. Lazear*, 51 W. Va. 329, 41 S. E. 405, holding husband has no estate in wife's separate property.

24 L. R. A. 355, *BRANSON v. GEE*, 25 Or. 462, 36 Pac. 527.

Followed without special discussion in *Cherry v. Lane County*, 25 Or. 489, 36 Pac. 531.

Due process of law.

Cited in *Towns v. Klamath County*, 33 Or. 233, 53 Pac. 604, holding notice of application for laying out road need not be given to landowner with subsequent opportunity for hearing on compensation; *State v. Sponaule*, 45 W. Va. 420, 43 L. R. A. 734, 32 S. E. 283, sustaining constitutionality of provision forfeiting land for owner's failure to enter for taxation.

Taking property without compensation first assessed and tendered.

Cited in *Baker County v. Benson*, 40 Or. 215, 66 S. E. 815, holding public officers not entitled to demand pay in advance for making copies of records for county.

24 L. R. A. 357, *DAVIE v. LUMBERMAN'S MIN. CO.* 93 Mich. 401, 53 N. W. 625.

Contracts void for indefiniteness.

Cited in *Flaherty v. Cary*, 62 App. Div. 121, 70 N. Y. Supp. 951, holding con-

tract for organizing corporation, not specifying where, amount of stock, number of directors, or scope of operations, void; *Faulkner v. Des Moines Drug Co.* 117 Iowa, 123, 90 N. W. 585, holding contract of employment, to continue "until mutually agreed void," void for uncertainty.

Distinguished in *Dykema v. Minneapolis, St. P. & S. Ste. M. R. Co.* 101 Mich. 48, 59 N. W. 447, holding damages recoverable for breach of lease of elevator at certain rate per bushel transferred, terminable upon ninety days' notice; *Lanford v. United States Wooden-Ware Co.* 127 Mich. 615, 86 N. W. 1033, holding damages recoverable by vendor for breach of contract to buy staves at stated price, with right to vendor to offer another proposition as to price, if that fixed left no profits.

Contracts invalid as lacking mutuality.

Cited in *Jackson v. Sessions*, 109 Mich. 222, 67 N. W. 315, holding assignment by subvendee of timber contract void for want of mutuality as between vendor and assignee assuming no liabilities; *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543, 34 U. S. App. 60, 68 Fed. 794, holding contract to sell certain quantity at stated price, without agreement to purchase, void as wanting mutuality; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 57 L. R. A. 699, 52 C. C. A. 29, 114 Fed. 81, holding accepted offer to sell at stated price during limited time, such goods as acceptor may desire, void; *Teipel v. Meyer*, 106 Wis. 43, 81 N. W. 982, holding contract to sell so long as dealer should continue to buy void; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 431, 56 Pac. 759, holding railway's contract to transport corn if purchased at certain rate void; *Woolsey v. Ryan*, 59 Kan. 605, 54 Pac. 664, holding damages not recoverable from nonpromising party to agreement to render services.

Distinguished in *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* 61 L. R. A. 405, 58 C. C. A. 222, 121 Fed. 301, holding valid contract for purchase of phosphate for specified period, at fixed price, in amounts as ordered, but amounting annually to specified number of tons, with right to purchase annually twice that amount.

Statutory construction, unexpressed intention.

Cited in *Union Cent. L. Ins. Co. v. Champlin*, 54 C. C. A. 210, 116 Fed. 860; *Johnson v. Southern P. Co.* 54 C. C. A. 511, 117 Fed. 465, holding legislature's unexpressed intention cannot be read into statute; *Chauncey v. Dyke Bros.* 55 C. C. A. 591, 119 Fed. 13, dissenting opinion by Sanborn, J., who holds secret intention cannot be interpreted into unambiguous statute.

24 L. R. A. 359, *UNION SAV. BANK & TRUST CO. v. GELBACH*, 8 Wash. 497, 36 Pac. 467.

Followed without special discussion in *Burns v. Woolery*, 15 Wash. 135, 45 Pac. 894.

Interest on municipal warrants.

Cited in *Williams v. Shoudy*, 12 Wash. 368, 41 Pac. 169, holding warrants issued for illegal indebtedness subsequently ratified draw 10 per cent interest from original presentment; *State ex rel. Theis v. Bowen*, 11 Wash. 433, 39 Pac. 618, holding state warrants draw interest at rate in force when presented to treasurer for indorsement; *Seton v. Hoyt*, 34 Or. 280, 43 L. R. A. 638, footnote p. 634, 75 Am. St. Rep. 641, 55 Pac. 967, denying power to reduce, by subse-

quent statute, rate of interest on county warrants indorsed "Not paid for want of funds."

Distinguished in *State ex rel. Capital Nat. Bank v. Young*, 22 Wash. 549, 61 Pac. 725, holding state warrants draw interest at rate prevailing at presentation, not at issuance.

Nature of municipal warrants.

Cited in *Eidemiller v. Tacoma*, 14 Wash. 386, 44 Pac. 877, holding law providing for diversion of fund invalid as to prior warrants drawn thereon; *Bardsley v. Sternberg*, 17 Wash. 249, 49 Pac. 499, holding municipal warrants subject to original defenses; *Fidelity Trust Co. v. Palmer*, 22 Wash. 475, 79 Am. St. Rep. 953, 61 Pac. 158, holding innocent purchaser from apparent owner of city warrant acquires title.

Running of statute of limitations against municipal warrants.

Cited in *Potter v. New Whatcom*, 20 Wash. 590, 72 Am. St. Rep. 135, 56 Pac. 394, holding statute does not run against city warrant until notice of readiness to pay.

Compelling payment of municipal warrants.

Cited in *Mason v. Purdy*, 11 Wash. 596, 40 Pac. 130, and *Cloud v. Sumas*, 9 Wash. 401, 37 Pac. 305, holding mandamus proper to compel payment of municipal warrant.

24 L. R. A. 363, *WALKER v. HANNIBAL & ST. J. R. CO.* 121 Mo. 575, 42 Am. St. Rep. 547, 26 S. W. 360.

Railroad's liability for injury by articles thrown from train.

Cited in footnote to *Card v. Eddy*, 36 L. R. A. 806, which denies railroad company's liability for injury to employee by throwing weighted message from moving train.

Cited in note (27 L. R. A. 166) on master's civil responsibility for wrongful or negligent act of servant or agent towards one who has no claim on master by reason of contract, incipient or perfected.

Distinguished in *Fletcher v. Baltimore & P. R. Co.* 168 U. S. 143, 42 L. ed. 414, 18 Sup. Ct. Rep. 35, holding liability of railroad to person injured by timber thrown off train by employees for own use, according to custom, question for jury.

24 L. R. A. 369, *ALLIANCE MILL CO. v. EATON*, 86 Tex. 401, 25 S. W. 614.

Acceptance of deed of trust for creditors.

Cited in *Bauman v. Jaffray*, 6 Tex. Civ. App. 495, 26 S. W. 260, holding acceptance by trustee of mortgage to secure preferred creditors not equivalent to assent by beneficiaries; *McLaughlin v. Carter*, 13 Tex. Civ. App. 702, 37 S. W. 666, holding notice to trustee of acceptance of deed of trust sufficient; *Louisiana Sugar Ref. Co. v. Harrison*, 9 Tex. Civ. App. 148, 29 S. W. 500, holding instruction making creditor's assent to deed of trust depend on notice to trustee erroneous; *Reagan v. First Nat. Bank*, 157 Ind. 650, 61 N. E. 575, and *Ohio Cultivator Co. v. Peoples Nat. Bank*, 22 Tex. Civ. App. 654, 55 S. W. 765, holding beneficiary accepting deed of trust for creditors cannot attack other secured claims; *Clark v. National Bank*, 13 C. C. A. 549, 30 U. S. App. 225, 66 Fed. 408; *Wallace v. Bagley*, 6 Tex. Civ. App. 489, 26 S. W. 519; *Tittle v. Vanleer*, 89 Tex. 178, 37 L. R. A. 342, 29 S. W. 1065,—holding deed of trust to pay creditors invalid as

against attachment levied before acceptance by beneficiaries; *Schneider v. McCoulsky*, 6 Tex. Civ. App. 504, 26 S. W. 170, holding attachment superior to claims of beneficiaries of mortgage for creditors not accepting before levy; *Reagan v. First Nat. Bank*, 157 Ind. 670, 61 N. E. 575, holding creditors secured by trust deed not entitled to priority over general assignment intervening between making and acceptance; *Martin-Brown Co. v. Henderson*, 9 Tex. Civ. App. 134, 28 S. W. 695, holding trust deed for creditors takes effect as to each upon acceptance; *Sutton v. Simon*, 91 Tex. 641, 45 S. W. 559, holding deed of trust valid lien from time of acceptance by creditor not participating in fraud; *Parlin & O. Co. v. Harrell*, 8 Tex. Civ. App. 374, 27 S. W. 1084, and *Hamilton-Brown Shoe Co. v. Mayo*, 8 Tex. Civ. App. 167, 27 S. W. 781, holding assent of creditors in trust deed essential to constitute valid lien; *South Texas Nat. Bank v. Texas & L. Lumber Co.* 30 Tex. Civ. App. 414, 70 S. W. 768, holding creditor garnishing stock previously assigned not entitled to prevail without showing that beneficiaries of assignment had not assented thereto.

Cited in notes (54 L. R. A. 343) on right of creditor to participate under assignment or deed of trust for benefit of creditors which he has repudiated; (37 L. R. A. 361) on whether preference by mortgage or sale is an assignment for creditors.

Distinguished in *Kraus v. Haas*, 6 Tex. Civ. App. 668, 25 S. W. 1025, holding beneficiary accepting deed of trust entitled to priority over subsequent attachment; *Bailey v. Deware*, 91 Tex. 92, 40 S. W. 966, holding issue of acceptance by beneficiary of trust deed not raised by pleadings.

Trust deeds.

Cited in *Texas Loan Agency v. Gray*, 12 Tex. Civ. App. 432, 34 S. W. 650, holding trust deed does not vest legal title in trustee after default.

What constitutes assignment of funds.

Cited in *Adoue v. Blum*, 6 Tex. Civ. App. 289, 25 S. W. 335, holding instructions to remit to creditor, and telegram to creditor to protect drafts, not assignment of funds.

24 L. R. A. 387, *FRENCH v. DEANE*, 19 Colo. 504, 36 Pac. 609.

Sufficiency of complaint for enticing husband.

Cited in *Williams v. Williams*, 20 Colo. 57, 37 Pac. 614, holding complaint alleging ultimate facts in action for enticing away husband sufficient.

Exemplary damages for malicious wrongs.

Cited in *Allison v. People*, 6 Colo. App. 85, 39 Pac. 903, holding exemplary damages not recoverable for wrongful arrest, without proof of reckless disregard of rights; *Republican Pub. Co. v. Conroy*, 5 Colo. App. 266, 38 Pac. 423, holding exemplary damages for libel not recoverable without proof of express malice; *Denver Tramway Co. v. Cloud*, 6 Colo. App. 451, 40 Pac. 779, holding exemplary damages not recoverable for expulsion from street car by conductor; *Page v. Yool*, 28 Colo. 467, 65 Pac. 636, holding mere intentional doing of wrongful act will not justify exemplary damages; *Williams v. Williams*, 20 Colo. 71, 37 Pac. 614, holding exemplary damages recoverable in action for enticing away husband, in wanton disregard of plaintiff's feelings.

Ex post facto laws.

Cited in *Brown v. Challis*, 23 Colo. 148, 46 Pac. 679, holding right to partition

of mining property not affected by legislation while proceedings pending; *Evans v. Denver*, 26 Colo. 196, 57 Pac. 696, holding act authorizing reassessment of invalid sewer assessments, retrospective.

Cited in footnotes to *State v. Kyle*, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed; *People ex rel. Chandler v. McDonald*, 29 L. R. A. 834, which holds statute not *ex post facto* for abrogating provision for change of magistrate or of venue for prejudice.

Distinguished in *Isola v. Weber*, 13 Misc. 99, 34 N. Y. Supp. 77, holding constitutional inhibition of limit of recovery in actions for negligently causing death comprehends pre-existing rights of action.

24 L. R. A. 392, *PUEBLO v. STRAIT*, 20 Colo. 13, 46 Am. St. Rep. 273, 36 Pac. 789.

Followed without special discussion in *Shutt Invest. Co. v. Pueblo*, 11 Colo. App. 439, 54 Pac. 644.

Abutter's right to damages for structure in street.

Cited in footnotes to *Home Bldg. & Conveyance Co. v. Roanoke*, 27 L. R. A. 551, which holds elevated approach to bridge over railroad tracks not additional burden; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *Garrett v. Lake Roland Elev. R. Co.* 24 L. R. A. 396, which holds erection for elevated railroad of abutment 9 feet high in street not taking of abutter's property; *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 246, which holds elevated railroad a "railway;" *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, sustaining right of abutting owner to compensation for construction in street of elevated railway track.

Abutter's right to damages for change of grade.

Cited in *Denver v. Bonesteel*, 30 Colo. 110, 69 Pac. 595, holding city liable for damages to abutting owners by change of grade, after lot owners had conformed to previously established grade.

24 L. R. A. 396, *GARRETT v. LAKE ROLAND ELEV. R. CO.* 79 Md. 277, 29 Atl. 830.

Rights of abutter in street.

Cited in *Poole v. Falls Road Electric R. Co.* 89 Md. 536, 41 Atl. 1069, denying injunction to prevent consequential injuries from construction of duly authorized street railway.

Cited in footnotes to *Pueblo v. Strait*, 24 L. R. A. 392, which holds abutter entitled to damages on building of viaduct over railroad, practically closing street; *Freiday v. Sioux City Rapid Transit Co.* 26 L. R. A. 246, which holds elevated railroad a "railway;" *Doane v. Lake Street Elev. R. Co.* 36 L. R. A. 97, which holds elevated railroad on pillars in public street not additional servitude; *Aldrich v. Metropolitan West Side Elev. R. Co.* 57 L. R. A. 237, which denies right to recover for injury to apartment house from elevated road crossing highway 19 feet away; *De Geofroy v. Merchants' Bridge Terminal R. Co.* 64 L. R. A. 959, sustaining right of abutting owner to compensation for construction in street of elevated railway track.

Distinguished in *Townsend v. Epstein*, 93 Md. 557, 52 L. R. A. 413, 86 Am.

St. Rep. 441, 49 Atl. 629, granting injunction against building private covered way across street.

Public improvement as nuisance.

Cited in *Omaha v. Flood*, 57 Neb. 129, 77 N. W. 379, holding duly authorized change of grade of street, damaging adjacent property, not nuisance.

24 L. R. A. 403, *VAN WITSEN v. GUTMAN*, 79 Md. 405, 29 Atl. 608.

Abutter's rights in highway.

Cited in *Townsend v. Epstein*, 93 Md. 550, 52 L. R. A. 411, 86 Am. St. Rep. 441, 49 Atl. 629, enjoining construction of covered way across street, interfering with abutter's light and air; *Bembe v. Anne Arundel County*, 94 Md. 326, 57 L. R. A. 280, 51 Atl. 179, holding county commissioners liable for failure to repair highway forming plaintiff's only egress; *Ulman v. Charles Street Ave. Co.* 83 Md. 144, 34 Atl. 366, holding individual cannot acquire title by adverse possession to part of highway; *Cereghino v. Oregon Short Line R. Co.* 26 Utah, 479, 99 Am. St. Rep. 843, 73 Pac. 634, denying right of city council to authorize permanent private switch track upon public street.

Cited in footnote to *Field v. Barling*, 24 L. R. A. 406, which holds abutter's right to have alley kept open includes right to light and air from above.

24 L. R. A. 406, *FIELD v. BARLING*, 149 Ill. 556, 41 Am. St. Rep. 311, 37 N. E. 850.

Rights of abutter in highway.

Cited in *Woollacott v. Chicago*, 187 Ill. 518, 58 N. E. 426, holding purchasers of lot according to plat have right to have streets thereon kept open; *Pennsylvania Co. v. Chicago*, 181 Ill. 296, 53 L. R. A. 226, 54 N. E. 825, holding abutting property owner cannot enjoin use of street as hack stand with municipal consent; *First Nat. Bank v. Tyson*, 133 Ala. 477, 59 L. R. A. 403, 91 Am. St. Rep. 46, 32 So. 144, sustaining abutter's right to relief against interference with light, air, and view by pillars of adjacent building encroaching on street; *Townsend v. Epstein*, 93 Md. 551, 52 L. R. A. 411, footnote p. 409, 86 Am. St. Rep. 441, 49 Atl. 629, sustaining abutter's right to relief against diminution of light and air by bridge over street; *Aldis v. Union Elev. R. Co.* 203 Ill. 575, 68 N. E. 95, sustaining abutting owner's right to compensation for loss of air, light, view, access, etc., by construction and operation of elevated road in street.

Distinguished in *Stewart v. Chicago General Street R. Co.* 58 Ill. App. 454, and *Bond v. Pennsylvania Co.* 69 Ill. App. 512, holding abutter cannot enjoin lawful occupation of street by railroad; *Bond v. Pennsylvania Co.* 171 Ill. 518, 49 N. E. 545, holding railroad owning abutting property, described with reference to street, not estopped to construct tracks therein, against objection of abutters; *Kotz v. Illinois C. R. Co.* 188 Ill. 583, 59 N. E. 240, holding abutting owner has no easement of light and air in railroad right of way.

Municipal grants of rights in highway.

Cited in *Snyder v. Mt. Pulaski*, 176 Ill. 402, 44 L. R. A. 409, 52 N. E. 62, holding city cannot grant permanent right to maintain private well in street; *Hibbard v. Chicago*, 173 Ill. 96, 40 L. R. A. 622, 50 N. E. 256, Affirming 59 Ill. App. 475, holding city cannot grant permanent use of street for awning; *McGann v. People*, 194 Ill. 539, 62 N. E. 941, holding city cannot, without consent of

property owners, grant right to build private switch in street; *People ex rel. Kocourek v. Chicago*, 193 Ill. 561, 62 N. E. 187, dissenting opinion by Magruder, J., holding city cannot grant right to construct bridge over alley; *McCormick v. South Park*, 150 Ill. 530, 37 N. E. 1075, raising, without passing upon, question as to character of balcony as unlawful encroachment; *People ex rel. Faulkner v. Harris*, 203 Ill. 279, 96 Am. St. Rep. 304, 67 N. E. 785, denying municipal authority to permit construction of bay window extending 18 inches into street; *McWethy v. Aurora Electric Light & P. Co.* 202 Ill. 227, 67 N. E. 9, denying abutter's right to enjoin authorized placing of telegraph poles in street, when fee is in municipality, in absence of special damage; *Chicago v. Pooley*, 112 Ill. App. 345, denying right of private person, although having consent of abutter and authority from city, to erect stand in public street.

Cited in footnote to *Van Witsen v. Gutman*, 24 L. R. A. 403, which denies right to take away for private use abutter's easement in public alley.

Special damage entitling individual to enjoin infringement of public right.

Cited in *Cicero Lumber Co. v. Cicero*, 176 Ill. 29, 42 L. R. A. 705, 68 Am. St. Rep. 155, 61 N. E. 758, holding lumber company with no other avenue for delivery may enjoin ordinance prohibiting use of street by traffic wagons; *John Anisfield Co. v. Edward B. Grossman & Co.* 98 Ill. App. 187, sustaining right of abutting owner to enjoin construction of adjacent bay window extending over sidewalk.

Injunction to protect easement.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Munsell*, 192 Ill. 434, 61 N. E. 374, holding destruction of easement enjoined; *Donovan v. Pennsylvania Co.* 61 L. R. A. 144, 57 C. C. A. 366, 120 Fed. 219, sustaining right of railroad company to enjoin congregation of hackmen in such numbers as to prevent free ingress and egress.

Validity of ordinances.

Distinguished in *Chicago Teleph. Co. v. Northwestern Teleph. Co.* 100 Ill. App. 64, holding ordinance within powers of council cannot be questioned for irregularities in passage.

24 L. R. A. 412, *CHICAGO v. BLAIR*, 149 Ill. 310, 36 N. E. 829.

Determination by public authorities of what is local improvement.

Cited in *Illinois C. R. Co. v. Decatur*, 154 Ill. 176, 38 N. E. 626, holding city authorities may, with due reference to benefits, declare what is public improvement; *Chicago & A. R. Co. v. Joliet*, 153 Ill. 653, 39 N. E. 1077, holding council's determination of benefits to property subject to special taxation for local improvement conclusive.

Basis of special assessment.

Cited in *People ex rel. Demen v. Ennis*, 188 Ill. 535, 59 N. E. 236, holding (*obiter*) special assessments to maintain local improvements illegal; *Sears v. Boston Street Comrs.* 173 Mass. 355, 53 N. E. 876, holding statute authorizing levy of special assessments, in excess of benefits received, unconstitutional.

What is local improvement.

Cited in *Chicago v. Hanreddy*, 102 Ill. App. 8, holding local improvement a public improvement whose benefits confined to locality; *New York L. Ins. Co. v.*

Prest, 71 Fed. 817, and *Kansas City v. O'Connor*, 82 Mo. App. 660, denying validity of special tax for street sprinkling; *Ewart v. Western Springs*, 180 Ill. 323, 54 N. E. 478, sustaining special assessment for electric light poles, wires, and lamps; *Palmer v. Danville*, 154 Ill. 162, 38 N. E. 1067, sustaining special tax for lateral sewer and water-service pipes; *West Chicago Park v. Baldwin*, 162 Ill. 91, 44 N. E. 404, holding water mains and sewer not street improvement justifying special assessment; *Crane v. West Chicago Park*, 153 Ill. 351, 26 L. R. A. 312, footnote p. 311, 38 N. E. 943, holding maintenance and repair of boulevards by annual assessments not local improvement.

Cited in footnotes to *Sperry v. Flygare*, 49 L. R. A. 757, which holds rural highway not local improvement authorizing assessment on farm lands; *Sears v. Board of Alderman*, 43 L. R. A. 834, which sustains frontage assessments on abutting property for expense of sprinkling streets.

Sprinkling streets as public function.

Cited in footnote to *Savage v. Salem*, 24 L. R. A. 787, which holds tanks used for sprinkling streets not removable from street as nuisance *per se*.

Right to impose on abutter duty of cleaning sidewalks.

Cited in footnotes to *Lincoln v. Janesch*, 56 L. R. A. 762, which sustains statute imposing on lot owners duty of repairing sidewalks and keeping them free from snow and ice; *State v. Jackman*, 42 L. R. A. 438, which holds void, ordinance requiring abutter to keep sidewalk free from snow.

24 L. R. A. 417, MORROW SHOE MFG. CO. v. NEW ENGLAND SHOE CO.

6 C. C. A. 508, 8 C. C. A. 652, 18 U. S. App. 256, 616, 57 Fed. 685, 60 Fed. 341.

Rights of vendor of fraudulently purchased goods.

Cited in *Missouri Broom Mfg. Co. v. Guymon*, 53 C. C. A. 21, 115 Fed. 112, holding right to replevin goods fraudulently purchased does not preclude equitable relief where property manufactured and sold; 581 *Diamonds v. United States*, 60 L. R. A. 599, 56 C. C. A. 126, 119 Fed. 560, denying right of vendor of goods fraudulently purchased to reclaim from government seizing from smuggler; *Ullman v. Biddle Bros.* 53 W. Va. 420, 44 S. E. 280, sustaining owner's right to replevin goods wrongfully sold by his bailee to bona fide purchaser.

Contract creditor's right in Federal court to equitable relief under state statute.

Cited in *Hook v. Ayers*, 12 C. C. A. 565, 24 U. S. App. 487, 64 Fed. 661, holding simple contract creditors cannot attack transfer of corporate property to officer; *Brown v. John V. Farwell Co.* 74 Fed. 765, holding creditor filing bill to reach debtor's assets must show *nulla bona* return of execution on judgment; *Jacobs v. Mexican Sugar Co.* 130 Fed. 592, denying right of nonjudgment creditor of corporation to pursue purely equitable remedy granted by state statute, in Federal court.

Distinguished in *Darragh v. H. Wetter Mfg. Co.* 23 C. C. A. 614, 49 U. S. App. 1, 78 Fed. 11, holding contract creditor may maintain bill in Federal court under state statutes for appointment of receiver of insolvent corporation.

Disapproved in *Jones v. Mutual Fidelity Co.* 123 Fed. 528, sustaining right of nonjudgment creditors of corporation to pursue in Federal courts purely equitable remedy provided by state statute.

Objection on appeal to sufficiency of complaint.

Cited in *Patillo v. Allen-West Commission Co.* 47 C. C. A. 645, 108 Fed. 737

(concurring opinion), holding objection on appeal to sufficiency of complaint not sustainable where facts supporting judgment inferable; *Less v. English*, 29 C. C. A. 280, 56 U. S. App. 16, 85 Fed. 473, dissenting opinion by Sanborn, J., who holds objection to sufficiency of complaint, first made on appeal, not sustainable where facts supporting judgment fairly inferable.

Contract creditor's right to equitable relief.

Cited in *Hook v. Ayers*, 12 C. C. A. 565, 24 U. S. App. 487, 64 Fed. 661, holding simple contract creditor cannot attack transfer of corporate property to officer.

24 L. R. A. 426, PETTINGELL v. CHELSEA, 161 Mass. 368, 37 N. E. 380.

Municipal liability for negligence.

Cited in *Daniels v. Racine*, 98 Wis. 651, 74 N. W. 553, holding municipal liability for defective highway purely statutory; *Saunders v. Ft. Madison*, 111 Iowa, 105, 82 N. W. 428, denying city's liability for negligence of fireman in ringing truck bell, frightening horse; *Dolloff v. Ayer*, 162 Mass. 571, 39 N. E. 191, denying town's liability for hose mixed with town's and used by fire department; *Workman v. New York City*, 179 U. S. 576, 45 L. ed. 326, 21 Sup. Ct. Rep. 212 (dissenting opinion), majority holding city liable for negligent collision of fire boat with another vessel.

Distinguished in *Butman v. Newton*, 179 Mass. 6, 88 Am. St. Rep. 349, 60 N. E. 401, holding city liable for negligence of servants operating stone-crusher, frightening horse.

— To employees.

Cited in *McCann v. Waltham*, 163 Mass. 344, 40 N. E. 20, denying city's liability to laborer for negligence of assistant street superintendent; *Taggart v. Fall River*, 170 Mass. 326, 49 N. E. 622, denying city's liability for negligence, to laborer employed in constructing street; *Peaty v. New York*, 33 Misc. 236, 67 N. Y. Supp. 276, denying city's liability for death of lineman through defective fire alarm pole.

Cited in footnotes to *Rhobidas v. Concord*, 51 L. R. A. 381, which sustains city's liability for failure to furnish servant reasonably safe place to work; *Peterson v. Wilmington*, 56 L. R. A. 959, which denies city's liability for injury to fireman from negligence in permitting apparatus to get out of repair; *Colwell v. Waterbury*, 57 L. R. A. 218, which denies city's liability for injury to employee through defect in machine for crushing stone for highways.

Distinguished in *Coan v. Marlborough*, 164 Mass. 208, 41 N. E. 238, sustaining city's liability to laborer for negligence in constructing sewer.

24 L. R. A. 428, UNITED STATES v. E. C. KNIGHT CO. 9 C. C. A. 297, 17 U. S. App. 466, 60 Fed. 934.

Anti-trust laws.

Affirmed in *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, holding monopoly of manufacture of sugar not within Federal anti-trust act.

Cited in *United States v. Debs*, 5 Inters. Com. Rep. 208, 64 Fed. 724, sustaining injunction against interference with railroads using Pullman cars, as combination in restraint of interstate commerce.

Cited in footnotes to *Gibbs v. McNeeley*, 60 L. R. A. 152, which holds anti-trust act violated by combination of manufacturers of product of state, market for four fifths of which in other states, to limit production and raise price; *Fuqua v. Pabst Brewing Co.* 35 L. R. A. 241, which holds beer brought from other state under invalid trust agreement subject to anti-trust law of state on arrival.

Combinations to restrain competition and control prices.

Cited in footnotes to *Hawarden v. Youghioghney & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right of action against wholesalers and favored retailers combining to drive other retailers out of business; *State ex rel. Crow v. Armour Packing Co.* 61 L. R. A. 464, which holds unlawful combination to fix prices shown by acts of competing dealers; *People v. Milk Exchange*, 27 L. R. A. 437, which holds incorporated milk exchange, constituting combination to fix price of milk, illegal; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent and maintain agreed prices; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices.

24 L. R. A. 430, *FIFIELD v. PHOENIX*, 4 Ariz. 283, 36 Pac. 916.

City's liability for injuries from discharge of fireworks.

Cited in footnotes to *Aron v. Wausau*, 40 L. R. A. 733, which denies city's liability for injury by explosion of cannon cracker on Fourth of July, in violation of ordinance; *Love v. Raleigh*, 28 L. R. A. 192, which denies city's liability for acts of servants in managing fireworks; *Bartlett v. Clarksburg*, 43 L. R. A. 295, which denies liability of town for injuries from fireworks, etc., fired on streets with consent of town authorities; *Madisonville v. Bishop*, 57 L. R. A. 130, which holds city liable for injuries by unorganized crowd of merry-makers.

24 L. R. A. 433, *STAPLES v. STAPLES*, 87 Wis. 592, 58 N. W. 1036.

Commitment for noncompliance with order to pay money.

Cited in *Re Meggett*, 105 Wis. 295, 81 N. W. 419, holding ability to pay not jurisdictional prerequisites to commitment for failure to comply with order; *Re Meggett*, 105 Wis. 295, 81 N. W. 419, sustaining court's power to compel payment of rents wrongfully collected by mortgagor, by commitment for contempt; *Hutchison v. Canon*, 6 Okla. 728, 55 Pac. 1077, sustaining court's power to enforce order to pay alimony by imprisonment until compliance.

Cited in note (34 L. R. A. 667) on constitutionality of imprisonment for debt.

Alimony as debt.

Cited in footnotes to *Coffman v. Finney*, 55 L. R. A. 794, which holds judgment for alimony a debt which survives death of both parties pending appeal; *State v. Cook*, 58 L. R. A. 625, which holds decree for alimony not within prohibition against imprisonment for debt.

Judgment for future payments.

Cited in *Barry v. Niessen*, 114 Wis. 259, 90 N. W. 166, holding bastardy judgment directing future payments cannot be docketed as lien on defendant's realty.

24 L. R. A. 444, KIRKWOOD v. FIRST NAT. BANK, 40 Neb. 484, 42 Am. St. Rep. 683, 58 N. W. 1016.

Followed without discussion in Kirkwood v. Exchange Nat. Bank, 40 Neb. 497, 58 N. W. 1135.

Power to grant legal or equitable relief.

Cited in *State ex rel. Horton v. Dickinson*, 63 Neb. 879, 89 N. W. 431, sustaining power of district court to give legal or equitable relief, as pleadings and proof warrant.

Actions on lost negotiable paper.

Cited in *Palmer v. Carpenter*, 53 Neb. 396, 73 N. W. 690, holding indemnity bond not prerequisite to recovery on unindorsed note payable to order, lost before maturity.

Cited in footnotes to *Bank of Gilby v. Farnsworth*, 38 L. R. A. 843, which holds drawer of draft lost in mails during transportation from payee for collection discharged by delay in discovering loss; *Haug v. Riley*, 40 L. R. A. 244, which holds right to prove lost note by copy not taken away by statute.

Maturity of certificate of deposit.

Cited in footnote to *Towle v. Starz*, 36 L. R. A. 463, which requires demand on last day of grace on expiration of six months, on certificate of deposit containing provision for leaving six months, and not bearing interest after maturity.

Cited in note (46 L. R. A. 776, 809) on rights of holder of negotiable paper transferred after maturity.

General finding sustaining judgment.

Limited in *Coad v. Read*, 46 Neb. 47, 66 N. W. 1002, holding general finding by court, where special finding not requested, sustains judgment.

24 L. R. A. 449, YEAZEL v. EINSPAHR, 40 Neb. 432, 58 N. W. 1020.

Right of purchaser at judicial sale to usufruct.

Cited in *Hendryx v. Evans*, 120 Iowa, 313, 94 N. W. 853, holding sale of real estate by sheriff under execution not complete in Nebraska, until confirmed by court; *Clark v. Missouri, K. & T. Trust Co.* 59 Neb. 59, 80 N. W. 257, and *Orr v. Broad*, 52 Neb. 497, 72 N. W. 850, holding purchaser at execution sale acquires right to rents and profits after confirmation, as against mortgagee in possession; *Woodworth v. Northwestern Mut. L. Ins. Co.* 185 U. S. 358, 46 L. ed. 947, 22 Sup. Ct. Rep. 676, holding obligee of appeal bond after confirmation of foreclosure sale entitled, upon affirmance, to recover rents and profits since confirmation.

Distinguished in *Philadelphia Mortg. & T. Co. v. Goos*, 47 Neb. 811, 66 N. W. 843, holding receiver may be appointed to collect rents and profits of mortgaged premises.

— To growing crops.

Cited in *Monday v. O'Neil*, 44 Neb. 726, 48 Am. St. Rep. 760, 63 N. W. 32, holding tenant entitled to crop grown during mortgage foreclosure.

Cited in footnote to *Aldrich v. Bank of Ohio*, 57 L. R. A. 920, which denies title of purchaser of land at judicial sale to growing crops.

24 L. R. A. 452, *STATE v. OLYMPIC CLUB*, 46 La. Ann. 935, 15 So. 190.

Prize fighting.

Report of second appeal in 47 La. Ann. 1096, 17 So. 599, holding proviso excepting glove contests at athletic clubs from prize-fight statute, meaningless.

Statutory construction.

Cited in *New Orleans v. Collins*, 52 La. Ann. 980, 27 So. 532, holding courts will not construe law permitting operation of slot machines as permitting use for gambling.

24 L. R. A. 462, *NORTH & SOUTH ROLLING STOCK CO. v. PEOPLE*, 147 Ill. 234, 35 N. E. 603.

Keeping corporate books within state.

Distinguished in *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 237, granting mandamus to compel keeping of corporate books at its principal office in state.

Effect of total abandonment of corporate business.

Cited in footnote to *Byrne v. Schuyler Electric Mfg. Co.* 28 L. R. A. 304, which holds *ultra vires*, attempt of corporation to exchange entire property for stock of other company.

Recognition or exclusion of foreign corporations.

Cited in note (24 L. R. A. 292) on recognition or exclusion of foreign corporations.

24 L. R. A. 469, *HENDERSON v. STATE*, 137 Ind. 552, 36 N. E. 257.

Requirement that act cover but one subject, embraced in title.

Cited in *Airy v. People*, 21 Colo. 151, 40 Pac. 362, holding act providing for payment of salaries and disposition of fees not multifarious; *Isenhour v. State*, 157 Ind. 525, 87 Am. St. Rep. 228, 62 N. E. 40, holding title of pure food act reciting subsidiary means of attaining purpose of act, not multifarious; *Gustavel v. State*, 153 Ind. 616, 54 N. E. 123, holding means of protecting fish and game may be embraced in one statute; *Garrigus v. Howard County*, 157 Ind. 109, 60 N. E. 948, holding provision for employment of expert accountants germane to subject expressed in title of fee and salary act.

Constitutional guaranty of free justice.

Cited in footnote to *Knee v. Baltimore City Pass. R. Co.* 42 L. R. A. 363, which sustains order staying all further proceedings in action till costs of appeal are paid.

Constitutional provision for open courts.

Cited in footnote to *State ex rel. Bragg v. Rogers*, 32 L. R. A. 520, which holds valid, act requiring county board of revenue to act in private.

Local legislation.

Cited in *State ex rel. Benton County v. Boice*, 140 Ind. 508, 39 N. E. 64, holding fee and salary act omitting to provide for treasurer of one county void as to county treasurers.

Cited in footnote to *Henderson v. Koenig*, 57 L. R. A. 659, which holds void, statute requiring probate judge of one county only, to accept salary instead of fees.

Fee and salary act.

Followed in *Legler v. Paine*, 147 Ind. 188, 45 N. E. 604 (distinguished in dis-

senting opinion); *Gross v. Whitley County*, 158 Ind. 534, 58 L. R. A. 396, 64 N. E. 25; *Sudbury v. Monroe County*, 157 Ind. 450, 62 N. E. 45; *State ex rel. McCay v. Krost*, 140 Ind. 44, 39 N. E. 46,—holding fee and salary act of 1891 not special or local.

Cited in *Harmon v. Madison County*, 153 Ind. 72, 54 N. E. 105, holding fee and salary act within constitutional provision for grading compensation in proportion to population and necessary services; *Walsh v. State*, 142 Ind. 358, 33 L. R. A. 393, 41 N. E. 65, holding fee and salary act, unconstitutional as to certain officers, curable by amendment; *Meer v. Shelby County*, 26 Ind. App. 87, 59 N. E. 184, holding county treasurer's salary governed by amendment passed after election.

When courts will consider constitutionality of statute.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 14, 71 Am. St. Rep. 301, 49 N. E. 582, and *Pennsylvania Co. v. Ebaugh*, 144 Ind. 694, 43 N. E. 936, holding courts will pass only upon constitutional questions necessarily involved; *Fesler v. Brayton*, 145 Ind. 84, 32 L. R. A. 582, 44 N. E. 37; *Switzerland County v. Reeves*, 148 Ind. 476, 46 N. E. 995; *Cass County v. Plotner*, 149 Ind. 119, 48 N. E. 635; *Isenhour v. State*, 157 Ind. 520, 87 Am. St. Rep. 228, 62 N. E. 40; *Currier v. Elliott*, 141 Ind. 407, 39 N. E. 554,—holding party seeking to overthrow statute must show rights impaired; *Gustavel v. State*, 153 Ind. 615, 54 N. E. 123, and *Citizens Street R. Co. v. Haugh*, 142 Ind. 258, 41 N. E. 533, holding statute must be shown clearly in conflict with Constitution; *Boring v. State*, 141 Ind. 660, 41 N. E. 270, dissenting opinion by *Jordan, J.*, who holds statute not unconstitutional unless clearly in conflict.

24 L. R. A. 483, *DICKSON v. WALDRON*, 135 Ind. 507, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1.

Master's liability for employee's torts.

Cited in *Efroymson v. Smith*, 29 Ind. App. 454, 63 N. E. 328, holding owner liable for foreman of store placing customer, wrongfully accused of stealing, under restraint; *Tyson v. Joseph H. Bauland Co.* 68 App. Div. 315, 74 N. Y. Supp. 59, holding proprietor of store liable for act of store detective, also special patrolman, in making arrest; *Flora v. Russell*, 138 Ind. 161, 37 N. E. 593 (dissenting opinion), majority holding railroad not liable for act of check clerk at freight depot in procuring search warrant; *Walker v. Wehking*, 29 Ind. App. 73, 63 N. E. 128 (dissenting opinion), majority denying master's liability for foreman's sending employee to work in dangerous place.

Cited in footnote to *Paulton v. Keith*, 54 L. R. A. 670, which denies theater owner's liability for manager obstructing service of process on actor.

Cited in note (37 L. R. A. 48) on which of two or more persons is master of another, who is conceded to be servant of one of them.

Distinguished in *Healey v. Lothrop*, 171 Mass. 264, 50 N. E. 540, denying liability of one paying for services of special policeman for assault by him; *Markley v. Snow*, 207 Pa. 452, 64 L. R. A. 687, 56 Atl. 999, holding arrest by employees of mining partnership, of one suspected of having fired building, long after commission of the crime, not within scope of their employment.

Distinguished in effect in *Sharp v. Erie R. Co.* 90 App. Div. 505, 85 N. Y.

Supp. 553, denying liability of railroad company for shooting by employee, who was also police officer, in making arrest for misdemeanor.

Effect of insanity on competency of witnesses.

Cited in note (37 L. R. A. 428) on effect of insanity on competency of witnesses.

24 L. R. A. 489, *McILHINNY v. McILHINNY*, 137 Ind. 411, 45 Am. St. Rep. 186, 37 N. E. 147.

Rule in Shelley's Case.

Cited in *Bonner v. Bonner*, 28 Ind. App. 151, 62 N. E. 497, holding devise to daughter during natural life, and to heirs in fee after her death, vests fee in her; *Williams v. Hedrick*, 37 C. C. A. 554, 96 Fed. 660, holding conveyance to one for life, and remainder to children if any surviving, not within rule in *Shelley's Case*; *Wescott v. Binford*, 104 Iowa, 652, 65 Am. St. Rep. 530, 74 N. W. 18, holding rule in *Shelley's Case* not applicable to devise defeating testator's intention; *Granger v. Granger*, 147 Ind. 101, 36 L. R. A. 190, footnote p. 186, 44 N. E. 189, holding rule in *Shelley's Case* not applicable to devise to one for life, and after his death to heirs of his body, if any survive him, with devise over otherwise.

Cited in footnote to *Glover v. Condell*, 35 L. R. A. 360, which holds ownership of fund, subject to limitation, given by bequest to son, and over, in case of death without living heirs.

Distinguished in *Waters v. Lyon*, 141 Ind. 174, 40 N. E. 662, holding conveyance to certain persons "during natural lives, and at their death to their heirs," vests estate in fee.

24 L. R. A. 492, *PEOPLE ex rel. GERMAN INS CO. v. WILLIAMS*, 145 Ill. 573, 36 Am. St. Rep. 514, 33 N. E. 849.

Duties of public officers.

Cited in *Anderson v. Schubert*, 55 Ill. App. 229, holding clerk cannot be compelled to docket appeal without payment of fees; *Nagle v. Wakey*, 161 Ill. 392, 43 N. E. 1079, Affirming 59 Ill. App. 204, denying liability for defective highway, of commissioners expending resources in good faith.

Mandamus to compel performance of public duties.

Cited in *Atty. Gen. v. Taggart*, 66 N. H. 372, 29 Atl. 1027, granting mandamus to compel president of senate to exercise governor's powers during latter's disability.

Cited in note (31 L. R. A. 342) on mandamus to compel surrender of office.

Necessity of demand before application for mandamus.

Cited in *Highway Comrs. v. Jackson*, 165 Ill. 23, 45 N. E. 1000, Affirming 61 Ill. App. 382, holding demand that commissioners obey supervisor's order unnecessary before petitioning for mandamus.

24 L. R. A. 498, *STATE v. CORBETT*, 57 Minn. 345, 4 Inters. Com. Rep. 694, 59 N. W. 317.

Regulation of sale of passage tickets.

Cited in *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 85, sustaining injunction against sale by ticket brokers of special, nontransferable excursion tickets; *Allardt v. People*, 197 Ill. 508, 64 N. E. 533, and *Jannin v. State*, 42

Tex. Crim. Rep. 640, 53 L. R. A. 351, footnote p. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, holding statute against sale of passage tickets by other than authorized agent constitutional; Com. v. Keary, 14 Pa. Super. Ct. 587, holding statute against ticket brokerage constitutional; People *ex rel.* Tyroler v. City Prison, 157 N. Y. 125, 43 L. R. A. 268, footnote p. 264, 68 Am. St. Rep. 763, 51 N. E. 1006, Reversing 26 App. Div. 234, 50 N. Y. Supp. 56, denying validity of statute prohibiting other than duly appointed agents from acting as ticket brokers.

Cited in note (24 L. R. A. 152) on statutes against ticket brokerage or scalping.

When statute unconstitutional.

Cited in State v. Harrington, 68 Vt. 637, 34 L. R. A. 104, 35 Atl. 515, holding law cannot be declared unconstitutional as violating spirit of Constitution.

24 L. R. A. 502, STATE v. GLADSON, 57 Minn. 385, 59 N. W. 487.

Affirmed in Gladson v. Minnesota, 166 U. S. 430, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627.

Subjection to police power of instruments of interstate commerce.

Cited in footnote to Burrows v. Delta Transp. Co. 29 L. R. A. 468, which sustains validity of state statute requiring fire screens on vessels burning wood.

24 L. R. A. 504, UNION CENT. L. INS. CO. v. CHOWNING, 86 Tex. 654, 26 S. W. 982.

Constitutionality of statutes permitting recovery of attorney's fees.

Followed in Union Cent. L. Ins. Co. v. Chowning, 8 Tex. Civ. App. 462, 28 S. W. 117; Fidelity & C. Co. v. Allibone, 15 Tex. Civ. App. 180, 39 S. W. 632; Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. App. 73, 54 S. W. 388; Washington L. Ins. Co. v. Gooding, 19 Tex. Civ. App. 496, 49 S. W. 123; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 325, 46 L. ed. 932, 22 Sup. Ct. Rep. 662; Merchants' Life Asso. v. Yoakum, 39 C. C. A. 68, 98 Fed. 251; New York L. Ins. Co. v. Orlopp, 25 Tex. Civ. App. 290, 61 S. W. 336,—upholding constitutionality of act permitting recovery of attorney's fees and 12 per cent damages from insurance companies.

Cited in Gulf, C. & S. F. R. Co. v. Ellis, 87 Tex. 22, 26 S. W. 985, holding act permitting recovery of attorneys' fees in suits against railway corporations constitutional; Dell v. Marvin, 41 Fla. 228, 45 L. R. A. 203, 79 Am. St. Rep. 171, 26 So. 188, holding provision allowing attorney's fees to plaintiff foreclosing mechanic's lien constitutional; Terre Haute & L. R. Co. v. Salmon, 161 Ind. 139, 67 N. E. 918, holding statute authorizing recovery of attorney's fees in addition to value of fence constructed by land owner along railroad right of way constitutional.

Cited in footnotes to Gano v. Minneapolis & St. L. R. Co. 55 L. R. A. 263, which sustains requirement for payment of attorney's fee on successful appeal by land owner from award in eminent domain; Atkinson v. Woodmansee, 64 L. R. A. 325, holding statute authorizing recovery of attorney's fees upon enforcement of mechanic's lien unconstitutional.

Requirement that all courts be open.

Cited in footnote to State *ex rel.* Bragg v. Rogers, 32 L. R. A. 520, which holds valid, act requiring county board of revenue to act in private.

Constitutional guaranty of free justice.

Cited in footnote to *Knee v. Baltimore City Pass. R. Co.* 42 L. R. A. 363, which sustains order staying all further proceedings in action till costs of appeal are paid.

Assignment of error.

Cited in *Morgan v. Butler*, 23 Tex. Civ. App. 474, 56 S. W. 689, and *Cammack v. Rogers*, 96 Tex. 460, 73 S. W. 795, holding assignment of error embracing more than one proposition improper; *Holton v. Galveston, H. & S. A. R. Co.* 31 Tex. Civ. App. 130, 71 S. W. 408, holding assignment of error complaining of several different matters, without segregating particular errors complained of, insufficient.

Definiteness of question to be certified.

Cited in note (31 L. R. A. 397) on definiteness of question to be certified.

24 L. R. A. 507, *SNODDY v. BOLEN*, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932.

Reservation in deeds.

Cited in *Harris v. Cobb*, 49 W. Va. 356, 38 S. E. 559, construing reservation in deed of one half usual royalty of one eighth of petroleum as reserving title to one sixteenth of oil; *Porter v. Kansas City & N. Connecting R. Co.* 103 Mo. App. 430, 77 S. W. 582, holding railroad granted land with reservation of right of way, without right to maintain ditch or platform interfering therewith.

Effect of deed bounded on highway.

Cited in *Thomas v. Hunt*, 134 Mo. 399, 32 L. R. A. 859, 35 S. W. 581; *Grant v. Moon*, 128 Mo. 48, 30 S. W. 328; *Overland Mach. Co. v. Alpenfels*, 30 Colo. 172, 69 Pac. 574,—holding grant bounded upon highway carries fee to center; *Scudder v. Detroit*, 117 Mich. 80, 75 N. W. 286, holding grantee of lands bounded on alley, where reversion reserved to plattee or assigns, takes fee; *Union Elevator Co. v. Kansas City Suburban Belt R. Co.* 135 Mo. 366, 36 S. W. 1071, holding abutter owns fee to center of street, subject to public easement; *Carter v. Foster*. 145 Mo. 396, 47 S. W. 6, holding city's interest in streets limited to public use; *Walker v. Sedalia*, 74 Mo. App. 75, holding abutter may recover for shade trees in street destroyed by change of grade.

Cited in footnote to *Crocker v. Cotting*, 33 L. R. A. 245, which holds no part of passageway included in grant of land "bounded by" such passageway.

24 L. R. A. 516, *LOCKWOOD v. WABASH R. CO.* 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698.

Rights of public in street.

Cited in *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 562, 34 L. R. A. 374, 56 Am. St. Rep. 515, 31 S. W. 784, holding ordinance granting right to occupy space under street for subway, to exclusion of other public uses, void; *Pennsylvania Co. v. Chicago*, 181 Ill. 310, 53 L. R. A. 231, 54 N. E. 825 (dissenting opinion), majority holding municipal authorities may establish hack stands in front of railroad depots; *Knapp, S. & Co. v. St. Louis*, 153 Mo. 573, 55 S. W. 104, holding abutter not suffering special injury cannot enjoin vacation of street by city; *Burnes v. St. Joseph*, 91 Mo. App. 495, holding municipality allowing hydrant to constitute obstruction in street liable to one injured.

Rights of railroads in streets.

Cited in *Schulenburg & B. Lumber Co. v. St. Louis, K. & N. W. R. Co.* 129 Mo. 460, 31 S. W. 796, enjoining construction of railroad in street already nearly filled by tracks; *Corby v. Chicago, R. I. & P. R. Co.* 150 Mo. 465, 52 S. W. 282, and *Sherlock v. Kansas City Belt R. Co.* 142 Mo. 184, 64 Am. St. Rep. 551, 43 S. W. 629, enjoining construction of railroad in alley, monopolizing use; *Brown v. Chicago G. W. R. Co.* 137 Mo. 536, 38 S. W. 1099, sustaining city's power to grant right to lay railroad tracks in street, not destroying use as thoroughfare; *Grand Ave. R. Co. v. Citizen's R. Co.* 148 Mo. 572, 50 S. W. 305, holding exclusive right to use street cannot be granted to street car company; *Ruckert v. Grand Ave. R. Co.* 163 Mo. 278, 63 S. W. 814, holding abutter cannot enjoin construction of street railroad without showing special damage; *Watson v. Robberson Ave. R. Co.* 69 Mo. App. 552, and *Knapp, S. & Co. v. St. Louis Transfer R. Co.* 126 Mo. 37, 28 S. W. 627, enjoining construction of railroad in street, unreasonably interfering with abutter's right of access; *Hulett v. Missouri, K. & T. R. Co.* 80 Mo. App. 90, sustaining abutter's right to recover damages from railroad changing grade of street; *Africa v. Knoxville*, 70 Fed. 738, raising, without deciding, question whether franchise to street railway to occupy streets with double track repealable; *De Geofroy v. Merchants Bridge Terminal R. Co.* 179 Mo. 708, 64 L. R. A. 964, 101 Am. St. Rep. 524, 79 S. W. 386, holding abutter entitled to compensation for construction of elevated track, although fee to street is in public.

Cited in footnote to *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488, which holds water tank in street, and station at which bells constantly rung and whistles blown, within few rods of church, a nuisance.

Distinguished in *Placke v. Union Depot R. Co.* 140 Mo. 637, 41 S. W. 915, denying injunction against construction of street railway not preventing current public use of highway; *Nagel v. Lindell R. Co.* 167 Mo. 97, 66 S. W. 1090, denying injunction against construction of street railway where width of street not alleged.

24 L. R. A. 521, *WEBSTER v. FITCHBURG R. CO.* 161 Mass. 298, 37 N. E. 165.

When person becomes passenger.

Cited in *Illinois C. R. Co. v. Treat*, 75 Ill. App. 340, holding purchaser of ticket passing through turnstile onto depot platform, passenger; *Chicago & N. W. R. Co. v. Weeks*, 99 Ill. App. 525, holding person taking short cut across tracks to depot not passenger; *Jones v. Boston & M. R. Co.* 163 Mass. 246, 39 N. E. 1019, holding person with ticket attempting to board train at station at which it only stops to discharge passengers, not passenger; *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 485, 54 L. R. A. 831, footnote p. 827, 60 N. E. 818, holding one with ticket, crossing tracks on highway to board train on further track, not passenger; *Phillips v. Southern R. Co.* 124 N. C. 126, 45 L. R. A. 164, footnote p. 163, 32 S. E. 388, holding one coming to station with intent to take next train, passenger; *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 120, 39 L. R. A. 150, footnote p. 148, 61 Am. St. Rep. 68, 48 N. E. 294, holding person with free pass, getting on front platform of baggage car after train in motion, not passenger; *Creech v. Charleston & W. C. R. Co.* 66 S. C. 538, 45 S. E. 86, holding person attempting to board moving train at crossing not entitled to care due passenger, and referring with approval to annotation in 24 L. R. A. 521; *Citizens Street R. Co. v. Jolly*, 161 Ind.

87, 67 N. E. 935, holding person in waiting to take street car at point where car usually receives passenger, and attempting to get on when car stops, passenger.

Cited in footnotes to *Donovan v. Hartford Street R. Co.* 29 L. R. A. 297, which holds one giving signal for street car to stop not passenger; *Southern R. Co. v. Smith*, 40 L. R. A. 746, which holds person with mileage ticket trying to cross main track to board train on siding not a passenger; *Keator v. Scranton Traction Co.* 44 L. R. A. 546, which holds woman with transfer ticket, injured by breaking of trolley pole while she is approaching car, passenger; *Exton v. Central R. Co.* 56 L. R. A. 508, which holds purchaser of ticket a passenger while using depot for purpose of journey; *Western & A. R. Co. v. Voils*, 35 L. R. A. 655, which holds person going to flag station for purpose of boarding train, passenger.

Distinguished in *Young v. New York, N. H. & H. R. Co.* 171 Mass. 34, 41 L. R. A. 193, footnote p. 193, 50 N. E. 455, holding person with ticket crossing track from station to platform, passenger.

24 L. R. A. 524, *SANDWICH MFG. CO. v. MAX*, 5 S. D. 125, 58 N. W. 14.

Right to prefer creditors.

Cited in *Church v. Foley*, 10 S. D. 80, 71 N. W. 759, and *Kehoe v. Hanson*, 6 S. D. 322, 60 N. W. 31, sustaining insolvent's right to secure creditor to exclusion of others; *Sprague v. Ryan*, 11 S. D. 57, 75 N. W. 390, holding fraudulent grantee of property relieved from liability to extent of grantor's debts paid; *Adams & W. Co. v. Deyette*, 8 S. D. 135, 31 L. R. A. 504, 59 Am. St. Rep. 751, 65 N. W. 471 (dissenting opinion), majority denying insolvent corporation's authority to prefer creditors.

Cited in footnote to *Re Fixen & Co.* 50 L. R. A. 605, which holds payment of money by insolvent to unsecured creditor in ordinary course of business, unlawful preference.

Preferential transfer as part of assignment.

Cited in *Jones v. Cullen*, 100 Tenn. 16, 42 S. W. 873, holding transfers of insolvent's entire property to secure creditors not part of contemporaneous invalid assignment; *Pollock v. Sykes*, 74 Miss. 712, 21 So. 780, sustaining mortgage to secure creditor, followed by general assignment.

Preference by mortgage or sale as assignment.

Cited in *Smith v. Baker*, 5 Okla. 335, 49 Pac. 61, holding conveyance of entire property to creditor by insolvent in payment of debt not assignment for creditors; *Cutter v. Pollock*, 4 N. D. 212, 25 L. R. A. 380, footnote p. 377, 50 Am. St. Rep. 644, 59 N. W. 1062, upholding mortgages of substantially entire property to secure part of creditors; *Noyes v. Brace*, 9 S. D. 604, 70 N. W. 846, holding evidence to show mortgage to secure creditor regarded as general assignment properly rejected.

Cited in note (37 L. R. A. 341) on whether preference by mortgage or sale is an assignment.

24 L. R. A. 531, *PENNSYLVANIA R. CO. v. HAMMILL*, 56 N. J. L. 370, 29 Atl. 151.

Proximate cause.

Cited in *Newark & S. O. R. Co. v. McCann*, 58 N. J. L. 645, 33 L. R. A. 128,

34 Atl. 1052, holding failure to stop car proximate cause of injury to passenger attempting to get off.

Cited in footnotes to *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199, which holds failure to give warning of approach of train not proximate cause of injury to one struck by body of other person hit by train; *Southern R. Co. v. Webb*, 59 L. R. A. 109, which holds negligent jolting of train, hurling passenger through door on track insensible, cause of death by train of other company; *Daniels v. New York, N. H. & H. R. Co.* 62 L. R. A. 751, holding negligent injury causing insanity not proximate cause of wilful, voluntary suicide.

Duty to licensee on track.

Cited in *Devoe v. New York, O. & W. R. Co.* 63 N. J. L. 278, 43 Atl. 899, holding railroad acquiescing in stile over fence liable only for wilful injury to persons crossing tracks.

Cited in footnote to *Pennsylvania R. Co. v. Martin*, 55 L. R. A. 361, which denies duty of railroad company to use care to avoid injury to one using track for own affairs.

24 L. R. A. 536, *MILLS v. BRITTON*, 64 Conn. 4, 29 Atl. 231.

Right to stock dividends.

Cited in *Alsop v. DeKoven*, 107 Ill. App. 208, Affirmed in 205 Ill. 313, 63 L. R. A. 587, 68 N. E. 930, holding that stock dividends belong to corpus of estate and go to remainderman rather than life tenant; *Re Murphy*, 80 App. Div. 242, 80 N. Y. Supp. 530, holding beneficiary entitled to "interest of \$20,000" entitled only to income of securities in which same was invested.

Cited in footnotes to *Pritchett v. Nashville Trust Co.* 33 L. R. A. 856, which holds life tenant entitled to stock dividends declared from net earnings; *Clark v. Campbell*, 54 L. R. A. 508, which holds purchaser of stock by writing providing for delivery on payment by certain date not entitled to dividends till payment.

Apportionment between life tenant and remainderman.

Cited in footnote to *Greene v. Greene*, 35 L. R. A. 790, which requires apportionment between life tenants and remaindermen of portion of trust fund recovered from insolvent's estate.

24 L. R. A. 543, *FINCHER v. HANEGAN*, 59 Ark. 151, 26 S. W. 821.

Effect of mistake in name.

Cited in footnote to *Stuyvesant v. Weil*, 53 L. R. A. 502, which holds mistake in Christian name of defendant duly served and notified that he is person intended will not prevent jurisdiction.

Distinguished in *Johnson v. Wilson*, 137 Ala. 472, 97 Am. St. Rep. 52, 34 So. 392, holding record of mortgage executed with mistake in Christian name not notice of execution by real mortgagor.

Initials as part of name.

Cited in footnotes to *State v. Higgins*, 27 L. R. A. 74, which holds second initial material part of name where only initial of first name given; *Beattie v. National Bank of Illinois*, 43 L. R. A. 654, which holds middle initial not part of Christian name; *Mosely v. Reily*, 26 L. R. A. 721, which holds initials of given name of delinquent taxpayers sufficient description.

24 L. R. A. 548, *VANDERPOEL v. GORMAN*, 140 N. Y. 563, 56 N. Y. S. R. 503, 37 Am. St. Rep. 601, 35 N. E. 932.

Power of corporations to make general assignment — Domestic corporations.

Cited in *Segnitz v. Garden City Bkg. & T. Co.* 107 Wis. 178, 50 L. R. A. 330, 81 Am. St. Rep. 830, 83 N. W. 327; *Whithed v. J. Walter Thompson Co.* 86 Ill. App. 83; *Binder v. McDonald*, 106 Wis. 340, 82 N. W. 156,—sustaining corporation's right to make general assignment when not prohibited by statute; *Muller v. Scandinavian & F. Emigrant Co.* 1 N. Y. Anno. Cas. 397, 72 N. Y. S. R. 804, 38 Supp. 175, raising, without deciding, question whether domestic corporation can make general assignment.

Distinguished in *Home Bank v. J. B. Brewster & Co.* 17 Misc. 443, 41 N. Y. Supp. 203; *People v. United States Law Blank & Stationery Co.* 24 Misc. 536, 53 N. Y. Supp. 852; *Croll v. Empire State Knitting Co.* 17 App. Div. 284, 45 N. Y. Supp. 680,—sustaining right of insolvent domestic corporation to make assignment without preferences.

— Foreign corporations.

Cited in *Rogers v. Pell*, 154 N. Y. 526, 49 N. E. 75, holding foreign corporation may make general assignment under state laws, if valid under law of domicile; *Workum v. Caldwell*, 27 Misc. 73, 58 N. Y. Supp. 175, sustaining general assignment without preferences by foreign corporation, permitted by law of domicile; *Franzen v. Zimmer*, 90 Hun. 106, 35 N. Y. Supp. 612, sustaining validity of general assignment by foreign insurance corporation; *Re Hulbert Bros.* 38 App. Div. 327, 57 N. Y. Supp. 38; sustaining validity of general assignment, with preferences, by foreign corporation; *Re Halsted*, 42 App. Div. 102, 58 N. Y. Supp. 898, holding general assignment by foreign corporation subject to statute limiting preferences; *Walter v. F. E. McAlister Co.* 21 Misc. 749, 48 N. Y. Supp. 26, holding general assignment by foreign corporation, contrary to laws of domicile and forum, void; *Mabon v. Ongley Electric Co.* 156 N. Y. 201, 50 N. E. 805, holding title of foreign assignee or receiver will be upheld by state courts; *Stoddard v. Lum*, 159 N. Y. 277, 45 L. R. A. 556, 70 Am. St. Rep. 541, 53 N. E. 1108, Reversing 32 App. Div. 569, 53 N. Y. Supp. 607, sustaining power of general assignee of foreign corporation to enforce payment of stock subscriptions in state courts.

What constitutes general assignment.

Cited in *People v. Mercantile Credit Guarantee Co.* 166 N. Y. 423, 60 N. E. 24, holding chattel mortgage of entire property to secure creditor, general assignment.

Presumption as to law of other states.

Cited in *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 472, 42 L. R. A. 147, footnote p. 140, 51 N. E. 398, denying that statutory restrictions on alienation of interests of *cestui que trust* are presumed to be law of other state.

Cited in footnote to *Aslanian v. Dostumian*, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

Applicability of statutes to foreign corporations.

Cited in *Standard Nat. Bank v. Garfield Nat. Bank*, 56 App. Div. 47, 67 N. Y. Supp. 472, holding statute prohibiting preferential transfers does not apply to foreign insolvent corporations; *Re Lampson*, 22 Misc. 212, 49 N. Y. Supp. 576, holding statute invalidating charitable bequests to corporations, made within two

months of testator's death, does not apply to foreign corporations; *National Mut. Bldg. & L. Asso. v. Pinkston*, 79 Miss. 483, 30 So. 602, holding only domestic corporations within exemption of building associations from usury laws; *Re Fayerweather*, 31 Abb. N. C. 288, 30 N. Y. Supp. 273, holding exemption of religious corporations from transfer tax applies to domestic corporations only; *Wamsley v. H. L. Horton Co.* 17 Misc. 328, 39 N. Y. Supp. 963, holding statutory provision for continuing action against directors after dissolution does not apply to foreign corporations; *Smead v. Chandler*, 71 Ark. 515, 76 S. W. 1068, raising, but not deciding, question whether statute prohibiting preference among creditors of insolvent corporations applies to foreign corporations.

Distinguished in effect in *Williams v. Gold Hill Min. Co.* 96 Fed. 461, holding statute regulating mortgages by mining corporations applies to foreign corporations, under public policy as evinced by Constitution.

State statute as evidence of public policy.

Cited in *Re Hulbert Bros.* 38 App. Div. 329, 57 N. Y. Supp. 38, holding state statute prohibiting preferential transfers by insolvent domestic corporations does not evince public policy.

Corporate general assignment, by whom made.

Cited in *Rogers v. Pell*, 154 N. Y. 527, 49 N. E. 75, holding, in absence of statute or by-law, power to make general assignment resides in corporate directors.

Powers of foreign corporations.

Cited in *Western Massachusetts Mut. F. Ins. Co. v. Hilton*, 42 App. Div. 60, 58 N. Y. Supp. 996, holding action maintainable by foreign insurance company, not authorized to do business in state, to recover assessment enforceable where made; *People ex rel. Badische Anilin & Soda Fabrik v. Roberts*, 152 N. Y. 66, 36 L. R. A. 759, 46 N. E. 161, dissenting opinion by O'Brien, J., who holds foreign corporation may become member of domestic firm, if not exceeding charter powers.

Distinguished in *Fowler v. Bell*, 90 Tex. 160, 39 L. R. A. 257, 59 Am. St. Rep. 788, 37 S. W. 1058, denying power of insolvent foreign corporation to make preferential transfer of property in state.

Jurisdiction over foreign corporations.

Cited in *Hallenborg v. Greene*, 66 App. Div. 597, 73 N. Y. Supp. 403, denying injunction to regulate internal affairs of foreign corporation.

24 L. R. A. 552, *COM. v. COYLE*, 160 Pa. 36, 40 Am. St. Rep. 708, 28 Atl. 576, 634.

24 L. R. A. 555, *STATE v. O'NEIL*, 51 Kan. 651, 33 Pac. 287.

Information charging different means of committing crime.

Cited in *State v. Hewes*, 60 Kan. 766, 57 Pac. 959, and *State v. Hall*, 14 S. D. 165, 84 N. W. 766, holding commission of homicide by different means may be charged in one count; *State v. Kirby*, 62 Kan. 440, 63 Pac. 752, holding shooting by shotgun and pistol may be alleged in single count.

Intoxication as excusing crime.

Cited in note (36 L. R. A. 465) on what intoxication will excuse crime.

24 L. R. A. 564, *STATE ex rel. LITTLE v. DODGE CITY, M. & T. R. CO.* 53 Kan. 329, 36 Pac. 755.

Compulsory operation of railroads.

Cited in *Jack v. Williams*, 113 Fed. 828, holding operation of railroad at loss not compellable in absence of statute or charter provision; *Royal Trust Co. v. Washburn, B. & I. R. R. Co.* 113 Fed. 537, raising, without deciding, question whether operation of railroad at loss may be compelled.

Cited in footnotes to *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* 45 L. R. A. 837, which holds street railway company's duty to operate road enforceable by mandamus; *State ex rel. Grinsfelder v. Spokane Street R. Co.* 41 L. R. A. 515, which sustains right to enforce operation of street railway by mandamus; *Southern R. Co. v. Franklin & P. R. Co.* 44 L. R. A. 297, which authorizes mandatory injunction to compel continued operation of leased railroad; *State ex rel. Knight v. Helena Power & Light Co.* 44 L. R. A. 692, which denies power to compel operation of abandoned street railway line; *San Antonio Street R. Co. v. State*, 35 L. R. A. 662, which denies right to compel street railway company by mandamus to operate abandoned portion of line; *State ex rel. Kellog v. Missouri P. R. Co.* 29 L. R. A. 444, which denies mandamus to enforce order of state railroad commissioners to restore and operate discontinued passenger train; *Chicago & A. R. Co. v. People*, 26 L. R. A. 224, which denies power to compel railroad companies by mandamus to increase number of trains; *People ex rel. Cantrell v. St. Louis, A & T. H. R. Co.* 35 L. R. A. 656, which upholds mandamus to compel running passenger cars separately from freight cars; *Brownell v. Old Colony R. Co.* 29 L. R. A. 169, which authorizes suit for specific enforcement of duty to operate ferry under franchise; *Benton Harbor v. St. Joseph & B. H. Street R. Co.* 26 L. R. A. 245, which denies mandamus to compel street railway company to pave track.

24 L. R. A. 568, *BARNARD v. SHIRLEY*, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117.

Liability for polluting stream.

Followed on second appeal in 151 Ind. 160, 41 L. R. A. 737, 47 N. E. 671.

Cited in *Richmond v. Test*, 18 Ind. App. 497, 48 N. E. 610, denying city's liability to riparian owner for pollution of stream forming natural outlet for sewer; *Valparaiso v. Hagen*, 153 Ind. 343, 48 L. R. A. 710, 74 Am. St. Rep. 305, 54 N. E. 1062, denying injunction against discharge of city sewage into natural water course; *Sloan v. James*, 7 Del. Co. Rep. 323, raising, without deciding, question whether water from artesian well can be discharged into stream, affecting volume or temperature.

Cited in note (41 L. R. A. 753, 754) on correlative rights of upper and lower proprietors as to use and flow of water in stream.

Distinguished in *Weston Paper Co. v. Pope*, 155 Ind. 400, 56 L. R. A. 901, 57 N. E. 719, denying right of factory to discharge offensive waste into stream; *Skaggs v. Martinsville*, 140 Ind. 480, 33 L. R. A. 782, 49 Am. St. Rep. 209, 39 N. E. 241, sustaining ordinance prohibiting flowing of water from flowing well upon street.

Disapproved in *Platt Bros. v. Waterbury*, 72 Conn. 553, 48 L. R. A. 706, 77 Am. St. Rep. 335, 45 Atl. 154, sustaining right of lower riparian owner to compensation for discharge of city sewage; *Strobel v. Kerr Salt Co.* 164 N. Y. 314, 51 L.

R. A. 692, 79 Am. St. Rep. 643, 58 N. E. 142, enjoining use of water by salt works, diminishing and polluting stream.

Deflection of overflow of river.

Cited in *Jean v. Pennsylvania Co.* 9 Ind. App. 57, 36 N. E. 159, sustaining railroad's right to protect tracks from overflow of river by levee not interfering with water course.

Disapproved in *Cairo, V. & G. R. Co. v. Brevoort*, 25 L. R. A. 532, 62 Fed. 134, denying right of riparian proprietor to turn overflow of stream by embankments.

Right to put property to lawful use.

Cited in *Windfall Mfg. Co. v. Patterson*, 148 Ind. 419, 37 L. R. A. 383, 62 Am. St. Rep. 532, 47 N. E. 2, denying injunction against drilling for gas needed in factory; *Haggart v. Stehlin*, 137 Ind. 65, 22 L. R. A. 589, 35 N. E. 997 (dissenting opinion), majority holding saloon in residence section actionable nuisance.

When sustaining demurrer is harmless error.

Cited in *Hardison v. Mann*, 20 Ind. App. 408, 50 N. E. 899, and *Kniss v. Holbrook*, 16 Ind. App. 237, 44 N. E. 563, holding sustaining demurrer is harmless error where facts provable under another paragraph.

Review of ruling sustaining demurrer.

Cited in *Eliason v. Bronnenberg*, 147 Ind. 249, 46 N. E. 582, holding special finding cannot present same question as ruling sustaining demurrer to complaint.

24 L. R. A. 575, *MEYER v. KRAUTER*, 56 N. J. L. 696, 29 Atl. 426.

24 L. R. A. 577, *BEY'S SUCCESSION*, 46 La. Ann. 773, 15 So. 297.

Presumption and burden of proof as to sanity.

Cited in note (36 L. R. A. 725) on presumption and burden of proof as to sanity.

24 L. R. A. 584, *STATE v. SARRADAT*, 46 La. Ann. 700, 15 So. 87.

Followed without discussion in *State v. Fried*, 46 La. Ann. 1418, 15 So. 88.

Market regulations.

Followed in *New Orleans v. Kientz*, 52 La. Ann. 954, 27 So. 344, sustaining ordinance against selling market products near markets; *New Orleans v. Faber*, 105 La. 214, 53 L. R. A. 168, footnote p. 165, 83 Am. St. Rep. 232, 29 So. 507, sustaining ordinance for selling certain food commodities in public market only; *New Orleans v. Graffina*, 52 La. Ann. 1085, 78 Am. St. Rep. 387, 27 So. 590, holding ordinance prohibiting fruit dealer from selling vegetables not discriminative or oppressive.

Cited in footnote to *Hutchins v. Durham*, 32 L. R. A. 706, which holds occupant of market stall, licensee and not lessee.

Cited in notes (48 L. R. A. 261) on legal restrictions on department stores; (38 L. R. A. 336) on municipal power over nuisances affecting safety, health, and personal comfort.

Validity of discriminating ordinances.

Cited in *Crowley v. West*, 52 La. Ann. 533, 47 L. R. A. 656, 78 Am. St. Rep. 355, 27 So. 53, denying validity of ordinance prohibiting additional livery stables, in specified locality but not affecting existing stables.

Cited in note (53 L. R. A. 764) on constitutionality of statute attempting to grant monopoly.

24 L. R. A. 589, *LEMAN v. MANHATTAN L. INS. CO.* 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15 So. 388.

Conclusiveness of proof of loss.

Cited in *Modern Woodmen v. Kozak*, 63 Neb. 155, 88 N. W. 248, holding proofs of loss admissible, but not conclusive against beneficiary upon question of suicide; *Supreme Tent, K. of M. v. Stensland*, 206 Ill. 131, 99 Am. St. Rep. 137, 68 N. E. 1098, sustaining admissibility of evidence by beneficiary contradicting statement in sworn proofs of death, that death was by suicide.

Cited in note (44 L. R. A. 853, 854) on conclusiveness of proof of loss as against insured or his beneficiaries.

Presumption against insured's suicide.

Cited in *Travelers' Ins. Co. v. Nicklas*, 88 Md. 473, 41 Atl. 906, holding burden of proof on insurer to show suicide by insured; *Boynton v. Equitable Life Assur. Soc.* 105 La. 205, 52 L. R. A. 688, 29 So. 490, holding suicide not shown by evidence not excluding hypothesis of accident; *Sovereign Camp v. Haller*, 24 Ind. App. 112, 56 N. E. 255, and *Daughtry v. Knights of Pythias*, 48 La. Ann. 1204, 55 Am. St. Rep. 310, 20 So. 712, holding suicide established by evidence giving no basis for theory of death by accident or act of others; *Brignac v. Pacific Mut. L. Ins. Co.* 112 La. 577, 66 L. R. A. 322, 36 So. 595, as to presumption against suicidal intent.

Cited in footnote to *Cox v. Royal Tribe of Joseph*, 60 L. R. A. 620, which authorizes consideration of presumption of death from natural causes in determining cause of death of insured, found dead in water.

Distinguished in *Laessig v. Travelers' Protective Assn.* 169 Mo. 281, 69 S. W. 469, holding, in suit on accident policy, presumption against suicide does not raise presumption of accidental death.

Suicide a question for jury.

Cited in *Supreme Lodge K. of P. v. Foster*, 26 Ind. App. 340, 59 N. E. 877, and *Sovereign Camp, W. of W. v. Haller*, 30 Ind. App. 455, 66 N. E. 186, holding insured's suicide question for jury.

24 L. R. A. 592, *GIANFORTONE v. NEW ORLEANS*, 61 Fed. Rep. 64.

Municipal liability.

Cited in *New Orleans v. Kerr*, 50 La. Ann. 417, 69 Am. St. Rep. 442, 23 So. 384, holding city liable for breach of contract for impounding stock, through failure to furnish adequate police protection; *New Orleans v. Abbagnato*, 26 L. R. A. 335, footnote p. 329, 10 C. C. A. 367, 23 U. S. App. 533, 62 Fed. 246, denying city's liability for killing by mob, permitted by negligence of city's officials.

Cited in footnotes to *Wallace v. Norman*, 48 L. R. A. 620, which denies city's liability for acts of officers when participating in conspiracy or mob; *Brown v. Orangeburg County*, 44 L. R. A. 734, which sustains county's liability for lynching of person other than prisoner; *Champaign County v. Church*, 48 L. R. A. 738, which sustains statute making county liable to penalty for death of person by mob violence; *Chicago v. Manhattan Cement Co.* 45 L. R. A. 848, which sustains stat-

ute compelling county to pay three fourths of value of property destroyed by mob.

Cited in note (48 L. R. A. 468) on power of legislature to impose burdens upon municipalities to control their local administration and property.

24 L. R. A. 606, ALLEN v. FORREST, 8 Wash. 700, 36 Pac. 971.

Statute relating to sale of tide lands.

Cited in State *ex rel.* Bartlett v. Forrest, 12 Wash. 487, 41 Pac. 194, holding statute giving right to purchase tide lands does not bind state to sell.

Distinguished in State *ex rel.* Billings v. Bridges, 22 Wash. 66, 79 Am. St. Rep. 914, 60 Pac. 60, holding right of applicant for tide lands complying with preliminary requirements not affected by repeal of statute.

24 L. R. A. 610, BLOCK v. SALT LAKE RAPID TRANSIT CO. 9 Utah, 31, 33 Pac. 229.

Abutter's rights in street.

Cited in Coombs v. Salt Lake & Ft. D. Co. 9 Utah, 325, 34 Pac. 248, holding abutter entitled to enjoin operation of railroad in street unless damages paid for easement taken; Cereghino v. Oregon Short Line R. Co. 26 Utah, 481, 99 Am. St. Rep. 843, 73 Pac. 634, sustaining right of citizen suffering special damage, to enjoin unlawful laying of railroad track in street.

Cited in footnotes to Townsend v. Epstein, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street; First Nat. Bank v. Tyson, 59 L. R. A. 399, which sustains right of injunction against pillars in street in front of adjoining lot, obstructing light and air from street; Brand v. Multnomah County, 50 L. R. A. 389, which holds bridge approach raising surface of street to established grade only, not additional servitude.

Duty of street railway to other users of street.

Cited in Hall v. Ogden City Street R. Co. 13 Utah, 254, 57 Am. St. Rep. 726, 44 Pac. 1046, holding street railway bound to use degree of care proportionate to danger of propelling power; San Antonio Rapid Transit Street R. Co. v. Limburger, 88 Tex. 85, 53 Am. St. Rep. 730, 30 S. W. 533, holding that right of electric railway companies to use of streets is not different from that of horse-power railway companies.

When findings conclusive in appellate court.

Cited in Whitesides v. Green, 13 Utah, 351, 57 Am. St. Rep. 740, 44 Pac. 1032; Fissure Min. Co. v. Old Susan Min. Co. 22 Utah, 444, 63 Pac. 587; McKay v. Farr, 15 Utah, 264, 49 Pac. 649; Gorringe v. Read, 24 Utah, 459, 68 Pac. 147; McCornick v. Mangum, 20 Utah, 20, 57 Pac. 428; Stahn v. Hall, 10 Utah, 403, 37 Pac. 585; Whitmore v. Utah Fuel Co. 26 Utah, 499, 73 Pac. 764; Herriman Irrig. Co. v. Keel, 25 Utah, 108, 69 Pac. 719,—holding findings not clearly erroneous conclusive on appellate court; Short v. Pierce, 11 Utah, 40, 39 Pac. 474, denying new trial on appeal, where findings not clearly contrary to weight of evidence.

24 L. R. A. 615, *BEAR v. HEASLEY*, 98 Mich. 279, 57 N. W. 270.

Followed without discussion in *Lemp v. Raven*, 113 Mich. 376, 71 N. W. 627.

Effect of attempted adoption of constitution by religious society.

Cited in *Russie v. Brazzell*, 128 Mo. 105, 49 Am. St. Rep. 542, 30 S. W. 526, sustaining legality of adoption of new constitution by United Brethren.

Disapproved in *Horsman v. Allen*, 129 Cal. 135, 61 Pac. 796, and *Philomath College v. Wyatt*, 27 Or. 477, 26 L. R. A. 89, footnote p. 68, 37 Pac. 1022, holding incorporation into confession of faith of doctrines previously contained in discipline not vital change destroying identity of church.

Conclusiveness of decisions of association or corporation tribunal.

Cited in footnote to *Philomath College v. Wyatt*, 26 L. R. A. 68, which holds construction of legislative acts of ecclesiastical body should be adopted by courts.

Cited in note (49 L. R. A. 399) on conclusiveness of decisions of tribunals of associations or corporations.

Rights of different factions on division of church.

Cited in *Ingles v. Bryant*, 117 Mich. 114, 75 N. W. 442, refusing permission to file bill to review decree entered by consent determining rights to church property nearly three years after its rendition, because of subsequent decision contrary thereto.

Cited in footnotes to *Smith v. Pedigo*, 32 L. R. A. 838, which denies right of majority of church abandoning its religious faith to hold church property; *Franke v. Mann*, 48 L. R. A. 856, which denies right of majority of church members to employ pastor whose teachings inconsistent with those of sect to which local church belongs.

24 L. R. A. 629, *WOLCOTT v. PATTERSON*, 100 Mich. 227, 43 Am. St. Rep. 456, 58 N. W. 1066.

24 L. R. A. 637, *SAN ANTONIO & A. P. R. CO. v. LONG*, 87 Tex. 148, 47 Am. St. Rep. 87, 27 S. W. 113.

Damages for pecuniary loss by negligently causing death.

Cited on second appeal in 19 Tex. Civ. App. 650, 48 S. W. 599, holding damages recoverable for loss of mother's services in managing estate descending to plaintiffs; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 618, 50 L. R. A. 712, 36 S. E. 881 (dissenting opinion), majority holding action not maintainable for negligent killing of husband or father voluntarily settling with wrongdoer in life-time.

When benefits may be offset against damages caused by negligent killing.

Distinguished in *Tyler S. E. R. Co. v. Rasberry*, 13 Tex. Civ. App. 188, 34 S. W. 794, holding insurance money cannot be deducted from damages for negligently causing death; *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 391, 38 S. W. 1121, holding, in action for causing wife's death, evidence of remarriage inadmissible.

Measure of pecuniary damages for negligent killing of relative.

Cited on second appeal in 19 Tex. Civ. App. 652, 48 S. W. 599, holding instruction confining damages to loss of benefits from mental and bodily labor of deceased erroneous.

24 L. R. A. 642, *MEXICAN NAT. R. CO. v. MUSSETTE*, 86 Tex. 708, 26 S. W. 1075.

Liability on supersedeas bond.

Cited in *Missouri, K. & T. R. Co. v. Lacy*, 13 Tex. Civ. App. 397, 35 S. W. 505, holding bondsmen liable on supersedeas bond accompanying unprosecuted writ of error.

Proximate cause.

Cited in *Galveston, H. & S. A. R. Co. v. Sweeney*, 14 Tex. Civ. App. 219, 36 S. W. 800, holding that whether injury was proximate result of negligence charged, question for jury; *Missouri, K. & T. R. Co. v. Hennesey*, 20 Tex. Civ. App. 319, 49 S. W. 917, holding negligence in carrying passenger past station, necessitating all night ride, proximate cause of illness; *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 514, 60 S. W. 453, holding seller's failure to give notice of danger was proximate cause of explosion from placing gasoline near furnace; *Rigdon v. Temple Water Works Co.* 11 Tex. Civ. App. 546, 32 S. W. 828, holding negligence in constructing water tower, proximate cause of injury from exploding lamp overturned by its fall; *Texas & P. R. Co. v. Bigham*, 90 Tex. 226, 38 S. W. 162, holding injury to shipper from stampeding cattle while trying to fasten stock-pen gate not proximate result of defective fastening; *Marchand v. Gulf, C. & S. F. R. Co.* 20 Tex. Civ. App. 4, 48 S. W. 779, raising, without deciding, question whether railroad's negligence was proximate cause of injuries to person against whom cow hurled by engine; *Travelers Ins. Co. v. Hunter*, 30 Tex. Civ. App. 493, 70 S. W. 798, holding that accidental injury, independent of all other causes, produced acute rheumatism resulting in death of insured.

Master's liability to servant for fellow servant's incompetency.

Cited in *Texas & P. R. Co. v. Johnson*, 89 Tex. 522, 35 S. W. 1042, holding railroad chargeable with knowledge of employee's incompetency, liable for injury to fellow servant.

Cited in notes (48 L. R. A. 385, 390) on duty of master with respect to employment of servants; (25 L. R. A. 717) on liability of master for injuries caused to one servant by incompetency of fellow servant; (41 L. R. A. 40) on knowledge as element of employer's liability to injured servant; (54 L. R. A. 175) on vice principalship as determined with reference to character of act which caused injury.

24 L. R. A. 647, *GRISWOLD v. ILLINOIS C. R. CO.* 90 Iowa, 265, 57 N. W. 843.

Agreements not to claim damages.

Cited in *Geiser Mfg. Co. v. Krogman*, 111 Iowa, 510, 82 S. W. 938, sustaining validity of stipulation in chattel mortgage against liability of mortgagee selling property; *Missouri, K. & T. R. Co. v. Carter*, 95 Tex. 477, 68 S. W. 159, sustaining agreement exempting railroad company from liability for loss by fire communicated from its engines to property of individual for whose convenience it maintains private switch.

Cited in note (21 L. R. A. 798) on constitutionality of statutes restricting contracts and business.

— By lessees of railroad lands.

Cited in *Ordelheide v. Wabash R. Co.* 80 Mo. App. 367, sustaining right of railroad leasing ground, to contract for exemption from liability for setting fire

to buildings thereon; *American Cent. Ins. Co. v. Chicago & A. R. Co.* 74 Mo. App. 102; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 197, footnote p. 193, 17 C. C. A. 66, 36 U. S. App. 152, 70 Fed. 203, Affirming 62 Fed. 905; *Kennedy Bros. v. Iowa State Ins. Co.* 119 Iowa, 32, 91 N. W. 831,—holding valid stipulation against liability for negligence in setting fire to leased buildings erected on right of way; *Stephens v. Southern P. Co.* 109 Cal. 92, 29 L. R. A. 754, footnote p. 751, 50 Am. St. Rep. 17, 41 Pac. 783, holding valid, provision in lease of railroad property against responsibility for damage by fire.

Cited in footnote to *Greenwich Ins. Co. v. Louisville & N. R. Co.* 56 L. R. A. 477, which sustains contract releasing company from liability for injury by fire to building permitted to be placed on right of way.

Reformation of lease.

Cited in *Nieler v. Chicago, M. & St. P. R. Co.* 114 Iowa, 423, 87 N. W. 285, reforming lease of railroad land erroneously describing land actually and theretofore occupied by lessee.

24 L. R. A. 655, *A'HERN v. IOWA STATE AGRIC. SOC.* 91 Iowa, 97, 58 N. W. 1092.

Liability of governmental agency for servant's torts.

Cited in *Maia v. Eastern State Hospital*, 97 Va. 511, 47 L. R. A. 579, 34 S. E. 617, denying liability of hospital for insane, maintained as governmental agency, for negligent injury to inmate.

Cited in note (29 L. R. A. 384) on nature of incorporated institutions belonging to state.

Injury on fair grounds.

Cited in footnote to *Hart v. Washington Park Club*, 29 L. R. A. 492, which holds no presumption of negligence arises from injury by runaway horse at horse race.

Liability for false arrest by agent.

Cited in footnote to *Markley v. Snow*, 64 L. R. A. 685, holding mining partnership not liable for act of employee in causing arrest of one suspected of firing building, long after commission of the crime.

24 L. R. A. 657, *FORD v. CHICAGO, R. I. & P. R. CO.* 91 Iowa, 179, 59 N. W. 5.

Violation of master's rule as negligence.

Cited in *Green v. Brainerd & N. M. R. Co.* 85 Minn. 323, 88 N. W. 974, holding brakeman's disobedience of conductor's order to station himself on rear car, contributory negligence.

Cited in footnote to *Pennsylvania Co. v. McCaffrey*, 29 L. R. A. 104, which holds railroad company requiring nineteen hours' work per day from employees liable for accident while part of train crew temporarily absent for food.

Contributory negligence as defense against statutory liability.

Report of later appeal in 106 Iowa, 87, 75 N. W. 650, holding contributory negligence an affirmative defense in action for injury by defective cattle-guard.

Cited in *Reeves v. Dubuque & S. C. R. Co.* 92 Iowa, 33, 60 N. W. 243, and *Hanson v. Chicago, St. P. & K. C. R. Co.* 94 Iowa, 413, 62 N. W. 788, holding, in statutory action for injury through unsafe railroad crossing, plaintiff's negligence

matter of defense; *Stuber v. Gannon*, 98 Iowa, 231, 67 N. W. 105 (dissenting opinion), majority holding plaintiff in action for personal injuries, under statute making owner of dog liable for damage, must show freedom from negligence; *Peter v. Chicago & W. M. R. Co.* 121 Mich. 334, 46 L. R. A. 228, 80 Am. St. Rep. 500, 80 N. W. 295 (dissenting opinion), majority holding contributory negligence no bar to recovery for fire set, under statute making company absolutely liable unless locomotive in good order.

Cited in note (28 L. R. A. 750) on whether wrongdoer may take advantage of general statutory imposition of damages for negligent injuries.

Railroad's duty to provide for employees' safety.

Cited in *Bryce v. Chicago, M. & St. P. R. Co.* 103 Iowa, 671, 72 N. W. 780, holding railroad liable to brakeman struck by bridge truss near track, while on side ladder.

Proof required in action for loss due to defective cattle-guard.

Cited in *Croddy v. Chicago, R. I. & P. R. Co.* 91 Iowa, 603, 60 N. W. 214, holding, in statutory action for railroad's neglect to maintain safe cattle-guards, plaintiff must show stock killed thereby.

Failure to comply with statute as negligence.

Cited in *Ives v. Welden*, 114 Iowa, 478, 54 L. R. A. 855, 89 Am. St. Rep. 379, 87 N. W. 408, holding failure to label gasoline jug, as required by law, negligence *per se*.

Contributory negligence at railroad crossing.

Cited in footnotes to *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look when within 30 feet of track does not prevent recovery; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence.

24 L. R. A. 664, *MULLEN v. REED*, 64 Conn. 240, 42 Am. St. Rep. 174, 29 Atl. 478.

What law applicable to construction of instrument.

Cited in *Rockwell v. Bradshaw*, 67 Conn. 14, 34 Atl. 758, holding will construable according to laws of testator's domicile.

Cited in footnote to *Union Cent. L. Ins. Co. v. Pollard*, 36 L. R. A. 271, as to law governing effect of answers in application for policy, and their use in evidence.

Cited in note (63 L. R. A. 858) on conflict of laws as to contracts of insurance.

Who are "heirs."

Cited in *Ruggles v. Randall*, 70 Conn. 48, 38 Atl. 885, holding word "heirs" in will signifies those entitled by law to inherit, unless such construction unreasonable.

Cited in note (30 L. R. A. 593, 594, 595) on who are "heirs" within meaning of life insurance policies.

24 L. R. A. 667, *CAMPBELL'S APPEAL*, 64 Conn. 277, 29 Atl. 494.

Inheritance by or through alien.

Cited in notes (31 L. R. A. 178) on alien's right to inherit; (31 L. R. A. 148) on effect of state statutes and Constitutions on inheritance through alien.

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Right to appeal.

Cited in *Woodbury's Appeal*, 70 Conn. 456, 39 Atl. 791, holding appeal will be dismissed where record fails to show appellant's pecuniary interest.

24 L. R. A. 671, *TATE v. GREENSBORO*, 114 N. C. 392, 19 S. E. 767.

Ownership and control of trees in highway.

Cited in *Miller v. Detroit*, Y. & A. A. R. Co. 125 Mich. 175, 51 L. R. A. 958, footnote p. 955, 84 Am. St. Rep. 569, 84 N. W. 49 (dissenting opinion), majority denying street railway's right to remove shade trees without first giving owner opportunity to do so; *Hazlehurst v. Mayes* (Miss.) 64 L. R. A. 807, 36 So. 33, holding abutter's right to maintain trees in highway subordinate to municipal right to erect electric light wires and poles.

Cited in footnotes to *Stretch v. Cassopolis*, 51 L. R. A. 345, which denies right to remove shade trees from street, without notice to abutter; *Wyant v. Central Teleph. Co.* 47 L. R. A. 497, which sustains telephone company's right to do necessary trimming of trees in highway without giving owner opportunity to do so; *Bradley v. Southern New England Teleph. Co.* 32 L. R. A. 280, which denies power of selectmen to cut and trim trees overhanging highway, without owner's consent; *Carmel v. Shaw*, 27 L. R. A. 580, which holds city has complete control over shade trees in public street; *Vanderhurst v. Tholcke*, 35 L. R. A. 267, which holds determination of city council that trees on sidewalk are obstruction conclusive.

Cited in notes (36 L. R. A. 599) on power of municipal corporations to define, prevent, and abate nuisances; (39 L. R. A. 670) on municipal power over nuisances affecting highways and waters.

Municipal liability for officers' torts.

Distinguished in *Love v. Raleigh*, 116 N. C. 306, 28 L. R. A. 193, 21 S. E. 503, denying city's liability for negligence of servants conducting fireworks display without lawful authority.

Right to review discretionary action of municipal authorities.

Cited in *State v. Higgs*, 126 N. C. 1031, 48 L. R. A. 452, 35 S. E. 473 (dissenting opinion), majority sustaining court's right to review municipal ordinance against projecting signs in street.

24 L. R. A. 679, *STATE USE OF HARTLOVE v. M. FOX & SON*, 79 Md. 514, 47 Am. St. Rep. 424, 29 Atl. 601.

Liability to third persons for negligence in performing contract.

Cited in footnotes to *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* 60 L. R. A. 117, which holds one contracting with owner to heat portion of building retained liable to tenants of lower floor for injury by freezing and bursting of water pipes designed for their protection from fire; *McCaffrey v. Mossberg & G. Mfg. Co.* 55 L. R. A. 822, which denies liability of manufacturer of drop press for injury to employee of purchaser from breaking of defective hook.

Liability of seller of dangerous article.

Cited in *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 512, 60 S. W. 453, holding seller of gasoline not giving notice of dangerous character liable for injury to buyer's employee.

Cited in footnotes to *Huset v. J. I. Case Threshing Mach. Co.* 61 L. R. A. 303,

which holds manufacturer supplying dangerous machine to another, without notice of dangerous character, liable for injury to vendee's employee; *Peters v. Jackson*, 57 L. R. A. 428, which holds one mistakenly selling poisonous drug for harmless medicine liable to third person taking it; *Ives v. Welden*, 54 L. R. A. 854, which holds merchant's failure to label gasoline renders him liable for injury to member of purchaser's family by explosion; *Woodward v. Miller*, 64 L. R. A. 932, holding vendor of buggy having concealed defect liable for resultant injuries, in absence of privity of contract between him and one injured.

24 L. R. A. 684, *MANNING v. LEIGHTON*, 65 Vt. 84, 26 Atl. 258.

Motion for reargument denied in 66 Vt. 57, 28 Atl. 630.

What assets give jurisdiction to appoint administrator.

Cited in footnotes to *Engelskirger's Appeal*, 51 L. R. A. 876, which holds ancillary administration grantable in any county where note constituting decedent's entire assets is; *Re Mayo*, 54 L. R. A. 660, which authorized appointment of administrator in county where nonresident killed, to bring action for his death.

Lien for attorney's fees.

Cited in *Gottstein v. Harrington*, 25 Wash. 511, 65 Pac. 753, holding statutory lien of attorney upon papers of client in his possession for compensation, retaining lien merely, not enforceable by action.

Cited in footnote to *Loofbourow v. Hicks*, 55 L. R. A. 874, which holds lien for attorney's fees allowed by judgment of foreclosure enforceable against land bid in by mortgagee or assignee.

24 L. R. A. 693, *BYRNE v. KANSAS CITY, FT. S. & M. R. CO.* 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605.

When relation of master and servant exists.

Cited in *Hardy v. Shedden Co.* 37 L. R. A. 39, 24 C. C. A. 264, 47 U. S. App. 362, 78 Fed. 613, holding driver of truck hired for use in procession, special servant of hirer; *Memphis & C. R. Co. v. Hoechner*, 14 C. C. A. 472, 31 U. S. App. 644, 67 Fed. 459, denying company's liability for negligent operation of railroad under exclusive control of receivers; *Brady v. Chicago & G. W. R. Co.* 57 L. R. A. 715, 52 C. C. A. 52, 114 Fed. 104, denying railroad's liability to employee for negligence of switchmen of depot company; *Roe v. Winston*, 86 Minn. 87, 90 N. W. 122, holding contractor having control over work trains furnished by railroad liable for negligence of engineer; *Garven v. Chicago, R. I. & P. R. Co.* 100 Mo. App. 620, 75 S. W. 193, holding master not liable for negligence of servants under control of stranger.

Cited in note (37 L. R. A. 42, 76) on which of two or more persons is master of another who is conceded to be servant of one of them.

Who liable for negligence of employees of railroad using another's tracks.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Berry*, 152 Ind. 611, 46 L. R. A. 48, 53 N. E. 415, holding railroad liable for negligence of employees operating its trains on another's tracks; *Atwood v. Chicago, R. I. & P. R. Co.* 72 Fed. 456, denying railroad's liability for negligence of crew of its train while running over another's track, subject to superintendent's orders.

Cited in note (44 L. R. A. 746) on liability of lessor of railroad for injuries

caused by negligence of another company using road under lease, license or other contract.

Distinguished in *Hulburt v. Wabash R. Co.* 130 Mo. 665, 31 S. W. 1051, holding railroad, charged with duty of repairing engines, liable to employee injured while running over another road; *Clark v. Geer*, 32 C. C. A. 300, 57 U. S. App. 473. 86 Fed. 451, and *Chicago, R. I. & P. R. Co. v. Groves*, 56 Kan. 610, 44 Pac. 623. holding railroad operating trains on another's tracks, subject to control of latter's dispatcher liable for employee's negligence.

Street railways as "railroads."

Cited in footnotes to *Vail v. Broadway R. Co.* 30 L. R. A. 626, which holds passenger on street car platform not passenger on "any railroad" so as to assume risk of injury; *Bloxham v. Consumers' Electric Light & Street R. Co.* 29 L. R. A. 507, which holds "street railway" within provision for selling railroad property for delinquent taxes.

Distinguished in effect in *Savannah T. & I. of H. R. v. Williams (Ga.)* 61 L. R. A. 250, footnote p. 249, 43 S. E. 751, holding chartered street railroad a railroad within statute as to liability for negligence of fellow servant.

Intersection of railroads.

Cited in footnote to *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.* 29 L. R. A. 367, which sustains right to make grade crossing at intersection of steam and street railroads.

Duty to maintain lookout on train.

Cited in note (25 L. R. A. 292) on duty to maintain lookout on railroad train.

When Federal, bound by decisions of state, courts.

Cited in *Elliott v. Felton*, 56 C. C. A. 76, 119 Fed. 272, holding decision of state court as to vice principalship not binding on Federal court in action for injuries causing death; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 284, 126 Fed. 298. holding Federal court may exercise independent judgment upon question of general jurisprudence arising under state statute not specifically construed as to such question by state court.

Distinguished in *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 338, 47 U. S. App. 36, 76 Fed. 300, holding Federal court not bound by state court's construction of statutes rendered after rights involved originated.

Contributory negligence as defense.

Cited in *Illinois C. R. Co. v. Ihlenberg*, 34 L. R. A. 398, 21 C. C. A. 553, 43 U. S. App. 726, 75 Fed. 880, holding Federal court in Tennessee will enforce nonrepugnant constitutional provision of state where injury received, as to employer's liability; *National Surety Co. v. State Bank*, 61 L. R. A. 397, 56 C. C. A. 661, 120 Fed. 597, holding foreign corporations, compelled to make state officer an agent for service of process, not estopped by latter's negligence.

Cited in note (25 L. R. A. 573) on how far statutes will be regarded as having abrogated maxim that one cannot profit by his own wrong.

24 L. R. A. 702, *LOW v. REES PRINTING CO.* 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362.

Infringement of freedom of contract.

Cited in *State v. Haun*, 61 Kan. 161, 47 L. R. A. 375, 59 Pac. 340, holding stat-

ute requiring wages paid in money unconstitutional; *Re House Bill No. 203*, 21 Colo. 28, 39 Pac. 431, holding act fixing mode of ascertaining compensation for mining coal invalid; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 543, 58 L. R. A. 754, 91 Am. St. Rep. 934, 90 N. W. 1098, holding statute forbidding discharge of employee because member of union unconstitutional; *Temple Iron Co. v. Carmanoskie*, 10 Kulp, 39, 7 Northampton Co. Rep. 260, enjoining intimidation of employees by strikers; *Vegelahn v. Guntner*, 167 Mass. 98, 35 L. R. A. 723, 57 Am. St. Rep. 443, 44 N. E. 1077, enjoining strikers' patrol in front of factory.

Cited in note (28 L. R. A. 276) on validity and effect of statutes requiring wages to be paid in lawful money.

Distinguished in *Harbison v. Knoxville*, 103 Tenn. 447, 56 L. R. A. 322, 76 Am. St. Rep. 682, 53 S. W. 955, holding act requiring payment of wages in money constitutional; *Dennis v. Moses*, 18 Wash. 591, 40 L. R. A. 314, 52 Pac. 333, dissenting opinion by Reavis, J., who holds act requiring appraisement of property sold on execution or foreclosure constitutional.

— Statutory regulation of hours of labor.

Cited in *Ritchie v. People*, 155 Ill. 110, 29 L. R. A. 84, 46 Am. St. Rep. 315, 40 N. E. 454, holding statute limiting employment of females in factories or workshops to eight hours a day unconstitutional; *Seattle v. Smyth*, 22 Wash. 329, 79 Am. St. Rep. 939, 60 Pac. 1120, holding city ordinance restricting hours of labor on public works unconstitutional; *Re Eight Hour Law*, 21 Colo. 32, 39 Pac. 328, and *Re Morgan*, 26 Colo. 443, 47 L. R. A. 64, footnote p. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, holding eight-hour law applying to mines and smelters unconstitutional; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 222, 59 L. R. A. 782, footnote p. 775, 93 Am. St. Rep. 670, 65 N. E. 885, holding void, act limiting to eight hours a day work of laborers on public contract; *Re Ten-Hour Law*, 24 R. I. 611, 61 L. R. A. 615, 54 Atl. 602 (dissenting opinion), majority sustaining legislation limiting to ten hours a day, work of street railway employees.

Cited in footnotes to *Fiske v. People*, 52 L. R. A. 291, which holds void, restriction of hours of labor on city contracts to eight hours per day; *Re Dalton*, 47 L. R. A. 380, which sustains eight-hour law applicable only to employees of state, municipality, or subdivision of state; *State v. McNally*, 36 L. R. A. 533, which denies power of city council to make violation of ordinance fixing hours of labor on public works a misdemeanor; *Wenham v. State*, 58 L. R. A. 825, which sustains statute limiting hours of work of women in certain employments; *State v. Buchanan*, 59 L. R. A. 342, which sustains prohibition against employment of women more than ten hours a day in certain establishments; *Short v. Bullion, B. & C. Min. Co.* 45 L. R. A. 603, which sustains eight-hour law for miners, smelters, and refiners; *Holden v. Hardy*, 37 L. R. A. 103, which sustains act prohibiting employment in underground mines for more than eight hours per day; *Re Ten-Hour Law*, 61 L. R. A. 612, which sustains limitation to ten hours a day, work of street railway employees.

Class legislation.

Cited in *Livingston Loan & Bldg. Asso. v. Drummond*, 49 Neb. 205, 68 N. W. 375, holding exemption of building and loan associations from general interest laws not class legislation; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 825, holding anti-trust law prohibiting combinations to fix prices, excepting associations of laboring men, unconstitutional; *State ex rel. Dawson County v. Farmers & M.*

Irrig. Co. 59 Neb. 5, 80 N. W. 52, holding statute exempting irrigation companies from general law requiring bridges over canals or ditches across highways unconstitutional.

Distinguished in *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 259, 28 L. R. A. 800, 32 S. W. 5, upholding exception of baled cotton from statute making void all stipulations limiting liability to less than entire loss, not exceeding insurance.

Effect on statute of invalidity of part.

Cited in *State ex rel. Cornell v. Poynter*, 59 Neb. 434, 81 N. W. 431; *Crawford Co. v. Hathaway*, 60 Neb. 760, 84 N. W. 271; *Redell v. Moores*, 63 Neb. 225, 55 L. R. A. 743, 93 Am. St. Rep. 431, 88 N. W. 243; *State ex rel. Wheeler v. Stewart*, 52 Neb. 250, 71 N. W. 941,—holding whole act fails where invalid portion obviously induced enactment; *Scott v. Flowers*, 61 Neb. 627, 85 N. W. 857, dissenting opinion by Norval, J., who holds whole act invalid where unconstitutional section induced adoption.

When statute held unconstitutional.

Cited in *People ex rel. Atty. Gen. v. Moores*, 55 Neb. 495, 41 L. R. A. 629, 76 N. W. 175, holding statute repugnant to right of local self-government, though not expressly prohibited, unconstitutional.

24 L. R. A. 710, *LYNN v. SOUTHERN P. CO.* 103 Cal. 7, 36 Pac. 1018.

Standing on outside of car as negligence.

Cited in *Nieboer v. Detroit Electric R. Co.* 128 Mich. 494, 87 N. W. 626 (dissenting opinion), majority denying liability of street car company to passenger injured while riding on bumper of crowded car.

Cited in footnote to *Benedict v. Minneapolis & St. L. R. Co.* 57 L. R. A. 639, which holds carrier liable for injury caused by requiring passengers on overcrowded cars to ride on platform.

Liability for failure to provide train.

Cited in note (32 L. R. A. 544) on liability to passenger for default or delay in running railroad trains.

Liability of carrier permitting overcrowding.

Cited in *Weisshaar v. Kimball S. S. Co.* 65 L. R. A. 87, footnote p. 84, 63 C. C. A. 143, 128 Fed. 401, holding steamship owner liable for death of passenger by swamping of boat sent to convey passengers to steamer, and permitted to be overcrowded by officer in charge.

24 L. R. A. 715, *ROBINSON v. EXEMPT FIRE CO.* 103 Cal. 1, 42 Am. St. Rep. 93, 36 Pac. 955.

Testimony as to deduction from witnesses' observation.

Cited in *People v. Chin Hane*, 108 Cal. 602, 41 Pac. 697, holding witness may testify that shots sounded as though fired inside of building; *Stout v. Pacific Mut. L. Ins. Co.* 130 Cal. 474, 62 Pac. 732, holding witness may state whether blow light or heavy.

Relief from improvident stipulation.

Cited in *Moffitt v. Jordan*, 127 Cal. 629, 60 Pac. 175, holding appellate court will not review relief from stipulation, unless discretion clearly abused; *Truett*

v. Onderdonk, 120 Cal. 586, 53 Pac. 26, holding court may relieve party from stipulation for dismissal.

24 L. R. A. 717, NORFOLK & W. R. CO. v. WARD, 90 Va. 687, 44 Am. St. Rep. 945, 19 S. E. 849.

Contributory negligence of employee.

Cited in notes (49 L. R. A. 35) on contributory negligence in entering or remaining in employment; (48 L. R. A. 757, 758, 765) on servant's right of action for injuries received in obeying direct command.

Assumption of risk.

Cited in Ostrander v. Lansing, 111 Mich. 697, 70 N. W. 332, holding assumption of risk from cave-in by workman on sewer, where danger increased by prior excavation, question for jury.

24 L. R. A. 719, CITIZENS' NAT. BANK v. BERRY, 53 Kan. 696, 37 Pac. 131.

Determination as to validity of seizure of property to satisfy judgment, in Citizens' Bank v. McClelland, 53 Kan. 699, 37 Pac. 132.

Authority of corporation president respecting litigation.

Cited in First Nat. Bank v. Marshall, 56 Kan. 445, 43 Pac. 774, sustaining president's authority to represent bank in litigation; Dallas Ice Factory & Cold Storage Co. v. Crawford, 18 Tex. Civ. App. 180, 44 S. W. 875, holding corporation bound by agreement of president and general manager to pay attorney's fee.

24 L. R. A. 721, PEOPLE v. EATON, 100 Mich. 208, 59 N. W. 145.

Rights of telephone companies in highway.

Cited in Michigan Teleph. Co. v. Benton Harbor, 121 Mich. 514, 47 L. R. A. 107, footnote p. 104, 80 N. W. 386, holding city's consent unnecessary to use of streets by telephone companies.

Cited in footnote to Dailey v. State, 24 L. R. A. 724, which denies telegraph company's right to cut branches from trees in highway.

Cited in note (39 L. R. A. 621) on municipal control over public nuisances on public streets and highways, created by street railroads and other electrical companies.

**Use of highways by electrical companies as additional servitude —
Conduits.**

Cited in Castle v. Bell Teleph. Co. 49 App. Div. 441, 63 N. Y. Supp. 482, holding conduit in city street for telephone wires not additional burden.

Cited in footnote to Coburn v. New Teleph. Co. 52 L. R. A. 672, which holds occupation of sidewalk with trench and pipes for conduit for telephone wires not additional burden.

— Poles and wires.

Cited in Magee v. Overshiner, 150 Ind. 135, 40 L. R. A. 373, footnote p. 370, 65 Am. St. Rep. 358, 49 N. E. 951, holding reasonable use of city streets for telephone system not additional servitude; Donovan v. Allert, 11 N. D. 297, 58 L. R. A. 780, footnote p. 775, 95 Am. St. Rep. 720, 91 N. W. 441, holding telephone poles and wires in street additional burden.

Cited in footnotes to Eels v. American Teleph. & Teleg. Co. 25 L. R. A. 640,

which holds permanent use of highway for telephone poles and wires not within public easement; *Snyder v. Ft. Madison Street R. Co.* 41 L. R. A. 345, which holds electric railway poles not ground of complaint to abutter; *Palmer v. Larchmont Electric Co.* 43 L. R. A. 672, which holds electric light poles not additional burden on fee in country highway; *French v. Robb*, 57 L. R. A. 956, which holds right to maintain, as against owner of soil, poles and wires rightfully placed in street to light it, not lost by wrongfully using for private lighting.

Disapproved in *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 107, 50 L. R. A. 304, footnote p. 298, 81 N. W. 1041, holding telephone poles and wires, additional burden; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 550, 28 L. R. A. 315, footnote p. 310, 51 Am. St. Rep. 543, 63 N. W. 111, holding telephone line along country highway not additional burden; *Bronson v. Albion Teleph. Co. (Neb.)* 60 L. R. A. 428, footnote p. 426, 93 N. W. 201, holding poles and wires permanently and exclusively occupying portion of street, additional burden.

24 L. R. A. 724, *DAILEY v. STATE*, 51 Ohio St. 348, 46 Am. St. Rep. 578, 37 N. E. 710.

Ownership of fee in highway.

Cited in *Rhode Island Hospital Trust Co. v. Hayden*, 20 R. I. 549, 42 L. R. A. 109, 40 Atl. 421, holding fee of highways in abutting owner, subject to public easement; *Hamilton, G. & C. Traction Co. v. Parish*, 67 Ohio St. 190, 60 L. R. A. 534, 65 N. E. 1011, holding fee of highways outside of municipalities in abutters.

Ownership and control of trees in highway.

Cited in *Western U. Teleg. Co. v. Krueger*, 30 Ind. App. 30, 64 N. E. 635, holding abutter owning fee of highway has, as to shade trees therein, rights and remedies of freeholder, subject only to public easement; *Bronson v. Albion Teleph. Co. (Neb.)* 60 L. R. A. 427, footnote p. 426, 93 N. W. 201, holding telephone company liable for injury to trees of abutter by authorized erection of poles.

Cited in footnotes to *Carmel v. Shaw*, 27 L. R. A. 580, which holds city has complete control over shade trees in public street; *Bradley v. Southern New England Teleph. Co.* 32 L. R. A. 280, which denies power of selectmen to cut and trim trees overhanging highway, without owner's consent; *Vanderhurst v. Tholcke*, 35 L. R. A. 267, which holds determination of city council that trees on sidewalk are obstruction, conclusive; *Stretch v. Cassopolis*, 51 L. R. A. 345, which denies right to remove shade trees from street without notice to abutter; *Miller v. Detroit, Y. & A. A. R. Co.* 51 L. R. A. 955, which sustains street railway company's right to remove obstructing shade trees without compensation to abutter.

Cited in note (39 L. R. A. 670) on municipal power over nuisances affecting highways and waters.

Electric lines as additional burden.

Cited in *Callen v. Columbus Edison Electric Light Co.* 66 Ohio St. 178, 58 L. R. A. 786, 64 N. E. 141, holding electric light poles and wires cannot be placed in street with municipal consent without compensating abutting owners; *Donovan v. Allert*, 11 N. D. 297, 58 L. R. A. 780, 95 Am. St. Rep. 720, 91 N. W. 441, holding telephone poles and wires in highway additional servitude; *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 524, 89 Am. St. Rep. 868, 41 S. E. 1022, holding owner entitled to additional compensation for telegraph line upon railroad right of way.

Cited in note (24 L. R. A. 722) on telegraph or telephone poles as additional burden on highway.

Wrongful injury to property.

Distinguished in *State v. Johnson*, 7 Wyo. 517, 54 Pac. 502, holding intentionally driving sheep across prosecutor's uninclosed, uncultivated land not within statute punishing malicious trespass.

Assertion of property rights.

Cited in *Fries v. Wheeling & L. E. R. Co.* 56 Ohio St. 146, 46 N. E. 516, sustaining owner's right to recover within twenty-one years compensation for land taken by railroad.

24 L. R. A. 730, *PORT ROYAL & A. R. CO. v. KING*, 93 Ga. 63, 19 S. E. 809.

24 L. R. A. 732, *PATTON v. STATE*, 93 Ga. 111, 19 S. E. 734.

Dog as property.

Cited in *Graham v. Smith*, 100 Ga. 436, 40 L. R. A. 505, 62 Am. St. Rep. 323, 28 S. E. 225, holding owner of dog may maintain trover.

Cited in note (40 L. R. A. 512) on property rights in dogs.

Dog as domestic animal.

Distinguished in *Wilcox v. State*, 101 Ga. 564, 39 L. R. A. 709, 28 S. E. 981, holding dog within statute against cruelty to domestic animals.

Right to kill dogs.

Cited in footnote to *Hodges v. Causey*, 48 L. R. A. 95, which denies right to kill trespassing dog whose owner notified to keep him from premises.

24 L. R. A. 734, *CARTER v. THORSON*, 5 S. D. 474, 49 Am. St. Rep. 893, 59 N. W. 469.

Contract to do public printing.

Cited in *Carter v. State*, 8 S. D. 159, 65 N. W. 422, holding allegation "that there was a large amount of printing to be done" insufficient in action by one contracting to do printing required by state.

What constitutes "indebtedness" within statutory limitation.

Cited in footnotes to *Kelly v. Minneapolis*, 30 L. R. A. 281, which requires deduction of amount of sinking fund from total apparent debt to ascertain actual debt; *Saleno v. Neosho*, 27 L. R. A. 769, which holds contract by city to pay fixed price annually for water supply not a debt for aggregate amount; *South Bend v. Reynolds*, 49 L. R. A. 795, which holds limitation of city debt not exceeded by contract for erection of city hall, for which yearly rent to be paid with option to purchase.

Limitation of municipal liability.

Cited in footnote to *Indianapolis v. Wann*, 31 L. R. A. 743, which holds contract for street lights for five years, payable monthly, void.

24 L. R. A. 737, *TALCOTT v. FIRST NAT. BANK*, 53 Kan. 480, 36 Pac. 1066.

Entry in bank pass book.

Cited in *Andrews v. State Bank*, 9 N. D. 328, 83 N. W. 235, and *Quattrochi Bros. v. Bank*, 89 Mo. App. 509, holding entry in pass book a receipt, not contract to pay money.

24 L. R. A. 740, *Re RICKER*, 66 N. H. 207, 29 Atl. 559.

Woman's right to practise law.

Cited in footnote to *Re Maddox*, 55 L. R. A. 298, which denies right of woman to practise law.

Adoption of law in England.

Cited in *Edgerly v. Barker*, 66 N. H. 457, 28 L. R. A. 334, 31 Atl. 900, holding law of estates tail not in force by adoption.

Who are public officers.

Cited in *Wiggins v. Manchester*, 72 N. H. 581, 58 Atl. 522, holding janitor of police building appointed by municipal authorities, employee, not public officer.

Cited in footnotes to *People v. Rathbone*, 28 L. R. A. 384, which holds notary within prohibition against public officer receiving free transportation; *State v. Loechner*, 59 L. R. A. 916, which holds member of city board of education, a ministerial officer.

24 L. R. A. 763, *BARBOUR v. HICKEY*, 2 App. D. C. 207.

Effect of delay on right to specific performance.

Cited in footnote to *Reid v. Mix*, 55 L. R. A. 706, which requires one seeking to rescind contract for delay to show special damages, or other party's intent to treat contract at end.

24 L. R. A. 768, *CHAMPER v. GREENCASTLE*, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14.

Reasonableness and constitutionality of ordinances.

Cited in *Skaggs v. Martinsville*, 140 Ind. 478, 33 L. R. A. 782, 49 Am. St. Rep. 209, 39 N. E. 241, holding courts will not inquire as to reasonableness when power exists to pass ordinance; *Shelbyville v. Cleveland*, C. C. & St. L. R. Co. 146 Ind. 70, 44 N. E. 929, and *Shea v. Muncie*, 148 Ind. 23, 46 N. E. 133, holding unreasonableness not valid objection to ordinance passed in pursuance of power specifically conferred; *Marshall & B. Co. v. Nashville*, 109 Tenn. 511, 71 S. W. 815, holding ordinance providing that all printing for city shall bear union label invalid.

Municipal regulation of liquor traffic.

Cited in *Steffy v. Monroe City*, 135 Ind. 467, 41 Am. St. Rep. 436, 35 N. E. 121, denying validity of municipal ordinance prohibiting screens in bar-room; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 281, footnote p. 278, 52 S. W. 913, sustaining ordinance for closing saloons between ten and four o'clock at night, and on Sundays, but not requirement for removing curtains on front doors and windows.

Cited in footnotes to *State v. Gerhardt*, 33 L. R. A. 313, which upholds requirement for keeping doors of room where liquor sold locked during prohibited hours; *State v. Barge*, 53 L. R. A. 428, which sustains ordinance against liquor dealer keeping room for lounging, drinking, or immoral purposes; *Campbells-ville v. Odewalt*, 60 L. R. A. 723, which holds void, ordinance subjecting to fine, possessor of premises on which liquor was furnished in violation of law, although without his knowledge or consent; *State v. Austin*, 25 L. R. A. 283, which holds

valid, ordinance forbidding unmarried minors to enter barroom, except as agent or servant; *Ex parte Sikes*, 24 L. R. A. 774, which holds prohibition of sale of liquor not included in authority to "license and regulate."

Cited in notes (48 L. R. A. 261) on legal restrictions on department stores; (21 L. R. A. 794) on constitutionality of statutes restricting contracts and business.

Police power of state.

Cited in *State ex rel. Duensing v. Roby*, 142 Ind. 191, 33 L. R. A. 220, 51 Am. St. Rep. 174, 41 N. E. 145, holding statute regulating horse racing within police power; *State v. Theriault*, 70 Vt. 627, 43 L. R. A. 294, 67 Am. St. Rep. 695, 41 Atl. 1030, upholding statute authorizing commissioners stocking stream to prohibit fishing for certain period; *State ex rel. Cox v. Board of Education*, 21 Utah, 414, 60 Pac. 1013, and *Blue v. Beach*, 155 Ind. 130, 50 L. R. A. 69, 80 Am. St. Rep. 195, 56 N. E. 89, sustaining statute empowering boards of health to require vaccination of school children; *Stull v. De Mattos*, 23 Wash. 76, 51 L. R. A. 895, 62 Pac. 451, holding license tax on persons selling stocks of merchandise at auction not within police power.

Implied powers of municipalities.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 422, 35 L. R. A. 685, 45 N. E. 587, holding municipalities possess only express or necessarily implied powers, and those essential to declared purposes; *Skaggs v. Martinsville*, 140 Ind. 479, 33 L. R. A. 782, 49 Am. St. Rep. 209, 39 N. E. 241, holding ordinance prohibiting flow of water from well on streets within power incidental to control of streets.

24 L. R. A. 774, *Ex parte SIKES*, 102 Ala. 173, 15 So. 522.

Municipal regulation of sale of liquor.

Cited in footnote to *Campbellsville v. Odewalt*, 60 L. R. A. 723, which holds void, ordinance subjecting to fine, possessor of premises on which liquor was furnished in violation of law although without his knowledge or consent.

24 L. R. A. 776, *REPUBLICAN MOUNTAIN SILVER MINES v. BROWN*, 7 C. C. A. 412, 19 U. S. App. 203, 58 Fed. 644.

Noninterference with internal management of corporation.

Cited in *Sidway v. Missouri Land & Live-Stock Co.* 101 Fed. 486, holding court without jurisdiction to interfere in internal management of solvent foreign corporation; *Condon v. Mutual Reserve Fund Life Asso.* 89 Md. 120, 44 L. R. A. 155, 73 Am. St. Rep. 169, 42 Atl. 944, holding courts cannot regulate internal management of foreign corporation doing business in state; *Re Rappleye*, 43 App. Div. 87, 59 N. Y. Supp. 338, holding courts without jurisdiction to compel inspection by stockholder of books of foreign corporation.

Cited in footnotes to *Madden v. Penn Electric Light Co.* 38 L. R. A. 638, which sustains court's noninterference with internal management of foreign corporation at suit of resident stockholder; *Clark v. Mutual Reserve Fund Life Asso.* 43 L. R. A. 390, which denies power to enjoin illegal assessments on resident members of foreign insurance company.

Appointment of receiver for corporation at stockholder's request.

Cited in *Dudley v. Dakota Hot Springs Co.* 11 S. D. 562, 79 N. W. 839, hold-

ing, in absence of statute, receiver for corporation cannot be appointed at suit of stockholder; *Wallace v. Pierce-Wallace Pub. Co.* 101 Iowa, 333, 38 L. R. A. 128, 63 Am. St. Rep. 389, 70 N. W. 216, holding dissensions between equal owners of stock will not justify receiver's appointment; *Scott v. Farmers' Loan & T. Co.* 16 C. C. A. 363, 32 U. S. App. 468, 69 Fed. 22, holding equity cannot prevent levy of execution by appointing receiver for insolvent corporation.

Distinguished in *Arents v. Blackwell's Durham Tobacco Co.* 101 Fed. 344, authorizing appointment of receiver to wind up affairs of corporation where threatened action of stockholder would destroy business.

Law governing stockholder's rights.

Cited in *Giesen v. London & N. W. American Mortg. Co.* 42 C. C. A. 519, 102 Fed. 587, holding subscriber for stock consents to be governed by charter and by-laws; *Metcalf v. American School Furniture Co.* 122 Fed. 119, holding minority stockholders bound to acquiesce in discontinuance of corporation by will of majority when charter so allows.

Necessity of notice of stockholders' meeting.

Cited in footnote to *Bagley v. Reno Oil Co.* 56 L. R. A. 184, which requires previous notice to authorize change at regular annual meeting, of by-laws increasing number of directors.

24 L. R. A. 781, *BROOKE v. PHILADELPHIA*, 162 Pa. 123, 29 Atl. 387.

Constitutional limitation of municipal indebtedness.

Cited in *Davis v. Braddock*, 31 Pittsb. L. J. N. S. 146, holding constitutional limitation refers to outstanding, not net, indebtedness.

Distinguished in *Houston v. Lancaster*, 191 Pa. 145, 44 W. N. C. 217, 43 Atl. 83, holding municipal debt cannot exceed 2 per cent of assessed valuation without popular vote.

What constitutes "indebtedness" within constitutional restriction.

Cited in *Bruce v. Pittsburg*, 166 Pa. 155, 30 Atl. 831, holding uncanceled certificates in sinking fund not part of municipal indebtedness within constitutional restriction.

Cited in footnotes to *South Bend v. Reynolds*, 49 L. R. A. 795, which holds limitation of city debt not exceeded by contract for erection of city hall for which yearly rent to be paid, with option to purchase; *McBean v. Fresno*, 31 L. R. A. 794, which holds limitation of city indebtedness not violated by contract to pay annual sum for term of years, if annual sum within limit.

Constitutional restriction of municipal appropriations.

Cited in *Com. ex rel. Philadelphia Police Fund Asso. v. Walton*, 182 Pa. 376, 61 Am. St. Rep. 712, 38 Atl. 790, upholding city's appropriation to police pension fund association.

24 L. R. A. 787, *SAVAGE v. SALEM*, 23 Or. 381, 37 Am. St. Rep. 688, 31 Pac. 832.

Structure in street as nuisance.

Cited in *Pettit v. Grand Junction*, 119 Iowa, 358, 93 N. W. 381, holding town buildings caused, by town authorities, to be erected in public street, public nuisance.

Cited in footnotes to *Barrows v. Sycamore*, 25 L. R. A. 535, which holds stand-pipe in street unlawful use of same; *Costello v. State*, 35 L. R. A. 303, which holds permanent appropriation of part of sidewalk for fruit stand indictable nuisance.

Cited in note (39 L. R. A. 659) on municipal power over nuisances affecting highways and waters.

Revocation of license to maintain burden on land.

Cited in *Africa v. Knoxville*, 70 Fed. 737, holding municipal consent to use of city streets by street railroad cannot be revoked as to streets unoccupied; *South Highland Land & Improv. Co. v. Kansas City*, 100 Mo. App. 521, 75 S. W. 383, holding license granted by city authorities to abutter to build wall and bring street above grade revocable at will.

Cited in note (49 L. R. A. 518) on revocability of license to maintain burden on land after licensee has incurred expense in creating burden.

24 L. R. A. 789, *MERTZ v. BERRY*, 101 Mich. 32, 45 Am. St. Rep. 379, 59 N. W. 445.

Homestead exemptions.

Cited in *Flannagan v. Forsythe*, 6 Okla. 229, 50 Pac. 152, holding exemption of homestead from prior debts includes liability for tort growing out of warranty of title to personalty sold.

Cited in footnote to *Stern v. Lee*, 26 L. R. A. 814, which holds exemption of homestead continues after conveyance in fee during minority of youngest child.

24 L. R. A. 793, *LYNCH v. DURFEE*, 101 Mich. 171, 45 Am. St. Rep. 404, 59 N. W. 409.

What constitutes "newspaper."

Cited in *Williams v. Colwell*, 14 App. Div. 31, 43 N. Y. Supp. 720, Affirming 18 Misc. 404, 43 N. Y. Supp. 720, holding daily paper mainly devoted to financial and mercantile affairs, but containing local and general news, newspaper; *Lynn v. Allen*, 145 Ind. 588, 33 L. R. A. 781, footnote p. 779, 57 Am. St. Rep. 223, 44 N. E. 646, holding daily journal, devoted to legal matters, newspaper; *Hanscom v. Meyer*, 60 Neb. 72, 48 L. R. A. 411, footnote p. 409, 83 Am. St. Rep. 507, 82 N. W. 114, authorizing publication of legal notice in weekly newspaper devoted particularly to certain class of business; *Hall v. Milwaukee*, 115 Wis. 485, 91 N. W. 998, holding law and business reporter, issued twice daily, having small circulation "newspaper" within statute providing for publication of city notices; *United States Mortg. Co. v. Marquam*, 41 Or. 406, 69 Pac. 37, holding weekly paper of sensational tone, having general circulation, "newspaper" within statute providing for publication of notice of execution sale.

Distinguished in *Crowell v. Parker*, 22 R. I. 52, 84 Am. St. Rep. 815, 46 Atl. 35, holding "Real Estate Register and Rental Guide," not usually used for legal notices, not "public newspaper."

What constitutes one a subscriber to newspaper.

Cited in footnote to *Ashton v. Stoy*, 30 L. R. A. 584, which holds person to whom newspaper sent without his consent, under contract with third person, not subscriber.

24 L. R. A. 795, *FERGUSON v. SNOHOMISH*, 8 Wash. 668, 36 Pac. 969.

Power of municipality to annex agricultural lands.

Cited in *Copeland v. St. Joseph*, 126 Mo. 433, 29 S. W. 281, holding city limits may be extended over contiguous farms having present prospect of becoming urban property.

Municipal taxation of rural lands.

Cited in *Frace v. Tacoma*, 16 Wash. 70, 47 Pac. 219, sustaining taxation of agricultural land within corporate limits for municipal purposes.

Cited in note (34 L. R. A. 195) on municipal taxation of rural lands within limits of corporation.

24 L. R. A. 798, *BURGESS v. MULDOON*, 18 R. I. 607, 29 Atl. 298.

Effect of divorce on curtesy.

Cited in footnote to *Doyle v. Rolwing*, 55 L. R. A. 332, which holds right of curtesy defeated by divorce for wife's fault.

24 L. R. A. 800, *HORN v. BENNETT*, 135 Ind. 158, 34 N. E. 321, 956.

Relative priority of notes secured by mortgage.

Cited in footnote to *Nashville Trust Co. v. Smythe*, 27 L. R. A. 663, which upholds agreement for preference given to assignee of part of series of notes secured by mortgage or vendor's lien.

Relation of notes to mortgage security.

Cited in footnotes to *Owings v. McKenzie*, 40 L. R. A. 154, which holds second note secured by deed of trust not made due by mere nonpayment of first note; *Kernohan v. Manss*, 29 L. R. A. 317, which holds bona fide purchaser before maturity of genuine notes secured by mortgage entitled to priority over previous assignee of genuine mortgage and forged copies of notes.

What constitutes election to consider debt due on default of instalment.

Cited in footnote to *Swearingen v. Lahner*, 26 L. R. A. 765, which holds bringing suit sufficient election to consider whole debt due on default of instalment.

Acceleration of payment on partial default as affecting negotiability.

Cited in footnote to *American Nat. Bank v. American Wood Paper Co.* 29 L. R. A. 103, which holds negotiable, corporate bonds secured by mortgage with provision accelerating payment on default as to part.

Enforcement of mortgage for part of debt.

Cited in note (37 L. R. A. 759) on proceedings to enforce mortgage for part of mortgage debt.

24 L. R. A. 806, *BUCKMAN v. STATE*, 34 Fla. 48, 15 So. 697.

Followed without discussion in *Van Dorn v. State*, 34 Fla. 63, 15 So. 701.

Right to jury trial.

Cited in *Hughes v. Hannah*, 39 Fla. 371, 22 So. 613, holding act conferring on equity courts jurisdiction of actions to recover real property, with damages for detention, illegal; *Wiggins v. Williams*, 36 Fla. 650, 30 L. R. A. 758, 18 So.

859, holding statute providing for assessment of damages for trespass on timber lands by court of equity unconstitutional.

Cited in footnotes to *Salt Creek Valley Turnp. Co. v. Parks*, 28 L. R. A. 769, which upholds right to jury trial in proceedings to declare turnpike road abandoned; *Es parte Keeler*, 31 L. R. A. 678, which holds summary proceeding for restraining order against carrying on nuisance not violation of right to jury trial.

Distinguished in *State ex rel. Broatch v. Moores*, 56 Neb. 36, 76 N. W. 530, and *Atty. Gen. v. Sullivan*, 163 Mass. 451, 28 L. R. A. 457, footnote p. 455, 40 N. E. 843, denying right to jury trial in quo warranto.

24 L. R. A. 812, *HODGES v. COOKSEY*, 33 Fla. 715, 15 So. 549.

Distress for rent.

Cited in *Schofield v. Liody*, 35 Fla. 2, 16 So. 780, sustaining exemption from distress of property other than products of rented land; *Smith v. Gufford*, 36 Fla. 491, 51 Am. St. Rep. 37, 18 So. 717, holding horse exempt from distress for rent.

Cited in footnote to *Hutsell v. Deposit Bank of Paris*, 39 L. R. A. 403, which holds right of distress does not pass to assignee of rent note.

24 L. R. A. 815, *FAWCETT v. SUPREME SITTING, O. OF I. H.* 64 Conn. 170, 29 Atl. 614.

Distribution of assets of insolvent corporation.

Cited in *People v. Commercial Alliance L. Ins. Co.* 17 App. Div. 390, 45 N. Y. Supp. 223, holding death claim accruing after beginning of proceedings to dissolve insolvent life insurance company not allowable; *Sands v. E. S. Greeley & Co.* 88 Fed. 132, 31 C. C. A. 425, 59 U. S. App. 610, holding transmission of assets of foreign insolvent to primary receiver before satisfying claims of domestic creditors without prior equities proper; *Cowen v. Failey*, 149 Ind. 384, 49 N. E. 270, permitting members of insurance order to prove claims in state of corporation's domicile, crediting amounts received from local receiver.

Cited in footnote to *Failey v. Fee*, 32 L. R. A. 311, which requires payment of established debts before sending assets to receiver at domicile of foreign insolvent corporation.

Cited in note (38 L. R. A. 99) on distribution of assets of insolvent insurance company.

Power of receiver outside of jurisdiction.

Cited in footnote to *Castleman v. Templeman*, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors.

Comity.

Cited in *Nashua Sav. Bank v. Anglo-American Land Mortg. & Agency Co.* 108 Fed. 782, dissenting opinion by Aldrich, J., who holds action by foreign corporation to recover stock assessment subject to such conditions as courts may impose.

Cited in footnote to *Baldwin v. Hosmer*, 25 L. R. A. 739, which denies right of local branch of foreign society to refuse to turn over assessments to ancillary receiver.

Status of benefit associations.

Cited in note (38 L. R. A. 46, 53, 57) on whether benefit association is insurance company.

Right of member upon rescission of contracts.

Cited in Supreme Council C. L. H. v. Black, 59 C. C. A. 417, 123 Fed. 653, sustaining right of member of benefit association which has wrongfully renounced its contract of insurance, to recover moneys paid therein.

24 L. R. A. 831, HERNANDEZ'S SUCCESSION, 46 La. Ann. 962, 15 So. 461.

Effect of statutes forbidding remarriage after divorce.

Cited in Benton's Succession, 106 La. 503, 59 L. R. A. 149, 31 So. 123, holding provision forbidding divorced party to marry within certain time does not affect validity of marriage elsewhere; Frame v. Thormann, 102 Wis. 673, 79 N. W. 39, holding statute forbidding guilty divorced party from remarriage, without extra-territorial force.

Cited in footnotes to State v. Shattuck, 40 L. R. A. 428, which sustains marriage, valid where made, by divorced person leaving state to evade law against remarriage; Crawford v. State, 35 L. R. A. 224, which holds valid, marriage in other state with innocent woman, of man prohibited by divorce decree from remarriage; Ovitt v. Smith, 35 L. R. A. 223, which holds void, remarriage by person from whom divorce granted; McLennan v. McLennan, 38 L. R. A. 863, which holds marriage contract in other state before lapse of time for taking appeal absolutely void; State use of Newman v. Kimbrough, 52 L. R. A. 668, which holds marriage in other state, between divorced man and his paramour, not entitled to recognition in state where divorce granted, to which he returns immediately after marriage.

Cited in notes (57 L. R. A. 169, 170) on conflict of laws as to validity of marriage; (59 L. R. A. 136) on conflict of laws on subject of divorce.

24 L. R. A. 843, NEWARK v. WATSON, 56 N. J. L. 667, 29 Atl. 487.

Preservation of public health.

Cited in State, Van Reipen, Prosecutor, v. Jersey City, 58 N. J. L. 266, 33 Atl. 740, sustaining right to condemn water rights of canal for municipal supply.

Cited in footnote to Lowe v. Prospect Hill Cemetery Asso. 46 L. R. A. 237, which authorizes injunction against interment in cemetery when likely to pollute and poison water in wells in vicinity.

Title to lands granted for public use.

Cited in footnote to La Societa Italiana Di Mutua Beneficenza v. San Francisco, 53 L. R. A. 382, which denies city's power to grant to private corporation land granted to city by United States, and set apart for cemetery.

24 L. R. A. 850, MYGATT v. COE, 142 N. Y. 78, 36 N. E. 870.

Covenants running with land.

Followed on subsequent appeal in 147 N. Y. 462, 42 N. E. 17, Affirming 64 N. Y. S. R. 877, 31 N. Y. Supp. 1130, holding that words "heirs and assigns" do not make covenant run with land; Wiggins v. Pender, 132 N. C. 637, 61 L. R. A. 775, footnote p. 772, 44 S. E. 362, holding that covenant of warranty inures

to benefit of assignee not named therein, if assigns are named in habendum clause of deed.

Cited in footnotes to *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land; *Wallace v. Pereles*, 53 L. R. A. 644, which holds conveyance by married woman of land deeded her by husband without consideration will not carry covenants in deed to husband; *Doty v. Chattanooga U. R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad.

Limited in *Clarke v. Priest*, 21 App. Div. 177, 47 N. Y. Supp. 489, Affirming 18 Misc. 502, 42 N. Y. Supp. 766, holding, where covenantee estopped by deed to grantee to assert title to encumbrance, covenant against encumbrances runs with land; *Geiszler v. De Graaf*, 166 N. Y. 341, 82 Am. St. Rep. 659, 59 N. E. 993, holding covenant against encumbrances runs with land.

— **When privity of estate exists.**

Followed on subsequent appeals in 147 N. Y. 463, 42 N. E. 17, holding that covenantor's legal possession creates privity of estate, carrying covenants of warranty and quiet enjoyment to remote grantee; 152 N. Y. 461, 57 Am. St. Rep. 521, 46 N. E. 949, holding that husband's acts of care, management, and occupancy with family of wife's property do not give interest making covenants run with land.

Cited in *Gould v. Partridge*, 52 App. Div. 44, 64 N. Y. Supp. 870, raising, without determining, whether privity of estate exists between grantor agreeing to maintain water wheel and furnish power, and subsequent grantee; *Hurxthal v. St. Lawrence Boom & Lumber Mfg. Co.* 53 W. Va. 94, 97 Am. St. Rep. 954, 44 S. E. 520, holding purchaser of lands at judicial sale, assignee of former owner so as to be entitled to benefit of covenant for benefit of heirs, devisees, and assigns.

Distinguished in *Trolan v. Rogers*, 88 Hun, 425, 34 N. Y. Supp. 836, holding no privity of estate between heirs claiming under independent title, and ancestor, working estoppel upon latter's covenant.

Rights of purchaser on foreclosure.

Cited in *Wright v. Phipps*, 90 Fed. 562, holding original covenants in deed run to purchaser under mortgage; *Wesco v. Kern*, 36 Or. 436, 60 Pac. 563, raising, without deciding, whether purchaser on foreclosure may maintain action on covenant of warranty in mortgagor's claim of title.

Res judicata.

Cited in *Roberts & Co. v. Buckley*, 80 Hun, 62, 29 N. Y. Supp. 873; *Abbey v. Wheeler*, 58 App. Div. 453, 69 N. Y. Supp. 432; *Roberts v. Buckley*, 145 N. Y. 229, 39 N. E. 966,—holding decision on former appeal must be followed so far as facts and questions are identical; *Genet v. Delaware & H. Canal Co.* 13 Misc. 424, 35 N. Y. Supp. 147, holding *res judicata* does not apply where different state of facts developed on retrial.

Occupancy of married woman's lands.

Cited in *Van Nostrand v. Hubbard*, 35 App. Div. 202, 54 N. Y. Supp. 739, holding married woman occupying farm under contract of sale, presumptively in possession.

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BLAKER v. HOOD, 53 Kan. 499, 36 Pac. 1115.

note to *Du Quoin v. Kelly*, 43 L. R. A. 644, which holds private "regularly organized bank" within statute as to deposit of public

Constitutional protection of right of contract.

In footnote to *Third Nat. Bank v. Divine Grocery Co.* 34 L. R. A. 445, denies right to prevent transfer of property in payment of debt while

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followed in *West v. Topeka Sav. Bank*, 66 Kan. 536, 63 L. R. A. 144, 97 Am. Rep. 385, 72 Pac. 252, sustaining constitutionality of act providing for organization and regulation of banks as exercise of police power of state.

Cited in *State v. Wilson*, 61 Kan. 36, 47 L. R. A. 74, 58 Pac. 981, sustaining act regulating weighing of coal at mine.

Requirement that bill contain only one subject, expressed in title.

Cited in *Re Thomas*, 53 Kan. 661, 37 Pac. 171, sustaining ordinance to prohibit and regulate manufacture and sale of liquor for certain excepted purposes; *Wilson v. Clark*, 63 Kan. 516, 65 Pac. 705, sustaining statute relating to general subject of elections; *State v. Wilcox*, 64 Kan. 790, 68 Pac. 634, sustaining statute creating state medical board, regulating practice of medicine, and prescribing penalties.

24 L. R. A. 857, *STATE v. JUNEAU*, 88 Wis. 180, 43 Am. St. Rep. 877, 59 N. W. 580.

Competency of children as witnesses.

Cited in *Freeny v. Freeny*, 80 Md. 409, 31 Atl. 304, and *State v. King*, 117 Iowa, 488, 91 N. W. 768, holding competency of children of tender years as witnesses within court's discretion; *Wheeler v. United States*, 159 U. S. 525, 40 L. ed. 247, 16 Sup. Ct. Rep. 93, holding boy of five, competent witness; *Barnard v. State*, 88 Wis. 660, 60 N. W. 1058, holding permitting child of seven to testify to assault on her, within court's discretion.

Open lewdness.

Cited in *Morris v. State*, 109 Ga. 354, 34 S. E. 577, raising, without deciding, question whether indecent exposure before one person indictable as open lewdness.

24 L. R. A. 859, *BURROUGHS v. EASTMAN*, 101 Mich. 419, 45 Am. St. Rep. 419, 59 N. W. 817.

Arrest without warrant.

Cited in *Com. v. Krubeck*, 23 Pa. Co. Ct. 36, 8 Pa. Dist. R. 522, 5 Lack. Legal News, 343, holding constitutional provisions against issuing warrant unsupported by oath do not apply to arrest without warrant.

Cited in footnotes to *Baltimore & O. R. Co. v. Cain*, 28 L. R. A. 688, which holds officer's arrest of disorderly passenger without warrant, in response to telegram by conductor, who pointed out person to be arrested, not unlawful; *McCullough v. Greenfield*, 62 L. R. A. 906, holding that possession of warrant

does not justify arrest in another town of accused, under direction by telephone of officer having warrant.

Cited in note (51 L. R. A. 207) on liability of officer for making arrest.













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